IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DAIMLERCHRYSLER	)	
CORPORATION	)	CIVIL ACTION NUMBER
	)	
Plaintiff	)	95C-04-167 and
v.	)	01C-04-036
	)	Consolidated Cases
PENNSYLVANIA NATIONAL	)	
MUTUAL CASUALTY INSURANCE	)	
COMPANY and **THE MARTIN CO.**	)	
INS. AGENCY, a/k/a **SP MARTIN**	)	
INSURANCE, INC., a/k/a **MARTIN**	)	
CO., and **MERRELL & GARAGUSO,**	)	
INC.	)	

Submitted: February 19, 2003
Argued: February 24, 2003
Decided: March 17, 2003

MEMORANDUM OPINION

Upon Motion of Defendant Merrell & Garaguso for Summary Judgment - ***DENIED***

Daniel F. Wolcott, Jr., Esq., Potter Anderson & Corroon, Wilmington, Delaware, attorney for plaintiff DaimlerChrysler Corporation

Daniel P. Bennett, Esq., Heckler & Frabizzio, Wilmington, Delaware, attorney for defendant Merrell & Garaguso

HERLIHY, Judge

Under Delaware law, provisions in construction contracts requiring a party to be indemnified for its own negligence are void. Where the other party, however, has obtained insurance that covers such indemnification, Delaware law provides that the party seeking coverage can enforce that insurance protection. Provisions requiring that other party to obtain insurance or coverage are often found in construction contracts.

Such a provision existed in this case in the contract between DaimlerChrysler Corporation and Merrell & Garaguso. Chrysler required M & G to make it an additional insured. During its work at Chrysler's Newark assembly plant, a M & G employee was injured by the negligence of a Chrysler employee. Chrysler defended the action but now seeks reimbursement for the cost of the defense.

But M & G did not add Chrysler as an additional insured to its policy as contractually required. If it had, Chrysler would have had an enforceable cause of action on that insurance. It seeks reimbursement, instead, on the basis that M & G breached its contractual obligation to add Chrysler.

M & G moves for summary judgment arguing that such a cause of action is the same as the void requirement of indemnification for one's own negligence. The issue presented is one of first impression and it is whether there is an enforceable cause of action for breach of contract for failure of a party to fulfill its contractual duty to obtain insurance which would have provided coverage for the other party's own negligence.

The Court holds that there is an enforceable cause of action as such a contract

requirement is an extension of the permissible cause of action for insurance coverage which is allowed in construction contracts. M & G's motion is **DENIED.**

Factual Background

Chrysler hired M & G to do some refurbishing work at its Newark assembly plant. In the contract, Chrysler required M & G to indemnify it against any losses, expenses, etc. due to Chrysler's own negligence. The contract also required M & G to obtain various insurance coverages, including general liability that would cover the contractual indemnification duty.

Brian Keech was a M & G employee working at the plant. A Chrysler employee hit a fence or object next to a fence while driving a fork lift knocking the fence into Keech, injuring him. Keech sued Chrysler. In turn, Chrysler sued M & G seeking indemnification and/or defense through the insurance M & G was obligated to get. Chrysler settled with Keech. It now seeks reimbursement since M & G has declined to cover Chrysler's costs of defense.

Apparently, M & G did not obtain insurance which would have covered Chrysler's claim or name Chrysler as an additional insured as contractually required. Chrysler, therefore, brought a separate action against Penn National Insurance Company, which was M & G's insurer on this job. It also sued the Martin Insurance Agency for alleged failure to get Chrysler named as an additional insured. There may be factual disputes involving Penn National and Martin over what they did or did not do, but there is no factual dispute

regarding M & G's failure to abide by its contractual obligation to obtain insurance. Chrysler's separate action against Penn National and Martin has been consolidated with its action against M & G.

