

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

SUN COMPANY, INC.	:	CIVIL ACTION
and	:	
SUN COMPANY, INC. (R&M),	:	
Plaintiffs	:	
v.	:	
BROWN & ROOT BRAUN, INC.	:	
and	:	
BROWN & ROOT, INC.	:	
Defendants	:	NO. 98-6504

SUN COMPANY, INC.	:	CIVIL ACTION
and	:	
SUN COMPANY, INC.(R&M),	:	
Plaintiffs,	:	
v.	:	
HIGHLANDS INSURANCE COMPANY	:	
and	:	
RIUNIONE ADRIATICA DI SICURTA	:	
Defendants	:	NO. 98-5817

M E M O R A N D U M

Newcomer, J. August 1999

I. Background

On September 9, 1992, plaintiff Sun Company, Inc. ("Sun") entered into a contract with defendant Brown & Root ("B&R"), who was to act as general contractor for work to be performed at Sun's refinery in Marcus Hook, on a project known as the BeNeshaps Project. Mechanical Construction, Inc. ("MCI") was engaged by B&R as a subcontractor on the project.

On March 21, 1994, MCI employees were engaged in "hot work" activities on top of a sludge storage tank when the tank exploded, injuring numerous MCI employees and subcontractors. The ensuing investigation by OSHA resulted in numerous citations against all parties responsible for work on the tank, Sun, B&R,

and MCI.¹ Although the degree of negligence by each is a matter of great debate, the existence of negligence by all cannot seriously be disputed.

Twelve of the injured workers filed suit in the Court of Common Pleas. The cases were ultimately consolidated under the caption Richardson et al. V. Sun Co Inc. Et al., Phila. CCP, December 1995, No. 2962. With the help of Judge Mark I. Bernstein and a Mediator, the twelve cases were settled in 1998 for \$13,028,350.

The settlements were paid from a pool of funds required by the Court and Mediator. MCI contributed nearly \$6,000,000 to the fund, per the terms of MCI's subcontract. Sun has no dispute with MCI in the present litigation. B&R's primary insurance carrier, Highlands Insurance Co., contributed \$738,337.52 of its \$1 million dollar limit towards the settlement fund. Riunione, B&R's excess insurer did not contribute any of its \$4 million dollar policy limit, nor did B&R contribute to the fund. The remaining \$6,629,128 was contributed by Sun, with all parties reserving their rights to resolve the responsibility and coverage issues to a later date and a different forum. This Court is that forum, and the time to resolve these issues is at hand.

Sun filed two lawsuits in this Court, consolidated under Civil Action No. 6504. In its first action, Sun sued Highlands Insurance Co. for the remainder of Highland's \$1 million dollar policy limit and for defense costs, and Riunione Adriatica Di

¹Sun's Citation contained 16 "Serious" violations, with \$61,150 in fines levied against them. Brown & Root's Citation contained 17 "Serious" violations with \$71,150 in fines levied against them. MCI's Citation contained 14 "Serious" violations, with \$44,800 in fines levied against them.

Sicurta ("Riunione") for its \$4 million dollars in excess coverage, also alleging bad faith against both. In its second action, Sun sued B&R for indemnification. Sun has moved for summary judgment on all counts, arguing that the contract language at issue is clear and unambiguous, and that the contract entitles it to indemnification, regardless of its own negligence, since it is clear that B&R and MCI were negligent. All defendants have also filed their own motions for summary judgment, essentially arguing that the contract is unambiguous, and that it entitles Sun to indemnification only for B&R and MCI's proportionate fault, with a proceeding in this Court being necessary to apportion fault.²

II. Legal Standards

A. Summary Judgment Standard

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506 (E.D. Pa. 1993). A trial court may enter summary judgment if, after review of all evidentiary material in the record, there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. Long v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983); Bank of America Nat'l Trust and Savings Ass'n v. Hotel Rittenhouse Assoc., 595 F. Supp. 800, 802 (E.D. Pa. 1984). Where

²Defendant Riunione, B&R's excess insurer, argues that it can only have exposure if the Court finds that Sun was less than 50% at fault, since more than half of the settlement amount is the responsibility of MCI and Highlands. Riunione requests judgment be entered in their favor because on the record it is clear that Sun has greater than 50% of the fault. In the alternative, they also request proceedings to determine proportionate fault.

no reasonable resolution of the conflicting evidence and inferences therefrom, when viewed in a light most favorable to the non-moving party, could result in a judgment for the non-moving party, the moving party is entitled to summary judgment. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 883 (3d Cir.), cert. denied, 454 U.S. 893 (1981); Vines v. Howard, 676 F. Supp. 608, 610 (E.D. Pa. 1987).

