IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Submitted: June 27, 2022
Decided: August 24, 2022
Unsealed: September 6, 2022

On Zurich's Motion for Summary Judgment on Counts I, III, and IV of Its Amended Complaint

On Plaintiffs Zurich American Insurance Company and American Guarantee and Liability Insurance Company's Motion for Summary Judgment on Syngenta Crop Protection, LLC's Bad Faith Counterclaim

On Defendant Syngenta Crop Protection, LLC's Motion for Summary Judgment

OPINION

John D. Balaguer, Esq., Timothy S. Martin, Esq., White and Williams LLP, Wilmington, DE, Michael M. Marick, Esq., Karen M. Dixon, Esq., Timothy H. Wright, Esq. (Argued), Skarzynski Marick & Black LLP, Chicago, IL, Alexis J. Rogoski, Esq., Andrew Gerow, Esq., Skarzynski Marick & Black LLP, New York, NY, *Attorneys for Plaintiffs Zurich American Insurance Company and American Guarantee and Liability Insurance Company*

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JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiffs Zurich American Insurance Company ("ZAIC") and American Guarantee and Liability Company ("AGLIC") (together, "Zurich") brought this coverage action seeking declaratory relief against Defendant Syngenta Crop Protection, LLC ("Syngenta"). Syngenta is an indirectly wholly-owned subsidiary of Syngenta Crop Protection AG ("SCPAG"). SCPAG is a wholly-owned subsidiary of Syngenta AG.

Insurance Policies

From January 1, 2017 to January 1, 2020, Zurich issued six liability insurance policies to Syngenta. ZAIC issued three primary commercial general liability

policies to SCPAG as the first-named insured (collectively, the "Primary Policies").[1] AGLIC issued three umbrella liability policies to SPCPAG as first-named insured (collectively, the "Umbrella Polices").[2] The Umbrella Polices covered damage in excess of the total limits of the Primary Polices.[3] The Primary Polices and Umbrella Policies (together, the "Zurich Policies") provide claims-based coverage.[4] Syngenta was an additional named insured under the Zurich Policies.[5]

Underlying Actions

Syngenta and its predecessors manufactured and sold Paraquat, a chemical compound used as an herbicide.[6] Syngenta is defending against multiple actions seeking recovery for alleged bodily injuries, sickness or disease resulting from exposure to Paraquat (the "Paraquat Actions").[7] Paraquat Action claimants allege that they developed Parkinson's disease as a result of Paraquat exposure.[8]

The Tillery Letter

In January 2016, prior to initiation of the Paraquat Actions, Korien Tillery LLC ("Tillery") sent Syngenta a letter, purportedly on behalf of its clients (the

[1] Amended Compl., ¶ 9.
[2] *Id.* ¶ 21.
[3] *Id.* ¶ 25.
[4] *Id.* ¶ 34.
[5] *Id.* ¶ 11, 24
[6] *Id.* ¶ 36.
[7] *Id.*
[8] *Id.* ¶ 35.

"Tillery Letter").[9] The letter stated that Tillery's clients were diagnosed with Parkinson's disease allegedly caused by exposure to Paraquat.[10] In February 2016, lawyers from Kirkland & Ellis LLP ("Kirkland") met with Tillery on behalf of Syngenta regarding the Tillery Letter.[11]

Notice to Zurich

On October 10, 2017, Syngenta received notice of the first Paraquat Action.[12] On November 13, 2017, Syngenta provided notice to Zurich of the first Paraquat Action and advised that it was being defended by Kirkland.[13] Syngenta's notice was silent as to the Tillery Letter and any additional pending Paraquat Actions.[14]

This Action

On May 13, 2019, Zurich denied coverage for the Paraquat Actions and filed this coverage action.[15] Zurich argues that the Tillery Letter constituted a claim for damages prior to the inception of the Zurich Polices.[16] Zurich further contends that coverage is denied pursuant to 18 *Del. C.* § 2711, because Syngenta failed to disclose

[9] Exhibit 2 for Zurich's Brief in Support of its Motion for Summary Judgment on Counts I, III, and IV of its Amended Complaint ("Tillery Letter") (Trans. ID. 67485555).
[10] *Id.*
[11] Defendant Syngenta Corp Protection, LLC's Opening Brief in Support of its Motion for Summary Judgment ("Syngenta's Summary Judgment Motion"), at 7 (Trans. ID. 67485132).
[12] Amended Compl., ¶ 42.
[13] *Id.*
[14] *Id.* ¶ 44.
[15] Complaint ("Original Complaint") (Trans. ID. 63260529).
[16] *Id.* at ¶ 2.

