IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ZURICH AMERICAN INSURANCE COMPANY and AMERICAN GUARANTEE AND LIABILITY COMPANY,	)	
Plaintiffs,	)	
v.	)	
	)	C.A. No. N19C-05-108 MMJ CCLD
SYNGENTA CROP PROTECTION, LLC,	)	
Defendant.	)	

Submitted: June 18, 2020
Decided: August 3, 2020

Upon Defendant's Motion for Partial Summary Judgment for a Declaratory Judgment on Count I and Counterclaim Count II
GRANTED
Plaintiff Zurich's Cross-Motion for Summary Judgment
DENIED

OPINION

John D. Balaguer, Esq., Timothy S. Martin, Esq., (Argued), White Williams LLP, Wilmington, Delaware, Michael M. Marick, Esq., Karen M. Dixon, Esq., Skarzynski Marick & Black LLP, Chicago, Illinois, Alexis J. Rogoski, Esq., (Argued), Andrew Gerow, Esq., Skarzynski, Marick & Black, LLP, New York, New York, *Attorneys for Plaintiffs*

Stephen E. Jenkins, Esq., Catherine A. Gaul, Esq., Ashby & Geddes, Wilmington, Delaware, Dorothea W. Regal, Esq., Andrew N. Bourne, Esq., (Argued), Dustin S. Grant, Esq., Hoguet, Newman, Regal & Kenney, LLP, New York, New York, *Attorneys for Defendant*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

1. Parties

Plaintiffs Zurich American Insurance Company ("ZAIC") and American Guarantee and Liability Company ("AGLIC") (collectively "Zurich") brought this coverage action seeking declaratory relief against Defendant Syngenta Crop Protection, LLC ("Syngenta").

Both ZAIC and AGLIC are New York corporations engaged in the insurance business and authorized to transact business in Delaware.[1]

Syngenta is a Delaware LLC.[2] Syngenta is indirectly wholly-owned by Syngenta Crop Protection AG ("SCPAG"), which is a wholly-owned subsidiary of Syngenta AG.[3] SCPAG is a global agrichemical company operating in approximately 90 countries, including the United States.[4]

2. Policies

ZAIC issued three primary commercial general liability policies to SCPAG as the first named Insured, written on a claims-made basis: (1) policy number GLO 0144423 00 (effective January 1, 2017 to January 1, 2018); (2) policy number GLO 0144423 01 (effective January 1, 2018 to January 1m 2019); and (3) policy

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[1] Compl. ¶ 1.
[2] *Id.* ¶ 5.
[3] Defendant's Ans. Br. at 5 (citing Declaration of Anette Terp, dated February 28, 2020 ("Terp Decl."), ¶¶ 1, 3).
[4] *Id.*

number GLO 0144423 02 (effective January 1, 2019 to January 1, 2020) (collectively, the "Primary Policies").[5] Syngenta was an additional named Insured under the Primary Policies.[6]

Each of the Primary Policies provides an aggregate limit of liability of $5 million in excess of a self-insured retention of $1 million.[7] The Primary Policies require Zurich to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[8] The Primary Policies impose on ZAIC "the right and duty to defend" the Insured "against any 'suit' seeking those damages."[9]

The Primary Policies apply if a "claim for damages because of 'bodily injury' . . . is first made against [Syngenta] . . . during the policy period."[10] The Primary Policies do not provide a definition for the term "claim."

Zurich also sold Syngenta an Umbrella Policy, policy number AUC 0144424 00, which was issued by AGLIC.[11] The Umbrella Policy was effective for the January 1, 2017 to January 1, 2018 policy period.[12] AGLIC agreed to "pay on

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[5] Compl. ¶ 9.
[6] *Id.* ¶ 11.
[7] Defendant's Op. Br., Ex. A, (Primary Policies), at "Declarations."
[8] *Id.*, Ex. A, (Primary Policies) § I.1.a
[9] *Id.*
[10] *Id.*
[11] *Id.* (citing Affidavit of Andrew N. Bourne, dated Nov. 13, 2019 ("Bourne Aff."), Ex. B, (Umbrella Policy) at "Declarations").
[12] *Id.*

behalf of" Syngenta "those damages covered by this insurance in excess of the total applicable limits of" the Primary Policy. AGLIC agreed to be bound by the "terms and conditions" of the Primary Policy.[13] AGLIC also agreed to "have the right and duty to assume control of the investigation and settlement of any claim, or defense of any suit against" Syngenta "when the applicable limit of" the Primary Policy "has been exhausted by payment of loss . . . ."[14]

3. *Underlying Actions*

Paraquat is a chemical compound[15] which was used in herbicide manufactured and sold by Syngenta and its predecessor companies.[16] At least as early as 2017, the press and some scientific publications have attempted to link Paraquat exposure to the development of Parkinson's disease.[17]

