

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

<b>DAIMLERCHRYSLER CORP.</b>	:	
Plaintiff,	:	
	:	Consolidated Cases
v.	:	C.A. No. 95C-04-167 CLS
	:	C.A. No. 01C-04-036 CLS
<b>PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY and THE MARTIN COMPANY INSURANCE AGENCY, a/k/a/ SP MARTIN INSURANCE, INC., a/k/a MARTIN CO., and MERRILL &amp; GARAGUSO, INC.,</b>	:	
Defendants.	:	

Submitted: January 27, 2004  
Decided: February 24, 2004

On DaimlerChrysler's Motion for Summary Judgment.  
**DENIED.**

On Penn National's Cross-Motion for Summary Judgment.  
**DENIED.**

**MEMORANDUM ORDER**

Daniel F. Wolcott, Jr., Esquire, and David E. Moore, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware, Attorneys for Plaintiff DaimlerChrysler.

Michael K. Tighe, Esquire, Tighe Cottrell & Logan, Wilmington, Delaware, and Kenneth M. Portner, Esquire, Weber Gallagher Simpson Stapleton Fires & Newby LLP, Philadelphia, Pennsylvania, Attorneys for Defendant Pennsylvania National Mutual Casualty Insurance Company.

John D. Balaguer, Esquire, White & Williams, Wilmington, Delaware, Attorney  
for Defendant The Martin Co. Insurance Agency.

Daniel P. Bennett, Esquire, Heckler & Frabizzio, Wilmington, Delaware, Attorney  
for Defendant Merrell & Garaguso.

**SCOTT, J.**

## **I. INTRODUCTION**

Plaintiff DaimlerChrysler Corporation (“Chrysler”) has filed a Motion for Summary Judgment against Defendant Pennsylvania National Mutual Casualty Insurance Company (“Penn National”). In its Response to Chrysler’s Motion, Penn National included a Cross-Motion for Summary Judgment against Chrysler. Upon a review of the motions, responses, oral arguments, and the record, this court concludes both motions should be **DENIED**.

## **II. BACKGROUND**

This case is a consolidation of two cases arising from an incident at Chrysler’s Assembly Plant in Newark, Delaware. Brian Keech (“Keech”), an employee of Defendant Merrell & Garaguso (“M&G”), was injured at the plant while working under a contract between M&G and Chrysler. Keech alleged his injuries were caused by Chrysler’s negligence. Chrysler then brought a third party action against M&G, alleging M&G was required to defend and indemnify Chrysler for its own negligence and obtain insurance naming Chrysler as an additional insured under M&G’s liability policy with Penn National. Chrysler subsequently settled with Keech for \$100,000. Chrysler now seeks reimbursement of the settlement amount plus related expenses, costs, and fees from Penn National. Penn National has cross-moved for summary judgment against Chrysler. Oral argument on the Motions was heard January 27, 2004.

### III. STANDARD OF REVIEW

The court will grant summary judgment only if there are no genuine issues of material fact “and the moving party must show he is entitled to judgment as a matter of law.”<sup>1</sup> In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the non-moving party.<sup>2</sup> Summary judgment, therefore, is appropriate only if, after viewing the evidence in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.<sup>3</sup>

### IV. DISCUSSION

The narrow issue that is before the court is whether, if the contract between Chrysler and M&G is an “insured contract,” Penn National is liable for reimbursement to Chrysler for the amount of the settlement and associated expenses.

Chrysler argues the contract between it and M&G is an “insured contract” and thus Penn National is required to reimburse Chrysler’s expenses of settlement.

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<sup>1</sup> *Deakyn v. Selective Insurance Co.*, 728 A.2d 569, 570 (Del. Super. 1997) (internal citation omitted).

<sup>2</sup> *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

<sup>3</sup> *Guy v. Judicial Nominating Com’n.*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).