any information about the pending Paraquat Actions in its application for the Zurich Policies.[17] Therefore, Zurich has no obligation to pay defense costs or indemnity for the Paraquat Actions.[18]

By Opinion dated August 3, 2020, the Court held that the Tillery Letter, sent almost one year before the Zurich polices were issued, did not constitute a claim for damages.[19] The Court reasoned that the Tillery Letter did not make any claim for damages and lacked the requisite specificity as to the certainty of future litigation.[20]

On September, 21, 2020, Zurich filed its Amended Complaint seeking the recoupment of defense costs paid to Syngenta pursuant to the August 3, 2020 ruling.[21] Specifically, Count I seeks a declaration that Zurich owes no duty to defend and to indemnify Syngenta for the Paraquat Actions.[22] In support, Zurich reasserts that the Tillery Letter constitutes a claim for damages based on new documents produced by Syngenta.[23] Counts III and IV seek recoupment of defense costs already advanced to Syngenta for the Paraquat Actions.[24]

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[17] *Id.*
[18] *Id.*
[19] *Zurich American Ins. Co. v. Syngenta Crop Protection, LLC*, 2020 WL 5237318, at *9-11 (Del. Super.).
[20] *Id.*
[21] Amended Compl., ¶ 1.
[22] *Id.* at ¶ 55.
[23] *Id.* at ¶ 56.
[24] *Id.* at ¶ 95, 99.

On June 7, 2021, Syngenta filed its Amended Counterclaim against Zurich alleging, in pertinent part, that Zurich's denial of coverage was made in bad faith.[25]

On April 18, 2022, Zurich filed a Motion for Summary Judgment on Counts I, III, and IV of its Amended Complaint.[26] Zurich argues that Syngenta omitted or misrepresented specific facts relating the allegations in the Tillery Letter, necessitating modification of the August 3, 2020 Opinion.[27] Zurich also filed a Motion for Partial Summary Judgment on Syngenta's Bad Faith Counterclaim, contending that the denial of claims was reasonable and justified.[28]

On April 18, 2022, Syngenta filed a Motion for Summary Judgment seeking to dismiss Zurich's Amended Complaint in its entirety.[29] Syngenta argues that the August 3, 2020 Opinion is not subject to reconsideration and is the law of the case.[30] No material omission or misrepresentation occurred because Syngenta did not submit a written application to Zurich.[31] It follows that Zurich is not entitled to recoupment or restitution.[32]

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[25] Amended Counterclaims of Syngenta Crop Protection, LLC, at ¶ 37 (Trans. ID. 66657430).
[26] Zurich's Brief in Support of its Motion for Summary Judgment on Counts I, III, and IV of its Amended Complaint ("Zurich's Summary Judgment Motion") (Trans. ID. 67485555).
[27] *Id.* at 20.
[28] Zurich's Partial Summary Judgment Motion, at 1.
[29] Syngenta's Summary Judgment Motion, at 1.
[30] *Id.* at 30.
[31] *Id.* at 12.
[32] *Id.* at 30.

The parties filed answers and replies. The Court heard oral argument on June 27, 2022.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if, after viewing the facts in the light most favorable to the non-moving party, the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as matter of law.[33] The moving party bears the initial burden of showing the absence of a genuine issue of material fact.[34] If the moving party satisfies the initial burden, summary judgement will be granted unless the non-moving party can prove the existence of a genuine issue of material fact.[35] Summary judgment may be granted against the non-moving party if the party bears the burden of proof at trial and fails to establish the existence of an element essential to the claim.[36]

ANALYSIS

In the August 3, 2020 Opinion, the Court found that Syngenta has met its burden of demonstrating potential coverage for purposes of the duty to defend.[37] The

[33] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[34] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[35] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[36] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[37] *Zurich*, 2020 WL 5237318, at *11.