Syngenta has been named as a defendant in actions seeking recovery for alleged bodily injuries, sickness or disease that allegedly resulted from exposure to Paraquat (the "Paraquat Actions").[18]

On May 30, 2008, a lawsuit was filed against Syngenta in the Superior Court of Los Angeles, California, alleging that the plaintiff, Shenkel, was exposed to

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[13] *Id.* at § I.A.1.
[14] *Id.* at III.A-A1.
[15] Terp Decl. ¶ 15.
[16] Ans. and Countercl. ¶ 18.
[17] Terp Decl. ¶ 15.
[18] Ans. and Countercl. ¶ 18.

Syngenta's Paraquat product and contracted Parkinson's disease as a result of that exposure (the "Shenkel Lawsuit").[19]

In September 2017, an underlying plaintiff filed the first of a string of Paraquat Actions against Syngenta (the "Hoffman Action").[20] Subsequently, two additional Paraquat Actions were filed against Syngenta in Illinois,[21] and ten in the Superior Court of California.[22]

The complaints in the Paraquat Actions were filed by farmers, farm hands, landowners and/or professional sprayers.[23] The Paraquat Action complaints allege that the underlying plaintiffs suffer from Parkinson's disease caused by plaintiffs' exposure to Paraquat manufactured, distributed or sold by Syngenta and its predecessors in the United States.[24]

The Paraquat Actions assert claims for negligence, public nuisance, strict product liability claims for design defect and failure to warn, and breach of implied warranty of merchantability.[25] Additionally, the Paraquat Actions filed in Illinois include claims under the Illinois Consumer Fraud and Deceptive Business Practice

[19] Affidavit of Amanu Nwaomah ("Nwaomah Aff."), ¶ 9.
[20] *Hoffmann v. Syngenta Crop Protection, LLC et al*, No. 17-L-517 (Ill. Cir. Ct. St. Clair Cty.).
[21] Answer and Counterclaim ¶ 19.
[22] *Id.* ¶ 20.
[23] *Id.* ¶ 22.
[24] *Id.*
[25] *Id.* ¶ 23.

Act, while the California Paraquat Actions include claims under the California Consumer Legal Remedies Act.[26]

The underlying plaintiffs in the Paraquat Actions seek monetary damages for lost income and medical treatment, pain, mental anguish, and disability.[27] Syngenta denies all liability to the underlying plaintiffs in the Paraquat Actions.[28] Syngenta has incurred substantial costs in an effort to defend itself in the Paraquat Actions.[29] Syngenta asserts that the costs have exceeded the $1 million self-insured retention.[30]

4. The Tillery Letter

On January 18, 2016, prior to the commencement of the Paraquat Actions, Syngenta received a letter from Korein Tillery LLC ("Korein Tillery").[31] Korein Tillery is a plaintiffs' toxic tort firm that was known to Syngenta from prior unrelated litigation.[32] Korein Tillery purportedly sent the 20-page letter on behalf of 200 unidentified victims of Paraquat exposure (the "Tillery Letter").[33]

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* ¶ 24.
[30] *Id.* ¶ 25.
[31] Affidavit of Michael Marick ("Marick Aff."), Ex. 5.
[32] Pl.'s Op. Br. at 2.
[33] Marick Aff., Ex. 5.

The Tillery Letter alleged that scientific evidence[34] supported the contention that Korein Tillery's clients suffered from Parkinson's disease as a result of Paraquat exposure.[35] The Tillery Letter did not request monetary damages.[36] Instead, Korein Tillery suggested that litigation could cause Syngenta to incur liability "far above its insurance policy limits" in defense costs.[37] Korein Tillery proposed that Syngenta engage in "bellwether" trials to establish causation as a legal matter, while agreeing to toll the statute of limitations as to its other clients' cases.[38]

Syngenta engaged trial lawyers from Kirkland & Ellis LLP ("Kirkland") to meet with Korein Tillery regarding what Korein Tillery called the "imminent initiation of litigation."[39] Kirkland met with Korein Tillery in February 2016.[40] At the meeting, Kirkland requested more information regarding claimants and their injuries.[41] Korein Tillery declined to identify any claimants or provide facts regarding their medical situation.[42] According to Defendant, that meeting