Procedural History

Chrysler's breach of contract action is not its first effort to obtain reimbursement from M & G for the costs of defending Keech's action. Originally it claimed that M & G had made it an additional insured. Chrysler and M & G filed cross motions for summary judgment on the issue whether there was an enforceable action on that insurance policy in the face of the statutory prohibition[1] against indemnification provisions in construction contracts for one's own negligence. Relying upon that prohibition, and an earlier Supreme Court opinion voiding under Delaware law an indemnification provision executed in and between Michigan based parties (valid under that state's law) for a project in Delaware,[2] this Court held Chrysler had no enforceable action against M & G's insurance.[3]

In reaching this result, which was one of first impression under Delaware law, this Court reviewed cases from other states which interpreted statutes that void indemnification clauses, but also like Delaware's statute contain similar provisions not voiding insurance for

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[1] 6 *Del.C.* § 2704(a).

[2] *J.S. Alberici Constr. Co., Inc. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518 (Del. 2000).

[3] *Keech v. Chrysler Corp.,* Del. Super., C.A. No. 95C-04-167, Herlihy, J. (December 21, 2000).

"any causes whatsoever."[4] That review showed a split of authority on the meaning of these insurance savings clauses, some finding invalid insurance coverage for indemnification in light of the statutory prohibitions against indemnification for one's own negligence. Others, however, found that such savings clauses preserve enforceable actions for insurance coverage despite the statutory prohibition.

The Supreme Court reversed and held that there was an enforceable cause of action against the insurance coverage.[5] Curiously, the Supreme Court did not examine the split in authority as this Court had, nor most of the cases this Court cited on both sides of the issue. In any event, it found there was an enforceable cause of action against the insurer.

Applicable Standard

A moving party is entitled to summary judgment where there are no genuine issues of material fact and it is entitled to judgment as a matter of law.[6] Chrysler and M & G indicate there is no factual issue germane to M & G's current motion. There may be other factual issues concerning Penn National and Martin, but such issues are not germane to this motion.

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[4] 6 *Del.C.* § 2704(b).

[5] *Chrysler Corp. v. Merrell & Garaguso, Inc.,* 796 A.2d 648 (Del. 2002).

[6] *Wilson v. Jome, Inc.,* 537 A.2d 187 (Del. 1988).

Discussion

When this case went to the Supreme Court on the issue of whether there could be an enforceable action against the insurer or its policy, that Court said:

> While we agree that the requirement to purchase insurance may, under certain circumstances be unenforceable, we reject the inference that such insurance, once secured, is unenforceable against the issuer of the insurance.[7]

That *dicta* and Chrysler's breach of contract action raising this novel issue prompted M & G's current motion. This case falls between the ban on indemnification clauses, but preservation of enforceable actions for it where there is insurance coverage for it.

While a novel issue to Delaware law, the Court is not without guidance from decisions in other states confronting the same issue. In *Kinney v. G.W. Lisk Co., Inc.,*[8] the New York Court of Appeals faced a similar situation and reasoned:

> An agreement to procure insurance is *not* an agreement to indemnify or hold harmless, and the distinction between the two is well recognized. Whereas the essence of an indemnification agreement is to relieve the promisee of liability, an agreement to procure insurance specifically anticipates the promisee's "continued responsibility" for its own negligence for which the promisor is obligated to furnish insurance.
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> Moreover this particular distinction is what renders indemnification, but not insurance procurement, agreements violative of the public policies underlying [the New York indemnity statute]. While an agreement purporting to hold an owner or general contractor free from liability for its own negligence undermines the strong public policy of placing and keeping responsibility for maintaining a safe workplace on those parties, the same cannot be said for an agreement which simply obligates one of the parties to a construction contract

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[7] *Chrysler Corp. v. Merrell & Garaguso, Inc.,* 796 A.2d at 649.

[8] 556 N.E. 2d 1090 (N.Y. 1990).