The party moving for summary judgment has the burden of proving that there are no genuine issues as to any material fact, and that he is entitled to judgment as a matter of law. Hollinger v. Wagner Mining Equip. Co., 667 F.2d 402, 450 (3d Cir. 1981); Cousins v. Yeager, 394 F. Supp. 595, 598 (E.D. Pa. 1975). The burden then shifts to the non-moving party to present opposing evidentiary material beyond the allegations in the complaint showing a disputed issue of material fact. Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 96 (3d Cir. 1982); Goodway Mktg., Inc. v. Faulkner Advertising, Inc., 545 F. Supp. 263, 265, 267-68 (E.D. Pa. 1982). The non-moving party must present sufficient evidence for a jury to return a verdict favoring that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505 (1986).

B. Contract Interpretation

The threshold question in the instant suit, and the determination which will greatly assist in the resolution of most of the remaining issues in the parties' respective motions, is the interpretation of the contract between Sun and B&R.³ As with

³The parties agreed in Section 10.9 of the Contract that the Contract "shall be governed and interpreted in accordance with the laws of the Commonwealth of Pennsylvania."

the interpretation of any contract provision, the Court first looks to the text of the contract to determine whether it unambiguously states the parties' intentions. John Wyeth & Bro. Ltd. v. Cigna Intern. Corp., 119 F.3d 1070, 1074 (3rd Cir. 1997). Such intention is not to be determined merely by reference to a single word or phrase, but rather by giving every part of the document its fair and legitimate meaning. Boyd v. Shell Oil Co., 311 A.2d 616, 618-19 (Pa. 1973). To be "unambiguous," a contract clause must be reasonably capable of only one construction. Wyeth at 1074. Further, Courts strive to avoid contract interpretations which would render a particular clause or section meaningless. Friestad v. Travelers Indemnity Company., 393 A.2d 1212, 1217 (Pa. Super. 1978); (Stern Enterprises v. Penn State Mut. Ins. Co., 302 A.2d 511 (Pa. Super. 1973).

The contract clause at issue in the present case is one of indemnification. Pennsylvania generally disfavors indemnification for a parties own negligence, requiring that if a contract purports to indemnify a party for it's own negligence, it must be stated in clear and unequivocal language. Clement v. Conrail, 963 F.2d 599, 601-602 (3d Cir.1992); Willey v. Minnesota Mining & Mfg. Co., 755 F.2d 315, 323 (3d Cir.1985); Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 4, (Pa.1991)("If parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence they must do so in clear and unequivocal language). An indemnification provision will be construed against the indemnitee if there is no clearly expressed or unequivocal language "to show that indemnification for its own

negligence was intended." Pittsburgh Steel Co. V. Patterson-Emmerson-Comstock, Inc., 171 A.2d 185, 188-89 (Pa. 1961).

"Protection from the results of one's own negligence must not be found on the basis of general language; if found at all, it must be found in language so clear as to remove any doubt that the other party to the contract understood the extent of the immunity to which he was agreeing." Fidelity Bank v. Tiernan, 375 A.2d 1320, 1326 (Pa. Super. 1977). The rationale behind this rule was most recently stated in Mace V. Atlantic Refining & Marketing, "[t]he liability on such indemnity is so hazardous, and the character of the indemnity (of the claiming indemnitee) so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation." 717 A.2d 1050, 1052, (Pa. Super. 1998).

All parties agree that the contract language at issue unambiguously states the parties intentions, and that summary judgment is appropriate. The Court now turns to relevant language of the contract at issue.