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[34] Syngenta asserts that the Tillery Letter merely repeated studies referenced in articles published in the news and scientific journals. Def.'s Reply Br., at 9–10.
[35] Marick Aff., Ex. 5.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Pl.'s Op. Br. at 3.
[40] (Declaration of Bradley Weidenhammer, dated February 28, 2020 ("Weidenhammer Decl."), ¶ 4.
[41] *Id.*, ¶¶ 5-6.
[42] Syngenta asserts that Korein Tillery has been evasive regarding details of potential claims in the past. Syngenta hired Kirkland to defend Syngenta in an action arising from alleged exposure to a different chemical. That case, which Syngenta refers to as *Doe v. Syngenta Crop Protection*,

conveyed the impression that Korein Tillery did not represent actual claimants and had not done the necessary work to bring an action against Syngenta.[43]

Kirkland did not hear from Korein Tillery again until April 2016,[44] at which time Kirkland reiterated its request "for medical records for the six plaintiffs you described as bellwether plaintiffs and copies of Syngenta documents you characterized as suggesting knowledge of a potential connection between paraquat and [Parkinson's disease]."[45] Korein Tillery did not respond at any time in 2016.[46]

5. Notice to Zurich

Syngenta provided its first notice to Zurich of the Hoffmann Action on or about November 13, 2017.[47] Syngenta later advised that it had received first notice of the Hoffman Lawsuit on October 10, 2017.[48] Syngenta advised that it was being defended by Kirkland.[49] Syngenta's notice made no mention of the previously asserted Shenkel Lawsuit or the Tillery Letter.

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was brought on behalf of one unnamed minor claiming bodily injury arising out of *in utero* exposure to the chemical atrazine. (No citations for *Doe v. Syngenta Crop Protection* provided). Korein Tillery had threatened to bring such claims for years prior, and implied that there could be thousands of plaintiffs, but ultimately filed on behalf of only one client.

[43] Declaration of Alan B. Nadel, dated February 28, 2020 ("Nadel Decl."), ¶ 17.

[44] Weidenhammer Decl., ¶ 10; Decl., ¶ 19.

[45] Marick Aff., ¶ 13.

[46] Weidenhammer Decl., ¶ 13; Nadel Decl., ¶ 19.

[47] Nwaomah Aff., ¶ 2.

[48] *Id.* ¶ 9.

[49] *Id.* ¶ 2; Marick Aff., ¶¶ 9–10.

6. This Action

Zurich filed this action on May 13, 2019 seeking declaratory judgment. Zurich's Complaint seeks a declaration that: (1) it owes no duty to defend and to indemnify Syngenta under the Zurich policies for the Paraquat Actions ("Count I"); and (2) pursuant to Delaware Code Title 18, Section 2711, Syngenta's misrepresentations, omissions, concealment of facts, and incorrect statements in its applications for the Zurich Policies prevent recovery under the Policies for the Paraquat Actions ("Count II").

On July 19, 2019, Syngenta filed an Answer and Counterclaim against Zurich, raising claims of: (1) breach of contract against ZAIC ("Counterclaim Count I"); (2) declaratory judgment that Zurich has a duty to defend Syngenta against the Paraquat Actions ("Counterclaim Count II"); and (3) declaratory judgment that Zurich is obligated to indemnify Syngenta for sums in may incur arising out of the Paraquat Actions ("Counterclaim Count III").

On November 14, 2019, Syngenta filed a Motion for Partial Summary Judgment for a Declaratory Judgment on Count I and Counterclaim Count II. On January 22, 2020, Zurich filed a Brief in Opposition to Syngenta's Motion for Partial Summary Judgment and in Support of its Cross-Motion for Summary Judgment. Zurich's cross-motion seeks judgment on Count I and Count II of its

Complaint. The parties filed answers and replies. This Court heard oral argument on June 18, 2020.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[50] All facts are viewed in a light most favorable to the non-moving party.[51] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[52] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[53] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[54] Generally, where the parties have filed cross-motions for summary judgment, the standard for summary judgment is not altered.[55] However, where no party asserts that genuine issues of material fact exist, such motions for summary judgment are considered

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[50] Super. Ct. Civ. R. 56(c).
[51] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[52] Super. Ct. Civ. R. 56(c).
[53] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[54] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[55] *ACW Corporation v. Maxwell*, 2019 WL 3024049, at *2 (Del. Super.) (citing *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

together as a stipulation for decision on the merits pursuant to Superior Court Civil Rule 56(h).[56]

ANALYSIS

1. Insurance Contract Interpretation

Insurance policies are contracts.[57] Interpretation of contracts is a question of law. The Court must give effect to the parties' mutual intent at the time of contracting.[58] The Court should interpret contract language as it "would be understood by any objective, reasonable third party."[59] Absent ambiguity, contract terms should be accorded their plain, ordinary meaning.[60] Ambiguity exists when the disputed term "is fairly or reasonably susceptible to more than one meaning."[61]

Insurance policies also are adhesion contracts, not generally the result of arms-length negotiation.[62] Thus, the rules of construction "differ from those

