

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LANG TENDONS, INC. : Civil Action  
: :  
v. : :  
: :  
NORTHERN INSURANCE COMPANY :  
OF NEW YORK : No. 00-2030

**MEMORANDUM AND ORDER**

BECHTLE, J. March , 2001

Presently before the court are the cross-motions for summary judgment of plaintiff Lang Tendons, Inc. ("Lang") and defendant Northern Insurance Company of New York ("Northern"); the various replies, responses and sur-replies thereto; Lang's Motion to Strike Defendant's Objections to Plaintiff's First Request for Production of Documents and Compel a Complete Response ("Motion to Compel"); Lang's Motion to Extend Deadline for Filing Motion for Summary Judgment; and the parties' joint motion to withhold this case from the trial pool until forty-five days after the court's ruling on the cross-motions for summary judgment. For the reasons set forth below, Lang's motion for summary judgment will be granted in part and denied in part; Northern's motion for summary judgment will be denied; Lang's motion to compel will be denied; the joint motion to withhold the case from the trial pool will be denied; and Lang's motion for an extension of time to file its motion for summary judgment will be denied as moot.

**I. BACKGROUND**

Lang is insured by Northern under a Commercial General Liability ("CGL") Policy. This policy which covered Lang in connection with its business as a supplier and installer of wire

cable and related hardware for structural engineering applications. Lang brought this action against Northern, seeking damages caused by Northern's refusal to defend and indemnify Lang for claims brought against it in Central Metals, Inc. v. Lang Tendons, Inc., No. 99-CV-2025 (E.D. Pa.) (the "Central Metals case").

The Central Metals case arose following an accident that occurred at the Claridge Hotel and Casino parking garage in Atlantic City. In the accident, the garage's cable barrier system was damaged when a Claridge patron drove through it, leading to her death and the death of a passenger. Following the accident, Central Metals, Inc. ("Central"), the entity responsible for installation of the cable barrier system, was required to remove and reinstall the system. A wrongful death and survivor action was commenced on behalf of the deceased patrons, and Claridge commenced an arbitration action against a number of entities involved in the construction of the garage for damages related to loss of use of the garage and necessary modifications and repairs. In those cases, Northern provided a defense and indemnity to Central, the contractor responsible for installing the cable barrier system, and to Roma, another subcontractor that installed the cable barrier system for Central, pursuant to insurance contracts with those entities.

After the conclusion of the litigation surrounding the deaths of the Claridge patrons and Claridge's arbitration cases, Central sued Lang in connection with Lang's supply of cables and

hardware that were installed in the parking garage. The relevant portions of the complaint in the Central Metals case (the "underlying complaint") assert that:

Central Metals entered into a contract with defendant [Lang] to supply a galvanized cable barrier system for the Claridge parking garage. Defendant agreed to supply a completely galvanized system - galvanized cables, barrels and wedges - and agreed to provide installation instructions and technical assistance and field support during installation of the system by Central Metals' installer . . . .

Prior to delivery of the materials to the project site, defendant did not perform any tests to determine whether or not a completely galvanized cable barrier system could be properly installed, and, if so, whether installation procedures should be changed from those procedures used to install cable barrier systems that were not completely galvanized . . . .

Following the death of the two Claridge patrons, Central Metals was required to remove and reinstall the galvanized cable system.

. . . Central Metals then completed the reinstallation of the cables and other remedial work . . . .

As a result of the failure of the galvanized cable barrier system, and the installation problems that resulted, Central Metals suffered damages, including, but not limited to, cost overruns in installation of the cable restraint system before the accident, issuing credit for cables which were removed after the accident, labor for removal of cables after the accident, purchase of additional materials to reinstall the cables after the accident, labor to reinstall cables after the accident, man hours in connection with investigations conducted after the accident, and man hours in connection with preparation and attendance of arbitration hearings in a case brought by the Claridge . . . before the American Arbitration Association.

(Mot. for Summ. J. of Def. Northern Ins. Co. ("Def.'s Mot. for Summ. J.") Ex. B at ¶¶ 9, 12, 17-19.) The underlying complaint goes on to assert: (1) breach of contract for failure to supply a

cable barrier system that could be properly installed, adequate installation instructions, technical support and field instructions; (2) breach of warranty because the barrier system was not merchantable, fit for general use, or fit for the particular purposes for which it was purchased; and (3) negligence in: the design, assembly and sale of the barrier system; failure to test the system to determine whether it could be adequately installed; failure to provide support and assistance regarding installation; failure to discover the defective condition or design of the system; and failure to warn Central Metals of the system's dangerous condition. Id. Ex. B at ¶¶ 21, 24-25, 28.