III. Discussion

A. The Contract

Section 6.1 of the Contract between Sun and B&R provides, in pertinent part:

Section 6.1 Liability and Indemnity

Contractor [B&R] agrees to **defend and indemnify** Owner [Sun] . . . from and against any and all claims, liabilities, expenses (including reasonable attorney's fees) . . .for property damage . . . and personal injury **to the extent caused by or arising out of the negligent acts or omissions of [B&R], its subcontractors, agents, servants or employees whether or not such actions or omissions occur jointly or concurrently with the negligence of [Sun]. . . or other**

third parties. To the extent that state or and/or federal law limits the terms and conditions of this clause, it shall be deemed so limited to comply with such state and/or federal law.

Contract Section 6.1 (emphasis added). Defendants focus on the phrase "to the extent" and argue that this is a limiting phrase of proportionality. They believe this phrase demonstrates that the contract unambiguously states that B&R is liable only for the amount of negligence B&R or it's subcontractors contribute to any injury. Sun focuses on the phrase "whether or not" and argues that this phrase unambiguously states that Sun is entitled to full indemnification for any injuries, regardless of Sun's own negligence, so long as B&R or it's subcontractors were negligent.

All parties reference other language in the contract in support of their position. Plaintiff points to Section 7.8, which states:

Insurance Deductibles

All deductibles applicable to the insurance specified in this Article VII shall be solely for the account of the party procuring the coverage, regardless of the cause, including either party's negligence.

Plaintiff argues that this section provides that all insurance deductibles shall be solely for the account of B&R, regardless of whether the loss resulted from Sun's Negligence or that of B&R. Sun contends there would be no reason to address this issue unless the parties contemplated that Sun would be indemnified (and insured) for losses resulting from its own negligence. "In other words, it would not be necessary to allocate responsibility for the deductible if Sun were expected to look to its own

underwriters for losses arising out of its own negligence." (Pl. Mem. at 14). Defendants, despite their many response and reply briefs, never directly addressed this argument. As discussed below, the Court disagrees with the plaintiff.

Defendants similarly point to language in the contract they believe is consistent with their reading of the indemnification clause. Specifically, Section 7.5, which reads:

Additional Insured

Comprehensive General Liability Insurance and Automobile Liability Insurance shall, subject to policy terms and conditions and only to the extent necessary to provide coverage under Contractor's insurance for the liability assumed by Contractor under Article VI Indemnification, cover Sun as additional insured.

Defendants also point to several other places in the contract where the "to the extent" language is employed, including Sections 5.2 and 7.3. Defendants believe these clauses would have to be read out of existence to give the contract the meaning Sun suggests. Like defendants above, Sun never directly addressed these arguments.

The bulk of the parties' arguments, however, are focused on the two phrases, "to the extent" and "whether or not." Bearing in mind the Boyd rule of construction, cautioning against determining the intent of the parties by reference to a single word or phrase, the Court will now turn to the parties respective arguments.

B. "To the Extent"

Initially, the Court notes that there are no cases interpreting a contract clause containing both the "to the

extent" and "whether or not" language at issue here. Regarding the "to the extent" clause, defendants argue, and the Court agrees, that the plain and ordinary meaning of the words clearly suggest that B&R's intended liability is to be limited by its and its subcontractor's proportionate share of the fault causing injury. In addition to the plain meaning of the words, the Third Circuit has had occasion to interpret a contract that contained "to the extent" language in Clement v. Consolidated Rail Corp., 963 F.2d 599 (3rd Cir. 1992). The Court reviewed the following clause:

[PTL] shall assume all responsibility for and shall protect, indemnify, and hold harmless Conrail against any and from any and all claims ... to the extent such event shall have arisen from any act of commission or omission, negligent or otherwise, of [PTL], or of any of [PTL's] agents, servants, or employees ... in performing or failing to perform any of the contractual duties or obligations required by this agreement.... Provided, further, that in no event shall [PTL] be responsible under this agreement for any claim, loss,... which are proven by any claimant to have resulted solely from any negligent act ... of Conrail ... and anyone other than [PTL].