Court further found that the Tillery Letter does not constitute a "Claim for Damages" first made in 2016 under the Primary Policies.[38]

Count I (Duty to Defend)

In order to constitute a Claim "it may not be necessary to reveal potential claimants' specific information, such as name, address or treating physician," however, "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."[39] "[A]n unclear or amorphous threat of future litigation is not sufficient to constitute a claim for damages."[40] There must be a "credible indication that there is at least one specific individual that is prepared to assert a claim."[41]

The Tillery Letter "omits information on age; lists a range of occupations, but 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."[42] The Court found that the Tillery Letter lacked specificity regarding potential claims or plaintiffs.[43]

[38] *Id.* at *6.
[39] *Id.* at *8 (emphasis in original).
[40] *Id.*
[41] *Id*. at *9.
[42] *Id.* at *8 (emphasis in original).
[43] *Id.*

The Court considers whether the Tillery letter, combined with subsequent conversation between Syngenta's counsel and Tillery, rise to the level of a "Claim for Damages" in 2016.

Zurich argues that the Court is permitted to revisit its prior ruling based on newly-discovered evidence. Zurich relies on *Perry v. Neupert*, where the Court of Chancery held that "the law of the case doctrine…permits a court to revisit an interlocutory ruling if good cause exists."[44] Law of the case is a judicially-created doctrine that prevents parties from relitigating issue that previously have been decided. "Once a matter has been addressed in a procedurally proper way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless a compelling reason to do so appears."[45] Law of the case "is not an *absolute* bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances."[46] This Court has held: "A party seeking to have the Court reconsider the earlier ruling must demonstrate newly discovered evidence, a change of law, or manifest injustice."[47]

Zurich asserts that documents produced by Syngenta after the Court's August 2020 Opinion establish that the Tillery letter is a claim for damages. Zurich argues

[44] 2019 WL 719000, at *28 (Del. Ch.).
[45] *Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch.).
[46] *Hamilton v. State*, 831 A.2d 881, 887 (Del.) (emphasis in original).
[47] *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. 1995).

that the questions presented by the Court during Oral Argument in 2020 also have been addressed through deposition testimony. The Tillery Letter was provided in 2016. The threshold issue in August 2020 was whether the Tillery Letter constituted a claim first made in 2016, prior to the inception of the Zurich Policies. Zurich asserts that since the 2020 decision, the following alleged facts were uncovered:

I. Tillery expressly told Syngenta that his clients "are primarily men" that "are in their late 50s and 60s," and that they were "diagnosed in their 50s and 60s."

II. Tillery advised Syngenta that his clients: (1) "were exposed and/or live in Madison or St. Clair Counties and will file suit there"; (2) "were either mixing/applying the product or were in the vicinity while it was applied"; and (3) "were all 'relatively sophisticated about the application process and use of paraquat....'"

III. Tillery advised Syngenta of his clients' specific injuries, stating that they "are severely disabled by PD; many can no longer walk and are in nursing homes." Additionally, Tillery did quantify his anticipated damages for Syngenta, advising that he "expects to leverage a massive settlement based on winning $5 million to $10 million verdicts for the first plaintiffs…."

IV. By no later than January 29, 2016, Kirkland had formed a "Paraquat Litigation Team." Syngenta incurred approximately $1.4 million in Kirkland fees in 2016 and an additional approximately $750,000 in 2017 before the Hoffmann Action was filed to (as Syngenta describes it) "evaluate potential legal liabilities Syngenta might face in the future because of Paraquat." Although, Syngenta has heavily redacted Kirkland's invoices from 2016, all those that have been produced refer to the billed matter as "Paraquat Litigation."[48]

[48] Zurich Br. in Support of Its Mot. for Summary Judgment on Counts I, III, and IV at 22-25.

Zurich asserts that deposition testimony uncovered new and additional information regarding the individual plaintiffs. When the Tillery Letter was sent, Tillery had been formally retained by six claimants who would have been the proposed "bellweather" plaintiffs. These six plaintiffs are identified as severely disabled males in their 50s-60s with a Parkinson Diagnosis, who currently reside in nursing homes in Madison or St. Clair Counties. There was no information provided as to the specific place of exposure or specific farms or fields.

Syngenta primarily contends that the Court's August 2020 Opinion constitutes law of the case, and the decision cannot be reconsidered unless it is clearly wrong, produces an injustice, or should be revisited because of changed circumstances. Syngenta asserts that in deposition, Tillery expressly confirmed that in 2016 he provided no specific identifying information concerning his purported clients to Syngenta and never made a demand for damages. Syngenta argues that Tillery's deposition confirms that he was not prepared to file any claims in 2016, consistent with Syngenta's belief at the time, and thus supports Syngenta's position and the Court's August 2020 Opinion.