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[56] *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *8 (Del. Super.) *aff'd*, 38 A.3d 1255 (Del. 2012).
[57] *IDT*, 2019 WL 413692, at *7; *Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2018 WL 6266195, at *4 (Del. Super.); *see also Cont'l Ins. Co. v. Burr*, 706 A.2d 499, 500–01 (Del. 1998) ("[A]n insurance policy is a contract of adhesion...."); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982) ("[A]n insurance policy is an adhesion contract....").
[58] *Id.* citing *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1212 (Del. 2018) ("Whether [a] contract's material terms are sufficiently defined is mostly, if not entirely, a question of law."); *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1263 (Del. 2017) ("The proper construction of any contract...is purely a question of law...."); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).
[59] *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014).
[60] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012); *see also Goggin*, 2018 WL 6266195, at *4; *IDT*, 2019 WL 413692, at *7.
[61] *Id.*
[62] *Hallowell*, 443 A.2d at 926.

applied to most other contracts."[63] Where policy language is ambiguous, the doctrine of *contra proferentem* requires the Court to interpret the policy in favor of the insured because the insurer drafted the policy.[64] The Court, pursuant to this doctrine, looks to "the reasonable expectations of the insured at the time when he entered the contract[.]"[65] The Court will *only* apply this doctrine where the policy is ambiguous.[66] When the policy language is "clear and unambiguous[,] a Delaware court will not destroy or twist the words under the guise of construing them" and each party "will be bound by its plain meaning."[67]

2. Duty to Defend

When determining an insurer's duty to defend a claim asserted against a policy holder, the Court will look to the allegations in the underlying complaint to decide whether the action against the policy holder states a claim covered by the policy.[68] Generally, an insurer's duty to defend is broader than its duty to indemnify.[69] An insurer has a duty to defend where the factual allegations in the

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[63] *Id.*
[64] *Id.* (citing *Novellino v. Life Ins. Co. of North America*, 216 A.2d 420, 422 (Del. 1966); *Steigler v. Insurance Co. of North America*, 384 A.2d 398, 400 (Del. 1978)).
[65] *Id.* at 927.
[66] *Id.* at 926.
[67] *Id.*
[68] *United Westlabs, Inc*, 2011 WL 2623932, at *8 (citing *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000)).
[69] *Liggett Group, Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024, 1030 (Del. 2002).

underlying complaint potentially support a covered claim.[70] The insurer will have a duty to indemnify only when the facts in that claim are actually established.[71]

The insured bears the burden of proving that a claim is covered by an insurance policy.[72] Where the insured has shown that a claim is covered by an insurance policy, the burden shifts to the insurer to prove that the event is excluded under the policy.[73]

The Delaware Supreme Court has outlined three principles to determine whether an insurer has a duty to defend an insured:

> (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured;
>
> (2) any ambiguity in the pleadings should be resolved against the carrier; and
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> (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.[74]

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[70] *DynCorp v. Certain Underwriters at Lloyd's, London,* 2009 WL 3764971, at *3 (Del. Super.).
[71] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009).
[72] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).
[73] *State Farm Fire & Cas. Co. v. Hackendorn,* 605 A.2d 3, 7 (Del. Super. 1991).
[74] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254–55 (Del. 2008) (internal citations omitted).

Further, "Coverage language is interpreted broadly to protect the Insured's objectively reasonable expectations...."[75] Exclusions, on the other hand, are construed narrowly in favor of coverage.[76]

The Court generally will look at two documents to determine the insurer's duty to defend: the insurance policy and the pleadings of the underlying lawsuit.[77] The duty to defend arises where the insured can show that the underlying complaint, read as a whole, alleges a risk potentially within the coverage of the policy.[78]

The complaint must allege some grounds for liability on the part of the insured, based upon a risk covered by the policy, for the duty to defend to arise.[79] The Court is not bound by the narrow language in a complaint filed against an insured.[80] The Court may review the complaint as a whole, considering all reasonable inferences that may be drawn from the alleged facts.[81] An examination

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[75] *Med. Depot, Inc. v. RSUI Indemn. Co.*, 2016 WL 5539879, at *7 (Del. Super.).
[76] *Deakyne v. Selective Ins. Co. of Am.*, 728 A.2d 569, 574 (Del. Super. 1997).
[77] *United Westlabs*, 2011 WL 262932, at *8 (citing *KLN Steel Products Co., Ltd. v. CAN Ins. Co.*, 278 S.W.3d 429, 434 (Tex. App. 2008)).
[78] *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974); *Virtual Business Enterprises, LLC v. Maryland Cas. Co.*, 2010 WL 1427409, at *4 (Del. Super.).
[79] *United Westlabs*, 2011 WL 262932, at *8.
[80] *Id.*
[81] *Id.*

of the complaint is not limited to the plaintiff's unilateral characterization of the nature of the claims.[82]