Id. at 601 (emphasis in original). The Third Circuit found that this clause did not require PTL to indemnify Conrail for Conrail's own negligence because the clause did not express in "clear, precise and unequivocal" terms that Conrail was entitled to indemnity for its own negligence. Id. at 602. However, the Court did find that PTL was required to indemnify Conrail for PTL's proportionate share of the total negligence causing injury, finding that "[t]he expression 'to the extent' means specifically that Conrail should be indemnified in an amount equivalent to the

proportion PTL's acts bear to the whole of the acts or omissions that caused Clement's death." Id. at 602.⁴

Despite the apparent clarity in the plain meaning of the language, and the Third Circuit's interpretation consistent with same, plaintiff argues that cases interpreting and finding the "to the extent" language to mean that the contractor was only liable for the contractor's own proportionate fault did not contain a "whether or not" clause demonstrating that the indemnitee was entitled to indemnification. See Clement v. Consolidated Rail Corp., 963 F.2d 599, 601 (3rd Cir. 1992); Burke v. Koch Industries, 744 F.Supp 677,679 (E.D.Pa. 1990). Plaintiff concedes that "**but for** the 'whether or not' language, Brown & Root's indemnity obligation would be limited to its pro rata share of liability." (Pl. Resp. To Def. Opp. at 3-4). However, plaintiff contends that the "whether or not" phrase alters the plain and judicially determined meaning of "to the extent," suggesting that Section 6.1 should be read to mean that B&R agrees to defend and indemnify Sun completely for damages and injury, so long as said damages and/or injury were "to any extent" caused by or arising out of the negligence of B&R or its subcontractor's, regardless of Sun's negligence. The Court now turns to the Contract language that forms the basis for Sun's

⁴See also, Harbor Ins. Co. v. Lewis, 562 F.Supp 800, 805 (E.D.Pa. 1983)(relying on "to the extent" language in endorsement to an insurance contract to find that an additional insured's insurance coverage was tied to the acts of the named insured resulting in a denial of coverage to additional insured for its concurrent acts of negligence).

contention.

C. "Whether or Not"

Plaintiff argues that the "whether or not" phrase in the contract is a clear and unequivocal statement of the parties intentions that, so long as defendants are liable, Sun is entitled to full indemnification whether or not Sun is jointly or concurrently liable. Plaintiff cites numerous cases in support of it's reading of the phrase. See United States v. Seckinger, 397 U.S. 203, 212-213 fn 17, (1970)(giving an example of contract language that would indemnify an indemnitee for the indemnitee's own negligence); Willey v. Minnesota Mining and Manufacturing Co., 55 F.2d 315, 323 (3rd. Cir. 1985)("whether or not based... upon active, passive, concurrent negligence of [indemnitee]" language is clear and unequivocal); Hershey Foods Corp. V. General Electric Service Co., 619 A.2d 285, 288 (Pa. Super. 1992)(despite finding that owner was 90% at fault, indemnity allowed where contractor agreed to indemnify it for loss caused in whole or in part by any negligent act or omission of [contractor]...regardless of whether or not it is caused in part by a party indemnified hereunder.").

None of these cases, however, contain the limiting "to the extent" language in the clause at issue here. Although plaintiff is correct in asserting that defendants can point to no cases where the "whether or not" language is present that do not find that language to be a clear and unequivocal statement of intent to indemnify and indemnitee for the indemnitee's own negligence,

plaintiff likewise cannot point to a single case holding that "whether or not" is a talismanic phrase whereby its very presence in a contract renders said contract to be one of indemnity for the indemnitee's own negligence. Further, in every case cited by Sun, the "whether or not" phrase specifically, and exclusively, provided indemnification whether or not the injuries were caused by either the "indemnitee's own negligence, or by the negligence a "party indemnified hereunder." In the instant contract, B&R specifically agrees to indemnify Sun, its parent, subsidiaries and affiliates, as well as the employees and agents of Sun, its officers, invitees, partners, parents, parent-affiliated companies, assigns, and successors in interest, to the extent of B&R and/or B&R's subcontractors, agents, servants or employees negligence, whether or not the following are jointly or concurrently negligent: Sun, its parent, subsidiaries or affiliates or other third parties. This reference to "other third parties" clearly suggests a broader scope than numerous enumerated parties entitled to indemnification. Such broad language is not found in any of the cases cited by plaintiff.