Lang demanded indemnity and a defense from Northern. Northern refused on the basis that the complaint did not allege an "occurrence" under the policy. Lang retained its own counsel and eventually settled the Central Metals case.

As a result of Northern's denial of a defense and indemnity, Lang filed the instant Complaint, alleging breach of contract and bad faith pursuant to 42 Pa. Cons. Stat. Ann. § 8371.

## **II. LEGAL STANDARD**

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

### **III. DISCUSSION**

The court will address the motions for summary judgment, the motion to compel, the motion to extend the summary judgment deadline, and the motion to withhold the case from the trial pool seriatum. Both parties agree that Pennsylvania law applies to the interpretation of the insurance policy.<sup>1</sup>

#### **A. The Motions for Summary Judgment**

The issues to be decided on summary judgment are whether Northern was obligated to defend Lang, and whether Northern was obligated to indemnify Lang in relation to the Central Metals case.

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<sup>1</sup> The court notes, however, that the policy at issue is similar, if not identical, to the standard CGL policy in use throughout the country.

When interpreting an insurance contract, words that are clear and unambiguous must be given their plain and ordinary meaning. Tenos v. State Farm Ins. Co., 716 A.2d 626, 628-29 (Pa. Super. Ct. 1998) (quoting Ryan Homes, Inc. v. Home Indem. Co., 647 A.2d 939, 941 (Pa. Super. Ct. 1994)). Any ambiguity must be construed in favor of the insured and against the insurer. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 746 (3d Cir. 1999); Riccio v. American Pub. Ins. Co., 705 A.2d 422, 426 (Pa. 1997). An ambiguity exists only where a provision is reasonably susceptible to more than one interpretation. Frog, Switch, 193 F.3d at 746; Ryan Homes, 647 A.2d at 941. Moreover, an insurance policy must be read in its entirety and the intent of the policy is gathered from consideration of the entire instrument. Riccio, 705 A.2d at 426 (citation omitted).

Lang's policy provides coverage for "property damage" caused by an "occurrence." (Pl.'s Mem. in Resp. to Def.'s Mot. for Summ. J. at 7.) An "occurrence" is defined as an accident. (Def.'s Mot. for Summ. J. at 9.) Property damage is defined as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." Id. Ex. C at 12. The central dispute between the parties is whether the allegations in the underlying complaint potentially and/or actually sought recovery for "property damage" resulting from an "occurrence."

The "physical injury" requirement was added to standard CGL policy language to reinforce that these policies only cover

visible harm or impairment or actual physical loss to tangible property. Standard Fire Ins. Co. v. Chester-O'Donley & Assocs., Inc., 972 S.W.2d 1, 8 (Tenn. Ct. App. 1998). Thus, these policies do not cover economic loss without some sort of physical injury to tangible property that is not the insured's product or part of the insured's work. Gulf Ins. Co. v. L.A. Effects Group, Inc., 827 F.2d 574, 577 (9<sup>th</sup> Cir. 1987); Transcontinental Ins. Co. v. Ice Sys. of Am., Inc., 847 F. Supp. 947, 950 (M.D. Fla. 1994); Newark Ins. Co. v. Acupac Packaging, Inc., 746 A.2d 47, 51 (N.J. Super Ct. 2000). Additional construction expenses, lost profits, or diminution in value of property caused by the insured's defective product are the types of economic damages that do not fall within the definition of "property damage." SLA Prop. Mgt. v. Angelina Cas. Co., 856 F.2d 69, 72-73 (8<sup>th</sup> Cir. 1988); Standard Fire, 972 S.W.2d at 9.

The court will first address Northern's duty to defend and then address its duty to indemnify Lang with regard to the Central Metals suit.

### **1. Northern's Duty to Defend**

An insurer is obligated to defend an insured whenever the complaint potentially may fall within the policy's coverage. Frog, Switch, 193 F.3d at 746; Pacific Indem. Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985). If the claim potentially may fall within the policy's scope, the insurer's refusal to defend at the

outset of the litigation is a decision it makes at its own peril. Britamco Underwriters, Inc. v. C.J.H., Inc., 845 F. Supp. 1090, 1094 (E.D. Pa. 1994) (citations omitted); Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484, 488 (Pa. 1959) (citation omitted).