Syngenta argues that the remaining evidence is entirely irrelevant to Zurich's motion because, allegedly: (1) the Kirkland Invoices are irrelevant to whether Tillery made an actual claim for damages or provided credible information about any specific individual ready to assert a claim; (2) Zurich points to documents from

previous litigation and Syngenta still has no knowledge of what they actually are; (3) the Letters to KPMG and Chem China in early 2016 have no bearing on Count I because they are only possibly relevant to Syngenta's motion seeking dismissal of ZNA's Section 2711 claim; and (4) the testimony simply corroborates that Tillery made multiple threats about bringing personal injury claims that would be ruinous to Syngenta.

Syngenta further argues that the deposition corroborates the distinction between "contracts" and "clients under contract." Syngenta argues that Zurich concedes that there is no proof that Syngenta knew specifically that Tillery had in fact been formally retained by six clients in 2016. In deposition, Tillery stated that he signed up plaintiffs[49] and had 200-300 cases under contract.[50] However, Syngenta contends that there is no evidence that Tillery had been retained by any client. There is no evidence that Tillery made an actual request or demand for damages.

Kirkland asked for additional information to verify that an actual claim had been made. No specifics were provided. However, Tillery said it was more properly subject to discovery. Eventually Kirkland looked at the totality of the circumstances, and concluded that Tillery's information wasn't credible.

[49] Blosveren Decl., Ex. K at 1.
[50] *Id.* at Ex. L at 1.

The Court already has found that the Tillery letter was not enough to constitute a Claim for Damages. The issue raised in this motion is whether the Tillery deposition and any other purported "new evidence" adds sufficient information to demonstrate that a Claim for Damages had been asserted at the time coverage was denied.

The Court finds that the Tillery deposition still does not provide specific evidence or disclosure tied to any ***individual*** potential claimant. During the June 2020 argument, the Court posed a hypothetical—which Syngenta concedes—would be more likely to constitute a claim:

> THE COURT: So another hypothetical, which may just be rhetorical…. If [Tillery] said, I'm not going to give you identifying information, but I'm going to say Person "A" is a female, contracted Parkinson's at this point and worked for a landscaper, potential Plaintiff "B" is a male, 40- years-old, whatever.
>
> MR. BOURNE: The answer is that gets us closer to a claim, yes. That gets us closer in the prism of what constitutes a claim.[51]

The Court finds that still there is not specific evidence - only groups and generalized categories such as: age range, occupation, gender, and a generalized disability that is the same as common Parkinson's symptoms. The alleged "new evidence" is still not sufficient to constitute a claim. There is no newly-discovered evidence or additional factual submission that raise ***genuine*** issues of ***material*** fact

[51] Def's Ex. 40 at 69:1-69:11.

sufficient to present the case to the jury. The Court finds there was no "Claim for Damages" at the time coverage was denied. The Court's decision on Zurich's duty to defend Syngenta under the Primary and Umbrella Policies, for purposes of the Paraquat Actions, remains unchanged.

Bad Faith Counterclaim

As the policyholder asserting a bad faith claim, Syngenta must show that Zurich lacked reasonable justification in refusing payment of a claim.[52] Reasonable justification means that at the time of denial, there were facts or circumstances known to Zurich that created a *bona fide* dispute, and therefore a meritorious defense to coverage.[53] In order to prevail on summary judgment, Syngenta has the burden to demonstrate that the undisputed facts show that Zurich did not have reasonable grounds for relying upon its defense to liability.[54]

Syngenta filed Amended Counterclaim IV on June 7, 2021, alleging bad faith denial of coverage. Syngenta argues that the jury should decide whether Zurich's explanation for denial of coverage was in good faith, or a bad faith pretense. Syngenta alleges numerous instances of Zurich's bad faith in claims handling, asserting that this evidence raises genuine issues of material fact regarding Zurich's

[52] *Tackett v. State Farm Fire & Cas. Ins. Co*., 652 A.2d 254, 262 (Del. 1995).
[53] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. 1982); *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.*, 2009 WL 2502101, at *1 (Del. Super).
[54] *Arch Ins. Co. v. Murdock*, 2019 WL 1932536, at *6 (Del. Super.).

true motivations for denying coverage. Further, Syngenta claims that Zurich had a broad duty to investigate prior to denial. Syngenta asserts that Zurich failed to conduct a reasonable investigation.