3. Primary Policies Exclusion

The Primary Policies require Zurich to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[83] The Primary Policies impose on ZAIC "the right and duty to defend" the Insured "against any 'suit' seeking those damages."[84]

However, the Primary Policies exclude a claim for damages made against any insured prior to the commencement of the policy period.[85] Further, a "claim by a person or organization seeking damages will be deemed to have been made... (1) When notice of such claim is received and recorded by any insured....[86]

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[82] *Blue Hen Mech., Inc. v. Atl. States Ins. Co.*, 2011 WL 1598575, at *3 (Del.Super.).
[83] Defendant's Op. Br, Ex. A, (Primary Policies) § I.1.a.
[84] *Id.*
[85] Section I.1.a of the Primary Policies provides that Zurich "will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply" and Section I.1.b provides that:

> This insurance applies to "bodily injury" and property damage" only if:...(3) A claim for damages because of the "bodily injury" or "property damage" is first made against any insured, in accordance with Paragraph c, below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods. *Id.*

[86] Defendant's Op. Br, Ex. A, (Primary Policies) § I.1.c.

A. Consideration of The Tillery Letter

Syngenta argues that the Court may not consider extrinsic evidence, such as the January 18, 2016 Tillery Letter, because the Court's review is limited to the policy and the underlying complaint.

Zurich argues that the Court may examine "extrinsic" evidence to determine whether the duty to defend was triggered by the timing of when the claim was first-made. Zurich relies on *United Westlabs, Inc. v. Greenwich Insurance Company.*[87]

The relevant policy in *United Westlabs Inc. v. Greenwich Insurance Company* excluded claims "first made" prior to inception of the policy.[88] The insurer, Greenwich Insurance Company, argued that the claim at issue was "first made" before the inception of the insurer's policy.[89] This Court relied on evidence outside the policy and underlying complaint to determine that Greenwich did not have a duty to defend because the claim was "first made" prior to inception of the policy.[90]

Zurich argues that the Tillery Letter constitutes a "Claim for Damages" under the Primary Policies. Syngenta received the Tillery Letter in January of

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[87] 2011 WL 2623932 (Del. Super.).
[88] *Id.* at *1.
[89] *Id.* at *6-7.
[90] *Id.*

2016. Thus, Zurich argues that the Primary Policies exclude the Paraquat Actions because the Tillery Letter preceded the 2017 inception of the Primary Policies.

The Court finds that *United Westlabs, Inc. v. Greenwich Insurance Company*[91] controls. Therefore, the Court may consider documents outside the instant complaint to determine whether a claim for damages had been made prior to the January 1, 2017 inception of the Primary Policies.

B. The Tillery Letter is Not a Claim for Damages

Syngenta argues that even if the Court may consider the Tillery Letter, it does not constitute a "Claim for Damages" under the Primary Policies. Thus the Tillery Letter does not exclude Zurich's duty to defend.

Page 1 of the Tillery Letter states: "Our firm has been retained by numerous victims of Parkinson's disease in connection with claims they and their spouses have against Syngenta for personal injuries and related damages. Virtually all of these men are farmers or pesticide applicators who have a positive history of exposure to Paraquat."[92]

Page 19 of the Tillery Letter explains:

> We believe that when all of this scientific information we have learned is publicly disseminated there will likely be a huge number of "copycat" lawsuits causing Syngenta to incur enormous defense costs all over the country and exposure to liability far above its insurance policy limits. As a simple example, if just 2,000 new Parkinson's cases are filed each

[91] 2011 WL 2623932.
[92] Pl.'s Op. Br., Ex. 5 (Marick Aff.) (Excerpt from the Tillery Letter), at 1.

> year (we expect far more) and defense costs of $500,000 per case are incurred, the financial exposure to Syngenta will equal one billion annually before payment of compensatory or punitive losses.[93]

The Primary Policies apply "to 'bodily injury'... only if ... [a] claim for damages because of the 'bodily injury' ... is first made against any insured."[94] The Tillery Letter alleged "personal injuries" such as those "bodily injuries" defined in Section I.1.b(3). However, the Primary Policies do not specifically define the term "Claim for Damages." Although the Tillery Letter alleges that there are potential plaintiffs with "*claims*...against Syngenta...for related *damages*," it does not quantify any damages or provide any details about such claims.