The obligation to defend is determined solely by the allegations of the complaint. American States v. Maryland Cas., 628 A.2d 880, 887 (Pa. Super Ct. 1993)(quoting Pacific Indem. Co., 766 F.2d at 760.) If the complaint contains multiple causes of action and one would constitute a claim within the scope of the policy's coverage, the insurer is obligated to defend until it can confine the claim to a recovery excluded from the scope of the policy. Id. If the insurer seeks to avoid its duty to defend on the basis of an exclusion, the burden is on the insurer to prove that the exclusion encompasses the underlying action. Id. (citing A.G. Allerbach, Inc. v. Hurley, 540 A.2d 289 (1988)).

The particular cause of action pleaded is not determinative of whether coverage has been triggered. Mutual Ben. Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999). Rather, it is necessary to look at the factual allegations contained in the complaint. Id. (citations omitted).

Thus, to determine whether Northern owed a duty to provide a defense, the court must determine whether the claims asserted in the underlying complaint potentially came within the coverage provided by the policy.

According to Northern, the underlying complaint alleges

nothing more than a breach of contract, which does not constitute an "occurrence" under the policy. (Def.'s Mot. for Summ. J. at 10.) It argues that while there are also claims for breach of warranty and negligence, these allegations arise from contractual duties, and are not common law claims of negligence. Id. Northern claims that under Pennsylvania law, such allegations do not constitute an "occurrence," and therefore do not trigger coverage. Id. Additionally, Northern asserts that the underlying complaint alleges no "property damage" sufficient to trigger coverage. Id. at 12.

According to Lang, the underlying complaint alleges not only that Lang breached its contract, but also that Lang was separately negligent, independent of its contractual obligations.<sup>2</sup> (Pl.'s Mem. in Resp. to Def.'s Mot. for Summ. J. at 9.) Lang points out that the alleged negligent acts - including its failures to test and design the system, to provide instructions and technical support, and to discover defective conditions - were not part of the contract. Id. at 8-9. Rather, the contract was a straightforward purchase order for materials. Id. at 9.

Furthermore, Lang claims that property other than that supplied by Lang was damaged, triggering coverage under the

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<sup>2</sup> Lang does not appear to dispute Northern's assertions that the breach of contract, warranty and negligent failure to warn claims are not covered by the policy. (Pl.'s Sur-Reply to Def.'s Mot. for Summ. J. at 3; Def.'s Mot. for Summ. J. at 17-18.)

policy and applicable caselaw. Id. Lang asserts: first, that "damage occurred when Lang's allegedly defective and negligently supplied component parts were incorporated by Central into the cable barrier system and structure of the garage;" and second, that "physical damage occurred when Central was required to remove and replace its barrier system which only in part consisted of Lang's material." Id. at 11.

- a. The underlying complaint contained allegations "property damage" resulting from an "occurrence"

The court concludes that the underlying complaint potentially sought recovery for "property damage" caused by an "occurrence" which fell within the coverage afforded by the policy, triggering Northern's duty to defend Lang. The complaint is sufficiently broad to encompass separate, independent negligent conduct by Lang, unrelated to any obligations that may have been included in the contract, resulting in damage to property other than Lang's materials.

First, the court notes that the underlying complaint is unclear as to whether Lang supplied the entire cable barrier system or simply some of the materials that made up the system. Although one reading of the complaint might suggest that Central alleges that Lang supplied the entire system, it can reasonably be read to allege that Lang only supplied the basic components that were then integrated into the completed cable barrier system

by Central Metals' installer. This latter interpretation is also supported by the fact that the complaint itself recognizes that Lang was one of a number of subcontractors involved in the process of supplying and installing the cable barrier system and that Lang was not responsible for the ultimate installation of the materials into the garage. Thus, the complaint potentially sought recovery for removal of a finished product comprised only partly of the materials supplied by Lang.<sup>3</sup> In any event, the "cable barrier system" that was incorporated into the garage was clearly the work product not only of Lang, but of Central Metals and its installer as well.<sup>4</sup>

Second, given this possible interpretation of the complaint, damages quite similar to those sought by Central have been

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<sup>3</sup> Although the court reaches this conclusion solely on the basis of the underlying complaint, it notes that Lang has submitted the affidavit of Joseph C. Giangulio, president of Central, who states that the complete cable barrier system installed by Central utilized materials supplied by Central and other work supplied by contractors besides Lang. (Pl.'s Resp. to Def.'s Mot. for Summ. J., Aff. of Joseph C. Giangulio ("Giangulio Aff.")).