Chrysler argues undisputed facts establish that: (1) M&G made a contract to provide indemnification to Chrysler, (2) an insurance policy was issued which included contractual liability coverage, and (3) the contract to provide indemnification was a covered contract under the policy. Chrysler argues the ruling in *Chrysler Corp. v. Merrell & Garaguso*<sup>4</sup> allows it to proceed with its claim against Penn National. The *Chrysler* case stated that even though 6 Del. C. § 2704(a) (“§ 2704(a)”) precludes indemnification of a contractor by a subcontractor as against public policy, the “savings clause” of 6 Del. C. § 2704(b) (“§ 2704(b)”) makes insurance, once purchased for the purpose of such indemnification, enforceable against the insurer.<sup>5</sup>

Penn National counters § 2704(b) only allows insurance coverage for indemnification if the party seeking indemnification (here, Chrysler) is a named insured. Penn National argues that because M&G is not directly liable to indemnify Chrysler under § 2704(a), there can be no “covered claim” even if the contract between Chrysler and M&G is an “insured contract.”

The court is not asked to decide whether Chrysler is an additional insured on M&G’s policy from Penn National. Whether Chrysler is an additional insured

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<sup>4</sup> 796 A.2d 648 (Del. 2002).

<sup>5</sup> *Id.* at 653 (“The savings provision has meaning only if it cannot be used as a shield by insurers to decline coverage for insurance once purchased. . .”).

under the Penn National policy is the subject of a factual dispute remaining to be resolved at trial. The court here, instead, is asked to decide whether Chrysler has a ground for obtaining reimbursement from Penn National by virtue of the provision in M&G's policy with Penn National providing coverage for liability arising under an "insured contract."<sup>6</sup>

The court finds Penn National is basing its position on the lack of direct liability of M&G to indemnify Chrysler. Section 2704(a), as a matter of public policy, precludes such direct liability. The court finds this cannot be the sole basis for analysis, however. If the only way an insurer assumes liability for indemnification is if the insured is liable, then even if there were insurance providing for payment for indemnification, it would never be applicable and the insurer would never be required to pay. The Court in *Chrysler* concluded, however, that if there were an insurance policy that provides coverage for indemnification, the insurer must pay.<sup>7</sup> The court finds that whether Penn National's liability arises from having Chrysler as a named insured on M&G's policy, or whether liability comes from an "insured contract" between M&G and Chrysler that is covered by M&G's policy, is a distinction without a difference.

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<sup>6</sup> For the purposes of argument, the contract between Chrysler and M&G is deemed an "insured contract."

<sup>7</sup> *Chrysler*, 796 A.2d at 653.

The *Chrysler* decision makes it clear that if there is insurance, Penn National must pay, even if M&G cannot be directly liable. As the Court held in *Chrysler*, the point of § 2704(b) is that the insurer cannot hide behind § 2704(a) and refuse to pay coverage “to any insured, however identified or designated.”<sup>8</sup>

The court does find, however, that the analysis does not end there. The decision in *Chrysler* has an implicit requirement that the insurer have notice of its potential liability. The Court in *Chrysler* assumed the insurer had issued an endorsement and received a premium for the indemnification coverage.<sup>9</sup> This court thus concludes that notice to the insurer is an essential element of whether there is coverage. The court finds this notice could be given to Penn National by Chrysler’s being named as an additional insured on M&G’s policy or notice to Penn National of the existence of an “insured contract” between Chrysler and M&G that would be covered under M&G’s policy. Based on testimony at oral argument and the record provided, the court finds there is a factual issue of whether Penn National had notice of its potential liability in this case. Because there is a genuine issue of material fact, summary judgment is inappropriate.

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<sup>8</sup> *Id.* (emphasis supplied).

<sup>9</sup> *Id.*

**V. CONCLUSION**

For the above reasons, Chrysler's Motion for Summary Judgment against Penn National is **DENIED**. Penn National's Cross-Motion for Summary Judgment against Chrysler is **DENIED**.

**IT IS SO ORDERED.**

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Calvin L. Scott, Jr.  
Superior Court Judge