Syngenta argues that the Tillery Letter is not a claim for damages because it does not demand any type or quantity of damages. Syngenta asserts that a threatening letter from an attorney does not qualify under Delaware law as a "claim for damages" absent a *demand for damages*. Syngenta relies on *Medical Depot Inc. v. RSUI Indeminty Company*.[95]

In *Medical Depot*, the underlying plaintiff's counsel had written the policyholder a "demand letter."[96] The letter indicated that counsel "intended to file a class action lawsuit if [the policyholder] failed to meet" certain conditions. The

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[93] *Id.* at 19.
[94] Def.'s Op. Br., Ex. A, (Primary Policies) § I.1.a
[95] 2016 WL 5539879, at *1 (Del. Super.).
[96] *Id.* at *2.

letter omitted any request for monetary relief.[97] This Court held that the demand letter did not constitute a claim under the policy, which defined a claim as a "demand for monetary relief."[98]

Medical Depot is distinguishable from the case at hand. In that case, Section 1782 of the California Civil Code applied to the underlying litigation.[99] Under Section 1782, the claimant had to request a refund from the insured for an allegedly defective product and provide the insured with an opportunity to pay the refund before the claimant could file a lawsuit.[100] This statutorily mandated prerequisite has no bearing on whether the claims asserted by the Tillery Letter constitute a "Claim for Damages" under the Primary Policies.

Zurich argues that the Tillery Letter need not make a specific monetary demand in order to constitute a claim. Zurich relies on *Berry v. Saint Paul Fire & Marine Insurance Company*.[101] In *Berry*, the United States District Court for the Eighth Circuit held that a letter may qualify as a "claim" despite the absence of a specific demand for payment provided that the context of the letter in its entirety is "sufficiently demanding in tone and substance." [102]

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[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] 70 F. 3d 981, 982 (8th Cir. 1995).
[102] *Id.*; Zurich also cites several cases outside Delaware which held that a "claim" does not have to demand a sum certain that would be accepted in settlement or even identify the quantum of damages at issue, including: *Precis, Inc. v. Fed. Ins. Co.*, 184 F. App'x 439, 441 (5th Cir. 2006);

Zurich further argues that the Tillery Letter is sufficiently demanding in tone and substance. Zurich contends that the Tillery Letter constitutes a claim because it uses the term "claims," and suggests bellwether trials and a litigation hold. Zurich asserts that its position is supported by the fact that Syngenta hired counsel to respond to Korein Tillery, and that Korein Tillery purported to represent at least six plaintiffs.

Syngenta counters that the Tillery Letter is not a claim because a request for a litigation hold or proposal for bellwether trials involving vague "plaintiffs" is not demanding in tone or substance. Syngenta notes that other jurisdictions have clearly held that a litigation hold request is not a demand against an insured for damages because "[a]t most it communicates to [the insured] a duty to preserve documents in connection with potential litigation against an unnamed party."[103]

Syngenta also asserts that Zurich HQ, which controls claims reporting and coverage decisions for the policies at issue,[104] has instructed that unspecified,

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Scottsdale Indem. Co. v. Convercent, Inc., 2017 WL 5446093, at *6-7 (D. Colo.); *Carosella & Ferry, P.C. v. TIG Ins. Co.*, 189 F. Supp. 2d 249, 253-54 (E.D. Pa. 2001); *Herron v. Schutz Foss Architects*, 935 P.2d 1104, 1109 (Mont. 1997); *Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co.*, 78 Cal. Rptr. 3d 264, 268-69 (Cal. Ct. App. 2008); and *Paradigm Ins. Co. v. P & C Ins. Sys., Inc.*, 747 So. 2d 1040, 1041 (Fla. Dist. Ct. App. 2000).

[103] *Colony Ins. Co. v. Chesapeake Energy Corp.*, 215 F. Supp. 3d 1190, 1995 (W.D. Okla. 2016).

[104] Terp Decl., ¶ 21.

nonconcrete, theoretical possibilities of claims do not qualify as a "claim" under the Syngenta insurance program.[105]

The Court finds that the Tillery Letter cannot be construed reasonably as a claim for monetary damages. The Tillery Letter refers in the most general way to "numerous victims." At no time prior to the January 1, 2017 policy inception was other information provided to amend the January 18, 2016 Tillery Letter. Thus, no information was provided to Syngenta which would identify any individual claimant or clarify any facts.