<sup>4</sup> Northern argues that the damages sought in the underlying complaint are not for any type of "physical injury to tangible property," and thus no "property damage" is alleged. Even assuming that Central Metals' complaint sought damages related only to the removal of a cable barrier system supplied entirely by Lang and consisting only of Lang's materials, the court is unwilling to grant summary judgment in favor of Northern on the basis that such allegations do not constitute "property damage." See West Am. Ins. Co. v. Lindepuu, Civ. No. 98-5968, 2000 U.S. Dist. LEXIS 17954, at \*14-15 (E.D. Pa. Dec. 13, 2000) (denying summary judgment on basis of insurer's argument that replacement of windows and doors installed by insured does not constitute claim of "property damage" caused by "occurrence," where insurer simply restated policy provisions and cited no legal authority for proposition).

recognized by this court and others as falling within the definition of "property damage." In Arcos Corporation v. American Mutual Liability Insurance Company, the insured manufactured weld wire that the buyer purchased for use in a nuclear submarine. Arcos, 350 F.Supp. 380 (E.D. Pa. 1972). When some of that weld wire failed due to a production error, the buyer sued the insured for costs and expenses incurred in, inter alia, the cost of testing to locate the improper welds and removing them. Id. at 382. This court held that such costs constituted "property damage" under the policy. Id. at 383 (citing Bowman Steel Corp. v. Lumbermans Mut. Cas. Co., 364 F.2d 246, 249-50 (3d Cir. 1966); Pittsburgh Plate Glass Co. v. Fidelity and Cas. Co. of New York, 281 F.2d 538, 541-545 (3d Cir. 1960)); see Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc., 858 F.2d 128, 134-35 (3d Cir. 1988) (holding that insured's defective steel caused property damage to another's product when it failed to withstand heat treating process after being stamped into washers, thereby incorporated into new product, by third-party); see also Lucker Mfg. v. Home Ins. Co., 818 F. Supp. 821, 829 (E.D. Pa. 1993) (recognizing Arcos' holding). The costs sought by Central, related to removal of cables, reinstallation of cables and purchase of materials to reinstall cables, are not materially different than the costs that this court determined constituted property damage in Arcos.<sup>5</sup>

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<sup>5</sup> Thus, the court agrees with Lang's assertion that  
(continued...)

Third, even if the completed cable barrier system was completely the work product of Lang, the underlying complaint seeks damages including, but not limited to, cost overruns, removal and reinstallation costs, and the purchase of additional materials to reinstall cables after the accident. (Def.'s Mot. for Summ. J. Ex. B ¶ 19.) Given this broad language concerning damages, it was clearly a possibility that in its suit against Lang, Central might seek to recover for physical injury to other parts of the garage resulting from the removal and reinstallation of the cable barrier system necessitated by the accident involving the Claridge patrons.<sup>6</sup> It is also reasonable to infer that the costs of purchasing additional materials to reinstall cables after the accident encompass costs associated with replacing materials other than those supplied by Lang that were damaged because of the necessity of removing and reinstalling Lang's materials.

The court is unpersuaded by Northern's argument that the allegations of the underlying complaint cannot constitute an

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<sup>5</sup>(...continued)  
physical damage related to the removal and replacement of the barrier system which only in part consisted of Lang's material would constitute property damage under the policy. However, the first type of damage asserted by Lang, damage from the mere incorporation of Lang's allegedly defective component parts into the structure of the garage, is the type of economic loss for which a CGL policy like the one at issue provides no coverage. SLA Prop. Mgt., 856 F.2d at 72-73.

<sup>6</sup> Northern acknowledges that allegations of physical property damage resulting from the alleged failure of the cable barrier would constitute an "occurrence." (Def.'s Mot. for Summ, J. at 12.)

"occurrence." As already stated, the allegations of the complaint potentially sought recovery for "property damage" as defined by the policy. Northern also argues, however, that allegations such as those in Central Metals' complaint, including the negligence count, amount to nothing more than a breach of contract, which the Pennsylvania courts have held do not constitute an accident or occurrence. (Def.'s Mot. for Summ. J. at 10.)

As support for this argument, Northern relies primarily on two cases from the Superior Court of Pennsylvania holding that claims essentially alleging breach of contract rather than independent tortious behavior are outside the scope of a general liability policy because such claims are not "accidents or occurrences." Snyder Heating Co. v. Pennsylvania Manuf. Assoc. Ins. Co., 715 A.2d 483 (Pa. Super Ct. 1998); Redevelopment Auth. of Cambria County v. Int'l Ins. Co., 685 A.2d 581 (Pa. Super Ct. 1996).

In Snyder, the insured contracted to maintain a heating system, but rendered a defective performance. Snyder, 715 A.2d at 484. The underlying complaint asserted claims for breach of contract and negligent performance of a maintenance agreement. Id. at 485-86. After noting that the complaint claimed that the insured's alleged nonfeasance constituted a breach of the maintenance agreement, the court concluded that the negligence claims, although cloaked in tortious terms, clearly sounded in breach of contract. Id. at 486-87. The court went on to hold

that the claims did not equate to an accident or occurrence, because by their nature they amounted to nothing more than the insured's failure to perform under the maintenance agreement. Id. at 487.