Zurich contends that as found in the August 2020 Opinion, there are at least questions of fact regarding Zurich's position that coverage is barred under 18 *Del. C.* § 2711. The basic question is whether Syngenta failed to provide material information about the Tillery Letter in response to certain questions on the insurance application. Therefore, at a minimum, there is a *bona fide* dispute over coverage.

The Court finds that Syngenta's alleged defects in claims handling, and alleged inferences of bad faith, do not raise genuine issues of material fact sufficient to present the bad faith counterclaim to the jury. The Court finds that at the time coverage was denied, a *bona fide* dispute existed as a matter of law. Therefore, Zurich had reasonable justification to deny coverage at that time. Counterclaim IV (Bad Faith) must be dismissed.

Count II (Material Misrepresentations in Application)

Zurich has alleged that Syngenta made material misrepresentations in its application for insurance. These include failure to disclose: the Shenkel Lawsuit, the 2016 Claims, the Hoffman Lawsuit, the Tillery Letter, and the Document Preservation Demand. Zurich claims that had it known of these omissions, Zurich would not have issued the policies, would not have issued the policies at the same

premium rate, would not have issued the policies in such large amounts, or would not have provided coverage with respect to Paraquat.

Syngenta responds that Zurich neither saw nor relied on the application submitted by Syngenta Crop Protection AG. There was no written application submitted by Syngenta itself. The only application was for the master policy.

Section 2711 of Title 18 of the Delaware Code provides in part: "Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either: (1) Fraudulent; or (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) 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."

Zurich argues that the underwriter for the Swiss affiliate of Zurich reviewed the application for insurance and instructed that the policies be issued. The Zurich underwriter testified that the information alleged to be misrepresented was material. Zurich further asserts that there is no prohibition against relying on the Swiss affiliate agent to review policy application.

Syngenta argues that Section 2711 requires: that the misrepresentation or omission be material; and reliance by Zurich. Syngenta contends that factual issues prevent summary judgment. In addition to materiality and reliance, questions remain as to agency or authority to review policies on behalf of Syngenta.

The Court finds that the genuine issues of material fact asserted by Syngenta prevent summary judgment on Count II (Material Misrepresentations in Application). Interpretation and application of Section 2711were discussed in the Court's August 3, 2020 Opinion.[55]

Count III (Recoupment) and Count IV (Restitution)

Syngenta argues that the Zurich policies do not provide a right to recoupment. Additionally, the Reservation of Rights Letter did not create a right to recoupment because it was withdrawn and superseded, and Zurich cannot unilaterally create a recoupment right. If Zurich is not entitled to recoupment, it cannot obtain restitution. Restitution requires a showing of unjust enrichment and unconscionability if the benefit were not disgorged.

Zurich counters that insurers have the right to recoup defense costs paid under a reservation of rights, where the insurer later demonstrates that it had no duty to defend.

[55] *Zurich*, 2020 WL 5237318, at *9-11.

In the Opinion dated August 3, 2020, the Court held that a "Claim for Damages" under the Primary Policies was not made prior to the January 1, 2017 policy inception date.[56] The Court concluded that Syngenta had met its burden of demonstrating ***potential coverage for purposes of the duty to defend***. Therefore, the Court granted 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.[57]

The Court has considered additional evidence in the context of the pending motions. The Court confirms its prior finding that there was no "Claim for Damages" at the time coverage was denied, and that Zurich had a duty to defend.

The Restatement of the Law of Liability Insurance states: "Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not obtain recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs."[58]

Other jurisdictions have followed the Restatement. For example, in *American Western Home Insurance Company v. Gjonaj Realty & Management Company*,[59] the

[56] *Id.* at *9.
[57] *Id.* at *11.
[58] Restatement of the Law of Liability Insurance § 21 (2019) and cmt. a.
[59] 138 N.Y.S.3d 626 (N.Y. App. Div. 2020).