Instead of finding certain language to be talismanic, the Pennsylvania Courts have consistently reviewed the entirety of the clause at issue in making an indemnity determination. A recent Superior Court decision, relying on two earlier Pennsylvania Supreme Court decisions, Perry v. Payne, 66 A. 553 (Pa. 1907) and Ruzzi v. Butler Petroleum Co., 588 A.2d 1 (Pa. 1991), reiterated the "Perry-Ruzzi doctrine of insistence of

clear unambiguous language for enforceability of an indemnity obligation." Mace v. Atlantic Refining & Marketing, 717 A.2d 1050, 1051 (Pa. Super. 1998). Thus, the "whether or not" language alone, and particularly as drafted, is insufficient to demonstrate by clear and unequivocal language the parties' intent to indemnify Sun for its own negligence, but instead must be read with the entire clause, and contract.

D. Interpreting the Contract as a Whole

As stated previously, the Court's task is to try to glean the parties' intentions from the language of the contract, and in the first instance, will look to the language of the contract to determine if it unambiguously states the parties intentions. To be unambiguous, a contract clause must reasonably be capable of only one construction. Wyeth at 1074. The Court finds that the contract is unambiguous, as it is only reasonably capable of one construction. The contract unambiguously says that B&R will defend and indemnify Sun from claims and liabilities for personal injuries when B&R and/or its subcontractors are negligent, to the extent of their negligence, whether or not Sun is jointly or concurrently negligent. In other words, B&R will be responsible for its and/or its subcontractors proportionate share of liability for an injury, regardless of Sun's own negligence. Sun cannot, without re-writing the contract, suggest any other reasonable construction. There is no basis in law or common sense for Sun's position that the phrase "whether or not" alters the common sense and judicially determined meaning of "to the

extent" to read "to any extent." Sun's construction does not give effect to any of the contractual provisions using the "to the extent" clause. Additionally, to accept Sun's position is to accept that B&R agreed to completely indemnify Sun, as long as B&R and/or its subcontractors are 1% negligent, regardless of whether Sun or any unidentified third party is negligent. Even ignoring the "to the extent" language, there is no basis in any of the cases cited by plaintiff for such a broad indemnity provision. Although the Court is clearly holding that the contract is unambiguous, even if the Court were inclined to give some weight to plaintiff's arguments, plaintiff would fall woefully short of demonstrating that the contract is a clear and unequivocal contract intending to indemnify Sun for Sun's own negligence, compelling the result that the contract must be interpreted against Sun. Pittsburgh Steel at 188-189.

The Court's reading of the contract is also consistent with, and gives full effect to, Section 7.8, contrary to plaintiff's argument. Section 7.8 provides that all insurance deductibles shall be for the party procuring the insurance under Article VII. As stated supra, plaintiff argues that this section provides that all insurance deductibles shall be solely for the account of B&R, regardless of whether the loss resulted from Sun's negligence or that of B&R. Sun then suggests that this means the parties must have contemplated that Sun would be indemnified for losses resulting from its own negligence. This simply is not true. All insurance deductibles are not solely for

the account of B&R under this provision. Both parties have responsibility to purchase insurance under Article VII to cover various contingencies, and this section simply states that the party procuring the insurance shall have the deductible for their own account, regardless of what, including either party's negligence, caused the loss. It makes perfect sense that the parties would want to make clear how the deductibles would be allocated, since both were responsible to purchase insurance. Further, although the parties agreed to allocate liability on a pro rata basis, this provision makes clear that the deductibles will not be allocated on such a basis. Without this provision, there might be some confusion as to how the deductibles would be allocated. The Court's reading of the Contract is not inconsistent with, and gives full effect, to Section 7.8.

Sun also argues that this construction renders the whether or not clause, and the entire indemnification section, meaningless,⁵ something Courts strive not to do in contract interpretation. Friestad v. Travelers Indemnity Co., 393 A.2d 1212, 1217 (Pa. Super. 1978).⁶ Sun asserts that this

⁵The Court finds plaintiff's citation to Bosse v. Litton Unit Handling Inc., 646 F.2d 689, 694 (1st Cir. 1991) to be uninformative. The First Circuit applied New Hampshire law, which, the Court noted, no longer was applying the strict construction rule to indemnity agreements, and was instead construing indemnity agreements like any other contract. Id. 693.

⁶Defendants argue that the "whether or not" language offers a substantial legal benefit to plaintiff. They assert that without the language, Sun would be held to the "well-established common law rule that 'indemnity is disallowed if the indemnitee is actively negligent.'" (B&R's Resp. Br. at 15)(citing DiPietro v. City of Philadelphia, 496 A.2d 407, 409-410 (Pa. Super. 1995)(citations omitted). Under this doctrine, defendants' argue, if Sun is actively negligent,

construction is inconsistent with Clement, relied on heavily by B&R., which held that the “to the extent” language unambiguously provided that the indemnitor was liable for the proportionate share of its own negligence. Id. at 602. Since the contract at issue in Clement did not contain a “whether or not” clause, and the Third Circuit found proportionate liability regardless of any fault of indemnitee, there would be no need for the “whether or not” language in the instant contract.

As previously noted, Courts do not attach a talismanic significance to the “whether or not” phraseology employed in the instant contract, and this Court does not attach the same significance to the language as plaintiff. Further, the Court does not believe that the holding in Clement necessarily renders the “whether or not” language superfluous or meaningless. The contract at issue was signed by Sun in August of 1992, and by B&R in September of 1992, just a few months after the Third Circuit’s decision in Clement, issued in May of 1992. Clement is the first and only contract case interpreting the “to the extent” language

even if their negligence is less than 50%, Sun would be entitled to no indemnification from B&R. Sun vigorously disputes this, arguing that Sun would be entitled to contribution from B&R in the event Sun paid more than its pro rata share of liability. The Court disagrees with Sun’s assertion that it would necessarily be entitled to contribution if it was negligent. Under the Pennsylvania Workmen’s Compensation Act, 77 Pa. Cons. Stat. Ann. § 481(b), an employer is not liable to a third party tortfeasor for indemnity or contribution unless “expressly provided for in a written contract...” Id. Therefore, without the appropriate agreement, Sun is not entitled to contribution. As a result of Clement, however, the “to the extent” language would likely have been sufficient to satisfy the statute, but that does not automatically render the “whether or not” language meaningless or superfluous, as discussed more fully below.

at issue, and the first and only case finding that the "to the extent" language was sufficient to find an indemnitor liable for its pro rata share of negligence when the indemnitee was also negligent. Although the Court must assume that the parties were aware of the Third Circuit's holding in Clement, Ruzzi at 5, it does not follow that the parties were restricted solely to those words when drafting their indemnity agreement intending to allocate liability proportionate to fault. With only one decision on record, it is not surprising that the parties used more verbiage than necessary to more clearly express the same sentiment. It may be that the "to the extent" language would have been sufficient to establish the responsibilities of the parties, but the "whether or not" language removed all doubt.

Although the Court explicitly holds that there is no ambiguity in this contract, even if the Court accepted plaintiff's arguments on this issue, "[a]t best, it can be said on [plaintiff's] behalf that the ["whether or not"] clause creates an ambiguity. However, Perry-Ruzzi demands precision and parties who rely on ambiguity or inference cannot thereby claim the benefit of indemnity." Mace at 1052.

Accordingly, for the foregoing reasons, the Court will deny plaintiff's motion and grant defendants' motions as to the interpretation of the contract language.

E. The Remainder of Sun's Motion

1. Riunione's \$4,000,000 excess insurance.

Sun was named an additional insured on B&R's insurance

policies, including its \$4,000,000 excess insurance policy with Riunione. B&R was required to do this per Section 7.5 of the contract, which reads:

Additional Insured

Comprehensive General Liability Insurance and Automobile Liability Insurance shall, subject to policy terms and conditions and only to the extent necessary to provide coverage under Contractor's insurance for the liability assumed by Contractor under Article VI Indemnification, cover Sun as additional insured.

Id. at § 7.5. Sun argues that, "although the obligations of the insurance defendants are to some extent defined by Brown & Root's duty to indemnify Sun, those obligations are more broadly construed in light of the underwriters' duty to Sun, as an additional insured." (Pl. Resp. at 5). Riunione argues, and the Court agrees, that it is only required to indemnify Sun to the extent of B&R's duty to indemnify.

In Harbor Ins. Co. V. Lewis, 562 F.Supp 800 (E.D.Pa. 1983), the district court was called upon to determine the extent of an insurance company's obligation to its insured, Reading Railroad Company ("Reading"), when both Reading and the named additional insured on the policy, the City of Philadelphia, were found to be negligent in an accident causing severe injuries to a boy. The City sought coverage as an additional insured on Reading's policy for the City's negligence. Endorsement number 8 to the policy in question provided, in pertinent part:

Additional Insured

It is agreed that the insurance afforded by this policy shall apply to the following additional insureds **but only to the extent of liability resulting from occurrences arising out of negligence of reading company and/or its wholly owned**

subsidiaries:...City of Philadelphia....

Id. at 802. The court, relying on the "to the extent" language, found that "[t]he insurance provided by the policy was strictly tied to the actions of the named insured[,]" and denied coverage to the city for their concurrent acts of negligence. Id. at 805.

In the instant case, although neither party has submitted, or referred to, an endorsement in the policy defining Sun's status as an additional insured, Plaintiff's Exhibit "C", the Certificate of Insurance, which appears to cover both Highlands and Riunione, says that an Additional Insured on the policy is covered:

only with the coverages and the minimum amounts of insurances required to be carried by the Named Insured under the contract and only for the liabilities the Named Insured assumes under the contract...The duty to defend an[] Additional Insured shall be limited to that portion of defense costs which are directly attributable to the defense of an insured claim.

Pl Ex. "C". Courts can also look to outside sources, such as agreements, to define the status of parties who are covered by an insurance contract. Carolina Cas. Ins. Co. V. Underwriters Ins. Co., 569 F.2d 304, 313-314 (5th Cir. 1978). It is clear from Section 7.5 of the Contract quoted above that B&R was required to obtain insurance coverage only to the extent necessary to satisfy the indemnity obligation it assumed in Section 6.1 of the Contract, which has already been determined to be for B&R's proportionate share of negligence. It is also clear from the Certificate of Insurance that the insurance companies did not intend to assume any more liability than assumed by B&R. Thus,

under the Court's reading of the above documents, and consistent with Harbor, Sun cannot collect on Riunione's policy unless it is determined that B&R's and/or its subcontractor's proportionate share of the liability is greater than 50%, as approximately that much of the settlement amount has already been contributed as a result of B&R's and MCI's negligence. The Court cannot and will not make that determination now, but will instead leave that for the finder of fact in the appropriate setting. The cases cited by Sun do not alter this result.

Transport. Indem. Co. v. Home Indem. Co., 535 F.2d 232 (3rd Cir. 1976), holds that an insurance company's duties to an additional insured cannot be expanded by a lease agreement between a lessor and lessee when the insurance company was not a party to the contract. The situation in Transportation Indemnity is not directly implicated by the instant case, however, as the contract between B&R and Sun does not expand Riunione's duties to Sun. Further, contrary to plaintiff's use of the case, Transportation Indemnity does not establish a broad rule of law that says the duties of an insurance company can never be defined by a contract between the insured and the additional insured, but instead is clearly limited to circumstances where the duties are expanded by a contract where the insurance company is not a party. As noted previously, courts can look to outside sources to define the status of parties who are covered by an insurance contract, which the Court has done here. Carolina Cas. Ins. Co. at 313-314.

Lloyd's of London v. Oryx Energy Co., 142 F.3d 255 (5th Cir. 1998) and Shell Oil Co. V. National Union Fire Insurance Co., 44 Cal. App. 4th 1633 (1996) are similarly unpersuasive. In Oryx, the Fifth Circuit reversed the district court's holding that Oryx's status as an additional insured was limited to the agreed upon indemnity in the contract, which was invalid as prohibited by the Texas Anti-indemnity Act. The Court relied on the parties' contract, which the Court found required indemnity for bodily injury to be "without limit, and without regard to causes or negligence of any of the parties." Id. at 258. The Court then found no merit in the argument that Texas Courts would limit coverage to match the Anti-Indemnity Act, based on the policy underlying the Act. This is a far cry from the instant case where indemnity was not to be "without limit" but instead "only to the extent necessary to provide coverage under the Contractor's insurance for the liability assumed by Contractor under Article VI Indemnification." As such, plaintiff's reliance on Oryx is misplaced.

Although at first blush Shell Oil Co. V. National Union Fire Insurance Co. seems to present more compelling support for Sun's position, upon closer inspection, it too falls short. In Shell, a case with facts strikingly similar to the case at bar, the California Appellate Court found a contractor's obligation to provide insurance to Shell as an additional insured to be broader than the indemnity obligation, based on a parsing of the section of the contract between Shell and its contractor addressing

insurance obligations. This Court finds Shell to be closely reasoned, and further finds such a parsing to be unnecessary as the "only to the extent" language in Section 7.5 clearly delineates and limits B&R's responsibility to procure insurance. Accordingly, the Court finds Shell unpersuasive.

As a result of these findings, the Court will deny plaintiff's motion as to Riunione, including plaintiff's bad faith claim. With a duty to indemnify not yet established, Riunione could not have acted in bad faith.

2. Plaintiff's Claim Against Highlands

Plaintiff claims that Highlands Insurance Company owes a duty to contribute to Sun's defense costs, that Highlands must tender all of its \$1,000,000 policy limit, and that Highlands has acted in bad faith. Highlands never directly addresses the "duty to defend" argument, but contends that it has already paid more than the proportionate share of liability it will ultimately be responsible for, and summary judgment is therefore premature. Highlands also argues that its refusal to tender the remaining \$261,662.48 for settlement purposes, assuming it was obligated to, could not constitute bad faith because there is not clear and convincing evidence of bad faith, but instead the evidence shows this to be a simple disagreement among honorable and reasonable people.

The Court finds both the parties' briefing and the evidentiary record to be inadequate on these issues, making a reasoned decision impossible. These issues clearly were not a

priority for either party, as their comparatively sparse submissions demonstrate. The Court will therefore deny plaintiff's motion without making any findings, and will thus esolve them at trial.⁷ The Court notes, however, that it is suspicious of what it perceives to be Highland's refusal to directly address the argument that it has a duty to defend Sun, but that will be for another day.

3. B&R's Duty to Indemnify Beyond Insurance Coverage

The Court has already determined that B&R's duty to indemnify Sun is limited by B&R's and/or its subcontractor's proportionate share of liability causing injury. However, to the extent that plaintiff is arguing that should B&R's proportionate liability exhaust it's insurance coverage, B&R is liable to indemnify Sun up to the amount of B&R's fault, the Court agrees with Sun. B&R agreed to indemnify Sun in Section 6.1 as described extensively throughout this Opinion. In Sections 7.2 and 7.5, B&R agreed to obtain insurance to satisfy it's indemnity obligations. The Court finds no language in the contract suggesting that B&R's liability should be limited by the amount of it's insurance coverage, nor does the unambiguous language in the contract support such a reading. Accordingly, summary judgment will be entered in favor of Sun on this issue consistent with this paragraph.

F. Riunione's Motion for Summary Judgment

⁷The Court will not entertain another pre-trial motion dedicated to these issues.

Riunione has moved for summary judgment, arguing that it is entitled to a declaration at this stage of the litigation that it's excess policy limits cannot be reached because, since Sun has already received money totaling more than half of the settlement amount, Riunione could not possibly have to expend any sums because there is no view of the facts that could find Sun less than 50% at fault. The Court finds that there are genuine issues of material fact surrounding the degree to which Sun's negligence contributed to the explosion at the refinery. Therefore, the Court will deny Riunione's motion, except that the Court has already exhaustively addressed the "to the extent" language, and will expeditiously hold a proceeding to determine the parties' respective negligence.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will deny Sun's motion except as stated in Section III(E)(3). The Court will grant B&R and Highland's partial motion for summary judgment, and grant in part and deny in part Riunione's motion consistent with Section III(F).

AN APPROPRIATE ORDER WILL FOLLOW.

Clarence C. Newcomer, J.