In Redevelopment Authority, the insured contracted to own and operate, and supervise improvements to a township's water system. Redev. Auth., 685 A.2d at 583. The underlying complaint asserted counts of breach of contract and negligence. Id. at 583-84. Specifically, the complaint sought damages for the insured's allegedly negligent failure to properly perform its contractual duties. Id. at 589. The court concluded that the claims in the complaint arose out of and were based upon duties imposed on the insured solely as a result of the contract. Id. Accordingly, the court held that there was no duty to defend or indemnify under the policy. Id. at 592.

These cases are factually distinguishable from the instant case. The Central Metals' complaint, unlike the complaints in Snyder, Redevelopment Authority and the other cases relied on by Northern,<sup>7</sup> contains allegations of breach of duties that can be interpreted as arising independently of the supply contract. For example, the existence of viable claims of negligence in design,

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<sup>7</sup> See Jerry Davis, Inc. v. Maryland Ins. Co., 38 F. Supp. 2d 287 (E.D. Pa. 1999) (finding that allegations of negligence in performance of contract to perform electrical wiring work not "occurrence"); Bash v. Bell Tel., 601 A.2d 825 (Pa. Super. Ct. 1992) (holding that failure to include customer's advertisement in phone directory pursuant to terms of contract not actionable in tort).

failure to test the cable barrier system and failure to discover defects within the system do not depend on a contractual relationship between Central and Lang. Rather, these duties existed independently of any agreement between those parties. These allegations, especially allegations of negligent design, involve conduct that presumably predated the contract. Also, Lang could have performed all of its alleged obligations under the contract with regard to supplying materials and aiding in their installation. However, if its materials caused damage due to a defect that reasonably should have been avoided or discovered through reasonable testing or design procedures, then Lang could still be held liable for such damages based on traditional common law negligence principles. The claims by Central are certainly broad enough to encompass this kind of "active malfunctioning" by Lang's product. See Snyder, 715 A.2d at 487 (citing Ryan, 647 A.2d at 942) (noting difference between active malfunctioning of insured's work or product giving rise to tort claims and claims arising out of failure to perform under terms of agreement). It is not, as Northern suggests, obvious that the negligence claims in the underlying complaint only illuminate ways in which Lang failed to perform under the contract.<sup>8</sup>

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<sup>8</sup> Although the court bases its conclusion solely on the allegations of the complaint, it notes that the contract between Central and Lang appears to have been a simple purchase order contract. Gianguilio Aff. Ex. A.; see American Contract Bridge League v. Nationwide Mut. Fire Ins. Co., 752 F.2d 71, 75 (3d Cir. (continued...))

b. Exclusions (m) and (n) are inapplicable

The court also concludes that the policy exclusions cited by Northern do not relieve it of its duty to defend. Northern asserts that coverage is precluded by the policy's "impaired property" and "your work" exclusions.

(i) Exclusion (m)

This provision, entitled "Damage to Impaired Property or Property Not Physically Injured," excludes from coverage:

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:  
(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or  
(2) A delay or failure by you . . . to perform a contract or agreement according to its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

(Def.'s Mot. for Summ. J. Ex. C at Bates No. 006.) This exclusion addresses situations where a defective product, after being incorporated into the property of another, must be replaced or removed at great expense, thereby causing loss of use of the property. Standard Fire, 972 S.W.2d at 10. The exclusion does

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<sup>8</sup>(...continued)

1985)(considering answers to interrogatories in determining whether allegations in complaint triggered duty to defend). That purchase order indicates nothing more than an agreement to supply components for a cable barrier system. (Giangulio Aff. Ex. A.) Furthermore, Central's president acknowledges that the contract only required Lang to supply certain cable, hardware and equipment, but did not otherwise require Lang to perform any work or services. (Giangulio Aff.)

not apply if there is physical injury to property other than the insured's work itself. Imperial Cas., 858 F.2d at 136; Transcontinental Ins., 847 F. Supp. at 950; Standard Fire, 972 S.W.2d at 10. Nor does it apply if the insured's work cannot be repaired or replaced without causing physical injury to other property. Oscar W. Larson Co. v. United Capitol Ins. Co., 845 F. Supp. 445, 448-49 (W.D. Mich. 1993); Action Auto Stores, Inc. v. United Capitol Ins. Co., 845 F. Supp. 417, 425-26 (W.D. Mich. 1993).