New York Appellate Division held that "a unilateral reservation of rights letter cannot create rights not contained in the insurance policy….[P]ermitting the insurer to recover the costs of defending claims that are later determined not covered by the policy flies in the face of basic contract principles and allows an insurer to impose a condition on its defense that was not bargained for…."[60] The *American Western* court reiterated the principle that the duty to defend is broader than the duty to indemnify.[61]

Reviewing a case controlled by Tennessee law, this Court ruled that defense costs must be reimbursed by the insured. In *Catlin Specialty Insurance Company v. CBL & Associates properties, Inc.*,[62] the reservation of rights letter was held to be a "quasi-contract or a contract implied in law based on unjust enrichment." The insurer provided the defense subject to a reservation of rights. The insured accepted the defense.[63]

The issue in this case appears to be of first impression in Delaware. In the August 3, 2020 Opinion, the Court found ***potential*** coverage for purposes of the duty to defend at that stage of the proceedings. As a result of the Court's Opinion, Zurich provided defense costs. If the Court ultimately had found that no duty to defend was

[60] *Id.* at 635-36.
[61] *Id.*
[62] 2018 WL 3805868 (Del. Super.).
[63] *Id.* at *5

triggered, who should bear the burden of the risk that an interlocutory ruling might be changed at the conclusion of the case?

The reservation of rights letter was withdrawn. The insurance contracts did not provide for recoupment. However, defense costs were paid in compliance with a Court order.

In *Nationwide Mutual Insurance Company v. Flagg*,[64] the Court held that the insurer has a duty to defend on all claims. However, the insurer was permitted to seek reimbursement from the insured "of those expenses, costs or fees incurred by providing [the] defense on those claims which may be proven later to fall outside the policy coverage."[65]

At least one other jurisdiction has found that an insurer is entitled to restitution of defense costs paid pursuant to a subsequently-overturned trial court ruling.[66]

Generally, an insurer's duty to defend is broader than its duty to indemnify.[67] Doubt as to whether the risk is insured is resolved in favor of the insured. If even one count or theory alleged in the complaint is covered, the duty to defend arises.[68] If the claim eventually is decided in favor of the insured, defense costs are not subject to reimbursement to the insurer. It is precisely the hoped-for successful defense that

[64] 789 A.2d 586 (Del. Super. 2001).
[65] *Id*. at 596-97.
[66] *See Steadfast Ins. Co. v Caremark Rx, Inc.*, 869 N.E.2d 910, 914 (Ill. App. Ct. 2007).
[67] *Liggett Group, Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024, 1030 (Del 2002).
[68] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254-55 (Del. 2008).

the insured bargained for. Whether or not the defense vindicated the insured's liability does not affect the insurer's contractual obligation to provide the defense.

However, it is different if it is ultimately determined as a matter of law that the duty to defend never was triggered. Under those circumstances, the insured did not bargain for a defense to which the insured was not legally or contractually entitled. Therefore, the Court finds that Zurich would have been entitled to recoupment, had the Court found that Zurich did not have a duty to defend.

Syngenta's motion for summary judgment on Count III (Recoupment) and Syngenta's motion for summary judgment on Count IV (Restitution) are hereby **DENIED AS MOOT**.

CONCLUSION

The Court finds that the alleged "new evidence" still is not sufficient to constitute a "Claim for Damages." There is no newly-discovered evidence or additional factual submission that raise ***genuine*** issues of ***material*** fact sufficient to present the case to the jury. The Court finds there was no "Claim for Damages" at the time coverage was denied. The Court's decision on Zurich's duty to defend Syngenta under the Primary and Umbrella Policies, for purposes of the Paraquat Actions, remains unchanged. **THEREFORE,** Syngenta's Motion for Summary Judgment on Count I (Duty to Defend) is hereby **GRANTED.** Zurich's Motion for Summary Judgment on Count I is hereby **DENIED.**

The Court finds that Syngenta's alleged defects in claims handling, and alleged inferences of bad faith, do not raise genuine issues of material fact sufficient to present the bad faith counterclaim to the jury. The Court finds that at the time coverage was denied, a *bona fide* dispute existed as a matter of law. Therefore, Zurich had reasonable justification to deny coverage at that time. **THEREFORE,** Zurich's Motion for Summary Judgment on Counterclaim IV (Bad Faith) is hereby **GRANTED**.

The Court finds that the genuine issues of material fact asserted by Syngenta prevent summary judgment on Count II (Material Misrepresentations in Application). **THEREFORE,** Syngenta's Motion for Summary Judgment on Count II (Material Misrepresentations in Application) is hereby **DENIED.**

The Court finds that because of the ruling on the duty to defend, Zurich is not entitled to recoupment. **THEREFORE,** Syngenta's Motion for Summary Judgment on Count III (Recoupment); Syngenta's Motion for Summary Judgment on Count IV (Restitution); Zurich's Motion for Summary Judgment on Count III; and Zurich's Motion for Summary Judgment on Count IV are hereby **DENIED AS MOOT.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston