

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CONSOLIDATED RAIL CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 v. ) C. A. No. 97C-10-001 CHT  
 )  
 LIBERTY MUTUAL INSURANCE )  
 COMPANY and PACIFIC INSURANCE )  
 COMPANY and JAMES JULIAN INC., )  
 )  
 Defendants. )

**Opinion and Order in Response to Motions by Liberty  
Mutual Insurance Company, Pacific Insurance Company,  
Consolidated Railroad and James Julian Inc.  
For Summary Judgment and Declaratory Relief**

Initial Briefing Completed June 3, 2003  
Oral Argument: August 19, 2004  
Final Submission: October 1, 2004  
Decided: March 16, 2005

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**TOLIVER, JUDGE**

Before the Court are two motions filed by the parties arising out of the costs of defending and ultimately settling the claims of the plaintiffs in the *Flowers*<sup>1</sup> and *Fydenkevez*<sup>2</sup> wrongful death actions against Consolidated Rail Corporation ("Conrail") and James Julian, Inc. ("Julian"). The matter having been briefed and argued, that which follows is the Court's resolution of the issues so presented.<sup>3</sup>

### **NATURE AND STAGE OF THE PROCEEDINGS**

The first of the two motions centers around the cross motions for partial summary judgment between Pacific and Conrail concerning the extent of Pacific's duty, if any, to defend Conrail for the costs incurred in participating in the *Flowers* and *Fydenkevez* litigation. In its April 30 opinion, the Court granted Conrail's motion and denied Pacific's motion for partial summary judgment, holding that Pacific had

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<sup>1</sup> *Flowers v. Consol. Rail Corp., et al.*, Del. Super., C. A. No. 94C-01-056, Toliver, J. (November 1997).

<sup>2</sup> *Fydenkevez v. James Julian, Inc., et al.*, Del. Super., C. A. No. 94C-01-055, Toliver, J. (November 1997).

<sup>3</sup> A detailed description of the underlying facts and proceedings upon which this litigation is premised is set forth in the opinion issued by this Court on April 30, 2004. See, *Consol. Rail Corp. v. Liberty Mutual*, Del. Super., C.A. No. 97C-10-001, Toliver, J. (April 30, 2004) (Mem. Op.). For the sake of brevity as well as to avoid redundancy, that description will not be repeated but is incorporated by reference here.

a duty to defend Conrail unless and/or until any claims being pursued were determined to be beyond the coverage of the policy.

Shortly before the Court issued its April 30 opinion, Conrail filed a supplemental brief based upon "additional discovery" provided by Pacific subsequent to the completion of the initial briefing on the Pacific/Conrail cross motions. At the time the April 30 opinion was issued, Pacific had not been afforded the opportunity to respond to Conrail's then most recent submission, nor had they received the additional discovery which Conrail promised to tender. The Court subsequently granted re-argument as to the April 30 opinion in its entirety.<sup>4</sup> Conrail subsequently provided the discovery in question and Pacific filed its supplemental response to the pending motion.

The second motion before the Court was filed by Julian on February 22, 2002 and seeks a determination as to the extent of Liberty's obligation to provide coverage for all of Julian's losses since litigation has begun. The Court's April 30 decision did not address Julian's motion. The Court

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<sup>4</sup> None of the other parties have submitted memoranda rearguing the opinion as issued other than Pacific and Conrail. Consequently, the focus of the reargument is only on the Pacific/Conrail dispute.

instead wrote to the parties and asked whether, in light of the Court's decisions on the other motions and the factual circumstances surrounding this aspect of the litigation, Julian's motion against Liberty was moot. On May 24, 2004, Julian filed its response answering the Court's quaere in the negative. Liberty agreed as well that the motion was not moot. In the interim, both Julian and Liberty advanced further arguments in support of their respective positions.

### **DISCUSSION**

The law governing the resolution of the instant controversies is not in substantial dispute and was cited in the Court's April 30 opinion. And, like the relevant facts underlying referred to in that opinion, the authority and discussion relied upon there is incorporated herein by reference. The Court will therefore focus, unless otherwise noted, on the two motions referenced above.

#### **Coverage Under The Pacific Force Account Work Policy**

In the supplemental briefing regarding Pacific's duty to

defend, Conrail advances two arguments not significantly different than those set out in the initial briefing. Nor has Pacific's response chartered any radically new courses in defense of its denial of coverage. Both are based in substantial part on the last exchange of discovery that was provided given the Court's April 30 pronouncement.

Conrail first states Pacific provided Conrail with a defense in other cases where the claims were "far more ambiguous" than the claims asserted in the *Flowers* and *Fydenkevez* cases.<sup>5</sup> It is argued that if a defense was provided in those cases, Liberty should have provided a defense for Conrail in the present litigation. Second, Conrail contends that its employees, including the "flagmen", that worked on the Route 15 Project were included under the coverage provided by the Force Account Work Policy.<sup>6</sup> Reduced to its essence, Conrail's argument appears to be that since the policy's premium was based in part on the total payroll for all employees who worked on the project, and the work of

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<sup>5</sup> Conrail lists four other railroad cases in which Pacific provided a defense for Conrail. Conrail refers to these cases as, the David Caramanica Railroad Crossing Accident, the Serena Naumann Railroad Crossing Accident, the Alejandro G. Grauds Railroad Crossing Accident, and the Terry Brown Railroad Crossing Accident. Supplemental Br. In Support of Consol. Rail Corp.'s Mot. For Partial Summ. J. as to Def. Pac. Ins. Co.'s Duty to Defend, D.I. 161, at 3-13.

<sup>6</sup> Supplemental Br. In Support of Consol. Rail Corp.'s Mot. For Partial Summ. J. as to Def. Pac. Ins. Co.'s Duty to Defend, D.I. 161, at 15.

the flagmen are alleged to be one of the proximate causes of both accidents, the *Flowers* and *Fydenkevez* complaints present claims which are covered under the policy in question.

Pacific's supplemental brief again argues the allegations in the complaint are not connected to the force account work in this case. It then attempts to differentiate those cases cited by Conrail where coverage was provided by insisting the allegations in the complaints in those cases specifically alleged force account work where as the *Flowers* and *Fydenkevez* claims did not. The balance of Pacific's response supports the arguments previously submitted.

Having considered the supplemental arguments made by the parties, the Court must follow its initial inclination. As noted in footnote 44 of the April 30 opinion, the arguments raised in Conrail's supplemental brief filed on April 2, 2004 had no bearing on the Court's decision to grant partial summary judgment for Conrail.<sup>7</sup> The Court noted that while it was interesting that Pacific provided a defense for Conrail in other railroad litigation, the decision to provide a defense must be made on a case by case basis.<sup>8</sup> In this case,

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<sup>7</sup> *Consol. Rail Corp.*, C.A. No. 97C-10-001, at n.44.

<sup>8</sup> *Id.*

the facts and circumstances present, coupled with the language of the policy at the center of the controversy militate in favor of coverage.<sup>9</sup> The arguments advanced by Pacific simply do not persuade the Court to reach a different conclusion. The holding initially expressed in the April 30 opinion in this regard, is therefore reaffirmed.

### **The Duty To Defend Julian**

It is now apparent from the pleadings and arguments conducted in this matter that Liberty does not dispute that it had, and still has, an obligation to defend and indemnify Julian concerning the claims for contribution and/or indemnification by Conrail based upon the tortious conduct alleged to have brought about the deaths referenced in the *Flowers* and *Fydenkevez* litigation.<sup>10</sup> The major contention which remains is the extent that Julian is entitled to a defense and possible indemnification of the breach of contract claims raised by Conrail against Julian based upon the failure to procure Railroad Protective Public Liability Insurance ("RPPLI"). Julian contends that once there was a

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

<sup>10</sup> Jan. 16, 2003, Oral Argument Tr., at 14-24.



duty to defend and a claim had been established, Liberty had a duty to defend any claim that might be arguably covered under the policy. Since the tort claims were obviously covered, Liberty should have defended Julian as to all claims advanced and must pay for all of the costs of defense incurred thus far. Liberty feels that its duty was limited to the tort claims and it does not owe Julian for the costs of defense outside of that obligation.