The cases cited by Northern in support of its argument that exclusion (m) applies involve substantially different facts than the instant case. In American International Surplus Lines Insurance Co. v. IES Lead Paint Division, Inc., this court held that an identically worded exclusion (m) applied to exclude coverage for damages to impaired property related to the insured's inadequate removal of asbestos. American Int'l, Civ. No. 94-4627, 1996 U.S. Dist. LEXIS 3404, at \*14-16 (E.D. Pa. March 19, 1996). In that case, the court determined that the property was rendered unusable as a result of the insured's inadequate work and failure to fulfill the terms of its contract, and was thus "impaired property." Id. at \*13. However, "the issue of whether the property was physically injured by [the insured's] actions never [came] into play in [the court's] analysis." Id. at \*14. Thus, the court did not consider the exception to exclusion m that makes it inapplicable where the insured's product has caused physical injury to property other

than the insured's work.

Likewise, the district court's decision in St. Paul Fire and Marine Ins. Co. v. Futura Coatings, Inc. is inapposite. Futura Coatings, 993 F. Supp. 1258 (D. Minn. 1998). In that case, the court applied exclusion (m) to exclude coverage for the loss of use of impaired property caused by the failure of the insured's product. Id. at 1263-64. The insured's product did not cause physical injury to other property. Id. at 1262-63.

Additionally, the underlying complaints in American International and Futura Coatings involved negligence allegations that were essentially contractual in nature.<sup>9</sup> See American Int'l, 1996 U.S. Dist. LEXIS 3404, at \*6 (discussing allegations of negligence in the performance of contract to remove asbestos); Futura Coatings, 993 F. Supp. at 1260 (noting that complaint alleged insured's system did not perform as promised).

Because the court has already determined that the underlying complaint potentially sought damages for injury to property other than Lang's product and is broad enough to state claims of negligence independent of Lang's contractual duties, this

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<sup>9</sup> Lang also correctly notes that in Futura Coatings, the exception to exclusion (m), regarding sudden and accidental physical injury to the product after it had been put to its intended use, was held inapplicable because the failure of the product was not sudden and accidental and occurred before the product was put to its intended use. Futura Coatings, 993 F. Supp. at 1264. In the instant case, the complaint can be read to allege that the Lang's product failed when the car drove through the cable barriers. Obviously, that failure was sudden and accidental and occurred after the barriers had already been put to their intended use.

exclusion does not apply to exclude the allegations of the underlying complaint from coverage. See Imperial Cas., 858 F.2d at 136 (holding exclusion inapplicable where insured's product caused damage to washers into which it had been incorporated); see also Alert Centre v. Klorion Prot. Servs., Inc., 967 F.2d 161, 165 (5<sup>th</sup> Cir. 1992) (applying Louisiana law in holding exclusion inapplicable to claims of tortious conduct independent of contract).

(ii) Exclusion n

This provision, entitled "Recall of Products, Work or Impaired Property," excludes from coverage:

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

(Def.'s Mot. for Summ. J. Ex. C at Bates No. 007.)

Such an exclusion is commonly referred to as a "sistership" exclusion. It is well settled that this exclusion applies "only if the product or property of which it is a part is 'withdrawn from the market or from use' by the insured, and even in such situations, the policy still covers damages caused by the product that failed." Arcos, 350 F. Supp. at 385; see Imperial Cas., 858 F.2d at 136 n.9 (stating that "a fortiori, they do not exclude coverage of damages arising from a defective product when no

sister products are involved"); Acupac, 746 A.2d at 55-56 (N.J. Super. Ct. 2000)(stating that exclusion only applies where because of actual failure of insured's product, similar products are withdrawn from use which have not failed but are suspected of containing same defect) (citations omitted); accord Action Auto Stores, 845 F. Supp. at 426; Johnson v. Studyvin, 839 F. Supp. 1490, 1498 (D. Kan. 1993). Because the court has already determined that the complaint potentially sought recovery for damages to property other than that of the insured, and because no "sister" products are involved, this exclusion is inapplicable.<sup>10</sup>

Accordingly, Lang has established that Northern breached its duty to defend Lang in the Central Metals case.

## **2. Northern's Obligation to Indemnify**

Both motions appear to seek summary judgment on the issue of Northern's duty to indemnify Lang for defense costs and the costs of settlement in the Central Metals case. (Pl.'s Mot. for Summ. J. at 17; Def.'s Mot. for Summ. J. at 17.)

An insurer has a duty to indemnify its insured only if it is established that the insured's damages are actually within the policy coverage. Britamco, 845 F. Supp. at 1094 (citations omitted); Safeguard Scientifics v. Liberty Mut. Ins. Co., 766 F.