While it may not be necessary to reveal potential claimants' specific information, such as name, address, or treating physician, there must be some demonstration by the potential claimant sufficient to put the potential defendant on notice that there is an *actual* person or persons who are intending to file a claim for damages. Here, the Tillery Letter implies the existence of "numerous" claimants *and* their spouses, but omits information on age; lists a range of occupations, but

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[105] Syngenta claims that in December 2018, SCPAG notified Zurich of a "notice of circumstances" relating to a different Syngenta product (glyphosate). *Id.*, ¶ 22 & Def.'s Ex. E. Syngenta asserts Zurich HQ explained that the notification of the glyphosate "circumstance" was unnecessary because of the lack of "detail [as to] concrete facts [that] appear likely that a specific, determinable claim by an individualized claimant will be brought against Syngenta." *Id.*, ¶ 23 & Ex. F. According to Syngenta, Zurich HQ instructed that: (1) SCPAG's insurance program operated on a "claims made principle which, as far as bodily injury of a third party because of a defective product of an insured entity is concerned, *requires that a concrete liability claim . . . has been made*." *Id.*, ¶ 24 & Ex. G (emphasis added); and (2) that "*it is not sufficient that there is theoretical possibility that whatever claim in connection with whatever product for whatever bodily injury of an unknown third party might be made* against any insured entity." *Id.*

provides neither timing nor duration of employment or location and identity of employer; and mentions unspecified injuries and unquantified damages relating to Paraquat exposure that *could* lead to litigation. In other words, an unclear or amorphous threat of future litigation is not sufficient to constitute a claim for damages.

The Tillery Letter begins by asserting that Korein Tillery had been retained "by victims of Parkinson's disease" who had incurred injuries and damages related to work as "farmers or pesticide applicators who have a positive history of exposure to Paraquat."[106]

This assertion is simply not enough to constitute a claim for damages because of bodily injury. The insured must have credible indication that there is at least one specific individual that is prepared to assert a claim.

Further, while the Tillery Letter goes into great detail supporting the reasons Syngenta may be found liable, the letter stops short of making any actual claim for damages. Rather, the letter suggests a bellwether process for resolving future claims.

The Court finds that the January 18, 2016 Tillery Letter constituted a threat of *future* litigation. The Tillery Letter's mere reference to personal injury is insufficient to constitute a claim. Taken as a whole, the Tillery Letter is

[106] Marick Aff., Ex. 5.

reasonably interpreted at most as *requesting* damages, and proposing a future method by which to resolve any future claims. The Tillery Letter's lack of specificity regarding potential claimants or plaintiffs prevents this Court from finding that the Tillery Letter is a "Claim for Damages."

The same analysis applies to the second Tillery Letter dated January 25, 2016, which states:

> Korein Tillery LLC hereby notifies [Syngenta] of the imminent initiation of litigation concerning Syngenta's paraquat products and requests that Syngenta take all steps necessary to preserve any and all documents, records and other information in its possession, custody or control that relate in any way to the subject matter or that could be discoverable in litigation concerning its subject matter....[107]

This request is for preservation of materials that *could* be discoverable in litigation that has not yet been initiated. Thus, it is a litigation hold letter, and not a claim for damages.

The Court finds that a "Claim for Damages" under the Primary Policies was not made prior to the January 1, 2017 policy inception date. **THEREFORE,** Syngenta's Motion for Partial Summary Judgment for a Declaratory Judgment on Count I and Counterclaim II regarding Zurich's duty to defend Syngenta under the Primary and Umbrella Policies concerning the Paraquat Actions is hereby **GRANTED.**

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[107] *Id.*, Ex. 8.

4. Accuracy of Syngenta's Applications for Insurance Policies

Zurich argues that it is entitled to summary judgment on Count II of its Complaint because Syngenta omitted material information in its applications for insurance.

Section 2711 of Title 18 of the Delaware Code ("Section 2711") prevents recovery under an insurance policy where the insured makes misrepresentations, omissions, or conceals facts that are material to the acceptance of the risk by the insurer. To bar recovery, the misrepresentation must be:

> Material either to the acceptance of the risk or to the hazard assumed by the insurer [or the] insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.[108]

A misrepresentation or omission is material "if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."[109] "A misrepresentation is a question of fact when there is conflicting evidence and a question of law when the evidence is susceptible to only one interpretation."[110]

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[108] 18 *Del.* C. § 2711.
[109] *United Westlabs, Inc.*, 2011 WL 2623932, at *12 (quotations omitted).
[110] *Id.*

On September 14, 2016, Syngenta submitted an application for Zurich coverage incepting on January 1, 2017. In the application, Syngenta was asked certain questions, which it answered (in bold) as follows:

> 19. Attach a summary of ground up aggregate losses, insured and uninsured, including all defense costs for the past 5 years or since the inception of the Applicants' first Bermuda market excess liability policy (whichever is longer) in the following categories:
> A. General Liability
> B. Products and Completed Operations Liability
> C. Pollution (excluding EPA superfund site claims)
>
> Please include loss data on divested or discontinued operations for which the Applicants have on-going liability.
> **Please refer to claims information.**
>
> 20. Are there any individual occurrences or claims during the past 10 years or since the inception of the Applicants' first Bermuda market excess liability policy (whichever is longer) which have cost or are reasonably expected to cost (including both indemnity and defense costs) more than $2 million U.S. (or equivalent)?
> **YES : Please see extraction of submission information on claims.**[111]

Syngenta refers to "claims information" and "extraction of submission information on claims." Neither of these disclosures include information on the Shenkel Lawsuit, the potential claimants referenced in the Tillery Letter, or the legal costs incurred by Syngenta in connection with any Paraquat claims.[112] Thus, Zurich argues that Syngenta omitted material information in its application for insurance which should bar recovery pursuant to Section 2711.