As noted in the April 30 opinion, Conrail had advanced a claim against Liberty contending that Conrail was an "additional insured" under the terms of the policy that Julian purchased from Liberty.<sup>11</sup> The basis of the Conrail claim was that since Julian had failed to purchase RPPLI as required by Julian's contract with DelDOT for the Route 15 Project, Conrail was entitled to a defense and coverage under Julian's policy with Liberty for the tort claims arising out of the *Flowers* and *Fydenkevez* litigation.<sup>12</sup> Liberty declined coverage and advanced two grounds for its action.

More specifically, Liberty primarily argued that Conrail was not an "additional insured" as that term was defined

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<sup>11</sup> *Consol. Rail Corp.*, C.A. No. 97C-10-001, at 26-28.

<sup>12</sup> *Id.* at 11-12.

under the policy and that the basis for Conrail's claim against Liberty did not lie in tort, which was arguably covered. Rather, Conrail's claim was based upon Julian's breach of its contract with DelDOT, which was not covered. Liberty also argued that since the claims against Conrail arose out of the activities of Conrail employees and not the acts of Julian employees, those claims did not constitute an insured "occurrence" as defined under the policy.

The Court addressed those contentions ruling first that Conrail was not an "additional insured" for purposes of the Liberty insurance policy with Julian. It went on to hold that even if Conrail did fall within the aforementioned category, the accidents in question could not be considered an "occurrence" under that same policy because of how and/or where they took place.<sup>13</sup> Conrail was not, as a result, entitled to any protection from Liberty in this litigation. Those conclusions are critical to the resolution of the instant controversy.

The Court previously reviewed the scope of the duties to defend and to indemnify and insured under a policy of insurance in contracts construed under the laws of

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<sup>13</sup> *Id.* at 29-30.

Pennsylvania.<sup>14</sup> The law in Delaware is no different. Simply put, while the duty to defend and the duty to indemnify obviously bear some relationship, they are independent of one another.<sup>15</sup> The duty to defend, moreover, is broader than the duty to indemnify.<sup>16</sup> The former is said to include the duty to defend any litigation that includes a potentially covered claim.<sup>17</sup> Indemnification, absent some affirmative defense or other manner of avoidance, is based solely upon the terms of the contract of insurance at issue.<sup>18</sup>

Multiple claim suits, like the present case, often include some claims that are covered under the policy, as well as non-covered claims. When litigation includes both covered and non-covered claims, the insurer has a duty to defend the entire suit, until it can determine which claims

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<sup>14</sup> *Id.* at 18-21.

<sup>15</sup> See, *Charles E. Brohawn & Bros., Inc. v. Employers Comm. Union Ins. Co.*, 409 A.2d 1055 (Del. 1979).

<sup>16</sup> *Id.*

<sup>17</sup> 22 Appleman, *Law of Liability Insurance*, § 136.2[D] (2003). See, *Continental Casualty Company v. Alexis I. DuPont School District et al.*, 317 A.2d 101 (Del. 1974).

<sup>18</sup> See, *Continental Cas. Co.*, 317 A.2d 101; *Penn. Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, (Del. Super. Ct. 1997); *Charles E. Brohawn & Bros., Inc.*, 409 A.2d 1055.

fall outside the policy coverage.<sup>19</sup> Stated differently, the duty to defend extends to all causes of action in a complaint as long as one cause of action is potentially covered.<sup>20</sup> The insurer's obligation in that regard is reduced and/or terminated altogether once it can reasonably be determined that potentially covered claims fall outside of the policy coverage, or when they are dismissed or settled.<sup>21</sup>

Because Liberty concedes it had a duty to defend the cross claims for contribution and/or indemnification and did not do so after October 2000, Julian is entitled to reimbursement for the costs of defending against the claims by Conrail in that regard. It also appears that to the extent the cross claims are related to or based upon the activities of Julian employees in whole or in part, there would be a claim for indemnification under the Liberty policy. The Court must also find that there was a duty to defend, as opposed to indemnify, Julian against the breach of

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<sup>19</sup> Appleman, *supra*, § 136.2[D]. See also, *Western World Ins. Co. v. Reliance Ins. Co.*, 892 F.Supp. 659 (M.D. Pa. 1995), *Southern Md. Agric. Ass'n*, 539 F. Supp. 1295 (D. Md. 1982), *Ruder and Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 422 N.E.2d 518, 439 N.Y.S.2d 858 (1981).