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<sup>10</sup> Northern also cites American International in support of its argument that exclusion (n) applies. (Def.'s Resp. to Pl.'s Mot. for Summ. J. at 18.) However, as already noted, the court never reached the issue of physical injury to other property in that case. American Int'l, 1996 U.S. Dist. LEXIS 3404, at \*14.

Supp. 324, 334 (E.D. Pa. 1991) (citations omitted). However, where there has been no adjudication of liability because the insured has settled the claims against it, and no apportionment of the settlement amount among the different counts of the underlying complaint, the court must determine whether an equitable apportionment between covered and uncovered claims must be made. Id.; see Cooper Labs Inc. v. Int'l Surplus Lines Ins. Co., 802 F.2d 667, 674 (3d Cir. 1986) (applying New Jersey law and remanding for consideration of equitable apportionment); American Home Assur. Co. v. Libbey-Owens-Ford Co., 786 F.2d 22, 30-31 (1<sup>st</sup> Cir. 1986) (stating that district court should allocate portion of settlement attributable to covered claims based on any evidence available regarding intent behind settlement decision); see also American States Ins. Co. v. State Auto Ins. Co., 721 A.2d 56, 64 (Pa. Super. Ct. 1998) (rejecting blanket rule that breach of duty to defend automatically requires insurer to indemnify after settlement and affirming trial court's allowance of insurer to present proof that underlying claim was not covered).

Thus, in order for Lang to be entitled to damages for breach of the duty to indemnify, it must first demonstrate that its liability to Central actually falls within the policy's coverage. Second, the court would have to equitably apportion the settlement figure to the claims that Lang demonstrates are actually covered by the policy. Safeguard Scientifics, 766 F. Supp. at 334.

However, the court has not been presented with any evidence as to whether the settlement damages paid out by Lang were actually covered by the policy. Nor is the court aware of any evidence regarding the intent of Lang or Central Metals with regard to their decision to settle. Thus, to the extent that the parties seek summary judgment on this issue, the motions will be denied. See 12<sup>th</sup> Street Gym, Inc. v. General Star Indem. Co., 93 F.3d 1158, 1167 (3d Cir. 1996) (denying insureds' motion for summary judgment where insureds settled underlying action before claims were confined to those outside of policy's scope).

**B. Lang's Motion to Compel**

Lang seeks to compel Northern to produce all of its claims files and internal documents concerning Northern's defense of Central and Roma in the wrongful death and arbitration actions. (Mot. to Compel at unnumbered p. 2.)

At the time that this motion was filed, the Federal Rules of Civil Procedure permitted discovery of "any matter, not privileged, which is relevant to the subject matter of the pending action." Fed. R. Civ. P. 26(b)(1) (amended 2000).<sup>11</sup> "Relevance is construed broadly and determined in relation to the facts and circumstances of each case." Hall v. Harleysville Ins. Co., 164 F.R.D. 406, 407 (E.D. Pa. 1996). Once the party from whom discovery is sought raises an objection, the party seeking

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<sup>11</sup> The motion to compel was filed on October 26, 2000. Effective December 1, 2000, the scope of discovery is limited to "any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1).

discovery must demonstrate the relevancy of the information requested. Vitale v. McAtee, 170 F.R.D. 404, 406 (citations omitted). At that point, the burden shifts back to the objecting party to show why discovery should not be permitted. Id. (citation omitted).

Lang's Complaint asserts a claim for bad faith denial of coverage against Northern under 42 Pa. Cons. Stat. Ann. § 8371.<sup>12</sup> In order to prevail on this claim, Lang must prove that Northern lacked a reasonable basis to deny coverage and disregarded its lack of reasonable basis in denying coverage. Keefe v. Prudential Prop. & Cas. Ins. Co., 203 F.3d 218, 225 (3d Cir. 2000) (citations omitted).

According to Lang, at the time that Northern provided a defense to Central and Roma, Northern was aware of Lang's involvement in the supply of the defective cable barrier system and understood Lang's potential liability. (Pl.'s Mot. for Summ.

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<sup>12</sup> The statute provides, in relevant part:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim . . .
- (2) Award punitive damages against the insurer.
- (3) Award court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371. Under Pennsylvania law, "bad faith" is defined as "a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill-will." Woody v. State Farm Fire and Cas. Co., 965 F. Supp. 691, 693 (E.D. Pa. 1997) (quoting PolSELLI v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994)).