> to obtain a liability police insuring the other.[9]

The Appellee Court of Illinois came to a similar conclusion in *Zettel v. Paschen Contractors, Inc.*.[10] That Court reasoned:

> Even more clearly, however, a promise to obtain insurance is not the same as a promise to indemnify. Under an indemnity agreement, the promisor agrees to assume all responsibility and liability for any injuries or damages. Under an agreement to obtain insurance the promisor merely agrees to procure the insurance and pay the premium on it. Once the insurance is obtained the promisor bears no responsibility in the event of injury or damage, even if the insurer should breach the insurance agreement through no fault of the promisor. While the joint venture in this case suing to recover any monies it may have to pay to the injured parties plus all costs of defense, this is not because [the subcontractor] promised to indemnify the joint venture; it is because if a person breaches a contract to obtain insurance, he is liable for any damages caused by the breach. In this case this would be the amount of any judgments up to the amount of the policy limits bargained for (or perhaps beyond if an insurer under the facts presented would have settled the cases rather than allowed them to go to judgment) plus the costs of defending the tort action.[11]

The Supreme Court's earlier opinion in this case holding that actions for insurance coverage for indemnification are enforceable, despite the unexplained *dicta*,[12] provides policy support for sustaining Chrysler's breach of contract action. In that earlier holding, the court based its decision to enforce the already issued policy on a number of public policy concerns.

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[9] *Id.* At 1092 (citations omitted)(emphasis in the original).

[10] 427 N.E. 2d 189 (Ill. App. Ct. 1981).

[11] *Id*. at 191 - 92 (citations omitted); *Accord Holmes v. Watson-Fasberg Co.,* 488 N.W. 2d 473 (Minn. 1992).

[12] Either on an appeal of this case or some other, an explanation will have to be provided.

First, the court reasoned that from the viewpoint of the insured worker, the greater the amount of insurance available to his or her claim, the better the prospect for full compensation.[13] Second, the purchase of insurance is supported by an additional premium, the cost of which, in the usual contractual setting, is included in the bid price.[14] Third, if in fact an insurer issues an endorsement to cover the actions of a third party and charges a premium for that coverage, it should not be permitted to create an illusion that insurance exists.[15]

While there is not an insurance policy here which Chrysler can enforce, some of these same public policy reasons the Supreme Court cited where insurance exists, apply to an unmet contract requirement to obtain insurance. First, the enforceability of insurance coverage, despite the ban on indemnification, is to provide protection for the worker. The requirement to obtain insurance or make a party an additional insured accomplishes the same goal. By sustaining a cause of action for a breach of that requirement and by allowing Chrysler to successfully sue for breach of contract makes the contract meaningful and not just words. It is irrelevant to this overall policy of protecting the injured worker that, in this particular case, these are large corporations. The priniciple of upholding such a cause of action cannot draw such a distinction. Nor can the principle of protecting the injured worker

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[13] *Chrysler Corp. v. Merrell & Garaguso, Inc.,* 796 A.2d at 652.

[14] *Id.* at 653.

[15] *Id.*

be dependent upon the financial status of the contracting parties.

Second, when M & G bid on the job, it knew it was to add Chrysler to its already existing general liability policy. As the prior decision noted, the cost of doing so is part of its bid price and is covered by the money received from Chrysler. Third, the “illusion,” as the Supreme Court said before, of M & G adding Chrysler as an additional insured should not be allowed to exist. It would be illusory to have a contractual requirement, such as here, and yet not provide a remedy for breach of contract when the requirement is not met. Without reflecting on anyone’s intentions or good faith in this case, the easy opportunity for mischief and escape from such a contractual obligation is all too obvious. A party, such as M & G, could enter into a contract containing a provision to add another party as an additional insured, or to obtain new or additional insurance, and then simply not do it. Such evasion would not only make the contractual provision illusory, it would have the serious potential of not providing the protection for the injured worker. To avoid that result, there must be an enforceable cause of action for breach of contract.

In short, Chrysler has an enforceable cause of action against M & G for breach of contract. There are, however, issues not resolvable in this motion involving damages and the other parties, Penn National and Martin.

Conclusion

For the reasons stated herein, the summary judgment motion of Merrell & Garaguso, Inc., is **DENIED.**

IT IS SO ORDERED.

____________________________________ J.