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[111] Marick Aff., ¶ 17.
[112] Marick Aff., ¶ 17.

Syngenta contends that there is no evidence of any misrepresentation or omission in its insurance applications. Additionally, no one at SCPAG, Syngenta AG or Syngenta knew, or had reason to know, of any alleged falsity.

To determine whether a material misrepresentation was made, Delaware law provides that the "threshold inquiry, and the necessary predicate to a materiality determination, is whether a misrepresentation has in fact been made. If not, the inquiry is at an end."[113] "Delaware courts have interpreted 18 *Del. C.* § 2711 to require an insurer to prove that the insured must have known or had a reason to know of the falsity before rescinding an insurance contract under a misrepresentation theory."[114] To establish materiality, an insurer also must prove that, but for the omission or misrepresentation, the insurer would not likely have issued the same policy or charged the same premium.[115]

"Materiality is, of course, a question of great specificity. It is a question of fact and one that is ordinarily not suited for summary judgment."[116] "Moreover, it is appropriate for a trial court to decline to issue a summary judgment even when it can point to no conflict of material fact, if it concludes that justice may be better

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[113] *Dickson-Witmer v. Union Bankers Ins. Co.*, 1994 WL 164554, at *3 (Del. Super.).
[114] *Goode v. Alexander Hamilton Life Ins. Co. of Am.*, 1995 WL 347365, at *2 (Del. Super.).
[115] *See* 18 *Del. C.* § 2711(3); *see also Prudential Ins. Co. of Am. v. Gutowski*, 113 A.2d 579, 581-82 (Del. 1955) ("A representation is material when the insured knows, or has reason to believe, that it will be likely to influence the insurance company either in fixing the amount of premium or in rejecting the risk altogether").
[116] *Pac. Ins. Co. v. Higgins*, 1992 WL 212601, at *6 (Del. Ch.) (internal citations omitted).

served by addressing the legal question posed in the context of the developed record of trial."[117]

Materiality becomes a question of law when the evidence is susceptible of only one interpretation.[118] That is not the case here. The Court finds that there are genuine issues of material fact regarding whether Syngenta's answers were accurate or constituted misrepresentations or omissions. Syngenta asserts that there was no omission because the Tillery Letter did not belong on the "ground up loss run" due to the fact that there was no *loss*. Further, Syngenta claims that there was no reason for Syngenta to reasonably believe that the potential claims described in the Tillery Letter would exceed $2 million in loss if they materialized.

Even if Syngenta made an omission, Zurich must demonstrate that the omission would have been likely to induce Zurich to decline to issue the policy. Zurich must outline what it would have done if the Tillery Letter had been disclosed in the applications. Materiality cannot be presumed in this case. Zurich HQ had information about Syngenta's business risks, including liability risks related to Paraquat, and—even after Syngenta was sued and gave notice of the Hoffmann Action—Zurich renewed its coverage.

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[117] *Id.* (internal citations omitted).
[118] *United Westlabs*, 2011 WL 262932, at *12.

In order to determine material omissions, the finder of fact first must determine whether an omission or misrepresentation was made. If the finder of fact determines that Syngenta's applications contained omissions, then the issue becomes whether the omission was material. The Court finds that genuine issues of material fact prevent summary judgment at this stage. **THEREFORE**, Zurich's Cross-Motion for Summary Judgment is hereby **DENIED**.

CONCLUSION

The Court finds that Syngenta has met its burdens of demonstrating potential coverage for purposes of the duty to defend. Zurich has failed to show that an exception or exclusion applies, or that a Claim for Damages was first made prior to the policy inception date.

THEREFORE, Syngenta's Motion for Partial Summary Judgment for a Declaratory Judgment on Count I and Counterclaim II regarding Zurich's duty to defend Syngenta under the Primary and Umbrella Policies concerning the Paraquat Actions is hereby **GRANTED**.

Further, the Court finds that genuine issues of material fact must be resolved regarding whether Syngenta's Applications for the Zurich Policies contained material omissions.

THEREFORE, Zurich's Cross-Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

The Hon. Mary M. Johnston