J. at 14-15.) Lang asserts that at the same time Northern was "concocting" Central's defense strategy, Northern refused to provide counsel or coverage to Lang and manipulated the litigation in order to protect its own interests rather than its insureds' interests. Id. at 15. Lang implies that Northern improperly influenced Central Metals' decision not to join Lang in the wrongful death and arbitration matters in order to allow Northern to continue to refuse to defend Lang and then raise the instant coverage argument with regard to Central's suit. Id. Lang further contends that Northern, through its counsel, was kept aware of developments demonstrating Lang's involvement in the accident and that Lang requested a defense and indemnity on numerous occasions between the time that the arbitration cases were initiated and the filing of Central's suit against Lang. Id.

Lang argues that the materials it seeks to discover contain evidence of Northern's consciousness of the benefits of withholding action by Central against Lang and may demonstrate the extent to which Northern sought to avoid the increased costs of defending and indemnifying Lang by restraining any joinder of Lang in the wrongful death and arbitration cases. (Pl.'s Mot. for Summ. J. at 16.)

Northern objects to the request primarily on relevancy grounds. (Def.'s Br. in Supp. of Resp. to Mot. to Compel at unnumbered pp. 3-5.) It contends that the materials sought

cannot possibly lead to relevant information because the duty to defend is based solely on the allegations of the underlying complaint. Id. at unnumbered p. 4. Further, it notes that these materials all concern events which occurred well before the filing of the underlying complaint. Id. at unnumbered p. 5.

The court concludes that Lang's discovery requests do not seek relevant information. As discussed above, the alleged bad faith on Northern's part was its denial of a defense and indemnity in the Central Metals case. Northern correctly points out that the duties to defend and indemnify are determined solely by the allegations in the underlying complaint. Id. at unnumbered p. 4; American States, 628 A.2d at 887. The only documents relevant to a determination of those duties are the underlying complaint and the policy itself. Therefore, they are also the only evidence relevant to a determination of the reasonableness of Northern's denial of coverage. The court simply fails to see how documents related to Northern's involvement in the wrongful death and survivor actions or the Claridge arbitration actions can provide any information that is material to an allegation of bad faith denial of coverage, especially given the fact that Lang was not named in those actions, or any other related action, and the complaint in the Central Metals case was not filed until the termination of those actions.<sup>13</sup> Accordingly, the motion to compel will be denied.

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<sup>13</sup> The February 1998 internal e-mail of Northern

(continued...)

**C. Joint Motion to Withhold Case from Trial Pool**

The parties have filed a joint motion to withhold this case from the trial pool until forty-five days after a ruling on the motions for summary judgment. That motion will be denied.

**D. Lang's Motion to Extend Deadline for Filing Motion for Summary Judgment**

The court will deny this motion as moot.

**IV. CONCLUSION**

For the foregoing reasons, Lang's motion for summary judgment will be granted in part and denied in part; Northern's motion for summary judgment will be denied; the motion to compel will be denied; the motion to withhold the case from the trial pool will be denied; and Lang's motion for an extension of time to file its motion for summary judgment will be denied as moot.

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<sup>13</sup>(...continued)

reflecting an awareness of a potential conflict of interest stemming from the Claridge accident, cited by Lang in support of its motion to compel, does not alter the court's analysis. (Pl.'s Mot. to Compel Ex. A.) That e-mail was created over a year before the filing of the complaint in the Central Metals case, the document which triggered the duty to defend and which gave rise to Lang's bad faith denial claim.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LANG TENDONS, INC. : Civil Action  
: :  
v. : :  
: :  
NORTHERN INSURANCE COMPANY : :  
OF NEW YORK : No. 00-2030

ORDER

AND NOW, TO WIT, this day of March, 2001, upon consideration of the cross-motions for summary judgment of plaintiff Lang Tendons, Inc. ("Lang") and defendant Northern Insurance Company of New York ("Northern"); the various replies, responses and sur-replies thereto; Lang's Motion to Strike Defendant's Objections to Plaintiff's First Request for Production of Documents and Compel a Complete Response; Lang's Motion to Extend Deadline for Filing Motion for Summary Judgment; and the parties' joint motion to withhold this case from the trial pool, IT IS ORDERED that:

1. Lang's motion for summary judgment is GRANTED IN PART and DENIED IN PART. Summary judgment is entered in favor of Lang and against Northern on the issue of Northern's duty to defend Lang;

2. Northern's motion for summary judgment is DENIED;

3. Lang's motion to strike objections to requests for document production and compel a complete response is DENIED;

4. The joint motion to withhold the case from the trial pool is DENIED; and

5. Lang's motion for an extension of time to file its motion for summary judgment is DENIED AS MOOT.

SO ORDERED.

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LOUIS C. BECHTLE, J.