<sup>20</sup> Appleman, *supra*, § 136.2[D].

<sup>21</sup> *Id.* See, *Knight v. United States Fidelity & Guar. Ins. Co.*, 65 F.3d 34 (5<sup>th</sup> Cir. 1995); *White Mountain Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907, 910 (1993); *Western World Ins. Co. v. Hall*, 353 N.W.2d 221 (Minn. Ct. App. 1984).

contract claim by Conrail. That duty ended, of course, as of April 30, for the reasons stated above.

That finding is based upon the complex relationship between Conrail and Julian in terms of their respective obligations towards each other and to DelDOT. It is also based upon the relationship between all three parties in terms of the scope of the Route 15 Project and the actual work to be completed. There was a potentially covered claim, given these circumstances, until the Court's April 30 decision that the failure to procure RPPLI did not make Conrail an "additional insured" or constitute an "occurrence" for purposes of the Liberty policy. That portion of the aforementioned decision relative to Conrail's status in that regard illustrates the complexities involved in the situation. It also highlights the fact that coverage, or the lack thereof, was not obvious and subject to reasonable dispute. The duty to provide a defense by Liberty for Julian under the terms of the policy was therefore implicated, and Liberty is responsible for the costs of defending the breach of contract claim under these circumstances.

Julian argues further that by refusing to continue to defend the cross claims based in tort, Liberty must be deemed

to have waived the right to contest any aspect of its obligation to defend or indemnify Julian under the policy in question. Julian contends that Liberty's breach of its duty to defend constituted a waiver by Liberty of all coverage defenses. In support of that position, it cites many cases outside of Delaware<sup>22</sup> that follow this rule and urges the Court to adopt the same. Liberty argues that Delaware should follow the opposing view which insists "that a breach of the duty to defend is a breach of contract separate and apart from the duty to indemnify."<sup>23</sup> The Court agrees with Liberty as an alternative holding.

While there is no Delaware case which provides guidance on this point, the philosophy underlying the decisions from other jurisdictions is clear. By failing to defend and exposing the insured to liability, the insurer gives up the right to contest the extent of its obligation to the insured. The Court finds this reasoning compelling and applies it to a limited degree in the present context. Liberty should not be permitted to contest its obligation to Julian having

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<sup>22</sup> Opening Br. in Support of James Julian Inc.'s Mot. for Summ. J. Against Def. Liberty Mutual, D.I. 124, at 20.

<sup>23</sup> Def. Liberty Mutual's Answ. Br. to James Julian's Mot. for Summ. J. Against Liberty Mutual and Cross-cl. for Summ. J. on Behalf of Liberty Mutual, D.I. 144, at 15.

breached its duty to defend and should not now be allowed to contest the extent of the obligation to do so that it may have had under the policy. The Court does not find, however, that the waiver extends beyond the duty to defend.

As noted earlier, the obligation to defend is broader than the duty to indemnify. A breach of the former does not automatically lead to a breach of the latter. For example, there can be a duty to defend a claim which turns out is not covered under the policy.<sup>24</sup> The need to tender a defense to protect the interests of the insured must be addressed immediately or prejudice may result. Coverage or indemnification of a particular claim is a different matter and can be addressed at a later point without harm to the insured. The question of coverage/indemnification will not be altered by the passage of time or events. It will be based upon the contract of insurance. To the extent that there is case law that sets forth a different approach, the Court declines to follow it.

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<sup>24</sup> That would be the result here where the Court has already ruled on Conrail's claim arising out of the failure to procure RPPLI.

**CONCLUSION**

\_\_\_\_\_Based upon the foregoing, the Court enters judgment as follows:

1. Conrail's Motion For Partial Summary Judgment As To Defendant Pacific's Duty-To-Defend must be, and hereby is, **granted**.
2. Pacific's Motion For Partial Summary Judgment As To Pacific's Duty-To-Defend must be, and hereby is, **denied**.
3. Julian's Motion for Summary Judgment as to Defendant's Liberty's Duty to Defend must be, and hereby is, **granted**.

**IT IS SO ORDERED.**

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**TOLIVER, JUDGE**