

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

ROBERT CATO & ASSOCIATES,	:	
INC. and PENNSYLVANIA NATIONAL	:	CIVIL ACTION
MUTUAL CASUALTY INSURANCE	:	
COMPANY,	:	NO. 01-CV-4182
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SELECTIVE INSURANCE COMPANY	:	
OF AMERICA and MARYLAND	:	
CASUALTY COMPANY,	:	
	:	
Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

July 2, 2003

On July 24, 2003, the parties presented oral arguments on their multiple motions before this Court. The following Memorandum addresses each of the motions and the arguments raised therein.

**I. DEFENDANT ASSURANCE COMPANY OF AMERICA’S MOTION TO DISMISS**

**A. Background**

Plaintiff, Robert Cato & Associates Incorporated (“Cato”), is a contractor insured by Plaintiff, Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) (“Cato” and “Penn National” collectively referred to as “Plaintiffs”). In 1997, Longport Ocean Plaza Condominium (“Longport”) in Longport, New Jersey contracted with Cato “to evaluate the

Longport Ocean Plaza Condominium building to develop a plan for completion of repairs, renovations and upgrades necessary to provide a water tight, structurally sound and aesthetically pleasing building . . .” Longport Compl. at ¶ 6. In 1998, Longport and Cato entered into a Construction Agreement to perform the work. Id. at ¶ 15.

Cato subcontracted the “[w]aterproofing of [the] entire exterior of [the] building including, balcony refinishing, glazed block coating system, joint sealants, walls at grade and parking garage, coating of concrete wall panels and EFIS system” to Melrose Enterprises, Ltd. (“Melrose”). As part of its work contract, Melrose was required to provide Cato with general liability insurance through its insurer, Defendant Assurance Company of America (improperly named in the Amended Complaint as Maryland Casualty Company and hereinafter referred to as “Assurance”). Pls.’ Resp.-Ex. B, Cato-Melrose Subcontract.

In the insurance agreement with Melrose, Assurance promises to “pay those sums that the insured (Melrose) becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” Def. Assurance’s Mot. to Dismiss-Certification of Rex F. Brien, Ex. A-Commercial General Liability Coverage Form at 1. Cato is an “additional insured” under this policy.<sup>1</sup> Therefore, Assurance will pay sums that Cato, the “additional insured,” becomes legally obligated to pay as damages, but only with respect to covered “bodily injury,” “property damage,” “personal injury,” and “advertising injury” which results from Melrose’s work under the work contract. Id.

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1. Defendant Assurance disputes that Cato is an “additional insured” under the policy, but assumes, *arguendo*, for purposes of its Motion to Dismiss that Cato is an “additional insured.” Def. Assurance’s Mot. Dismiss at 4.

In 2000, Longport sued Cato for property damage allegedly resulting from, *inter alia*, the failure to properly waterproof the complex. As a result, the condominium units suffered water infiltration and damage to personal and common property.

Penn National provided a defense to Cato in the underlying action, Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Associates, Inc., Civil Action No. 00-CV-2231 (hereinafter referred to as the “underlying action”). Defendant Assurance did not provide a defense to Cato.

Plaintiffs brought the present action pursuant to 28 U.S.C. § 2201, seeking a declaratory judgment that Defendant Assurance is obligated to indemnify Plaintiffs in the underlying action. Defendant Assurance filed a motion to dismiss for lack of a justiciable case or controversy, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Assurance also moves for the dismissal of Plaintiffs’ request for a declaration that Assurance’s insurance policy is primary to that of Plaintiff Penn National for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

**B. Standard of Review**

Defendant Assurance brings this motion by way of Fed. R. Civ. P. 12(b)(1) for lack of a justiciable case or controversy, and 12(b)(6) for failure to state a claim upon which relief can be granted. “When a motion under Rule 12 is based on more than one ground, the court should consider the 12(b)(1) challenge first because if it must dismiss the complaint for lack of subject matter jurisdiction, all other defenses and objections become moot.” In re Corestates Trust Fee Litig., 837 F.Supp. 104, 105 (E.D. Pa. 1993) (Buckwalter, J.), *aff’d*, 39 F.3d 61 (3d Cir. 1994). Accord Bell v. Hood, 327 U.S. 678, 682 (1946) (“Whether the complaint

states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.”). Finding that there is no justiciable case or controversy to support subject matter jurisdiction over the instant action, it is unnecessary to reach the merits of Defendant’s 12(b)(6) challenge.

**C. Discussion**

Assurance’s Motion to Dismiss seeks the dismissal of Plaintiffs’ duty to indemnify claim on the basis that Cato’s liability in the underlying action did not result from Melrose’s “work,” and, thus, no coverage is available to Cato under the Assurance policy. An insurer’s duty to indemnify depends on the basis of liability, if any, that results in the underlying case. St. Paul Reinsurance Co. v. Bottoms Up, No. 01-6792, 2002 U.S. Dist. LEXIS 12136, at \*4 (E.D. Pa. May 10, 2002). Assurance notes that Plaintiffs’ Amended Complaint fails to allege that Cato is liable in the underlying action for damage or injury that resulted from Melrose’s work. Additionally, following trial in the underlying action, Melrose was adjudged to have no liability with respect to the underlying plaintiff, Cato, or any other party in the underlying action.

Plaintiffs submit that their duty to indemnify claim is not moot and that there are questions as to whether Melrose caused any damage. They argue that “[t]he jury’s finding that Melrose did not breach the subcontract to perform its work is *not* equivalent to a determination that the work that Melrose performed did not have some minimal causal connection to the property damage.” Pl.’s Resp. at 11 (emphasis in original). Plaintiffs claim that it is arguable that the damages for which Cato was found liable as the project’s general contractor would not have occurred “but for” Melrose’s work. Id. Additionally, Plaintiffs argue that the potential for

Assurance to indemnify Cato still exists due to the absence of a final determination in the underlying action. Id. Plaintiffs point to post-trial motions that have yet to be ruled upon and the possibility of filing an appeal with the United States Court of Appeals for the Third Circuit as evidence of the lack of a final resolution. Id. at 11-12.

The Court finds that Plaintiffs' arguments are without merit. In the underlying action, the Court determined that the underlying plaintiff's property damage did not result from Melrose's work. Where it has been adjudicated in the underlying action that Melrose's work did not result in damage or injury, it necessarily follows that Cato's liability in the underlying action was not for damages within the coverage of the Assurance policy. As such, no coverage under the Assurance policy is available to Plaintiffs for their liability in the underlying action. Therefore, as a matter of law, there is no justiciable case or controversy with respect to Plaintiffs' indemnity claim sufficient to confer jurisdiction on this Court.

Additionally, if an appeal is filed with the Third Circuit Court of Appeals and if the appeal is ruled in favor of Plaintiffs, then it is possible that coverage may exist under the Assurance policy. But this is merely a hypothetical scenario, presenting too many variables which do not pose a present case or controversy before this Court. Accordingly, the Court grants Defendant Assurance's motion to dismiss as to Plaintiffs' duty to indemnify claim.

## **II. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT SELECTIVE INSURANCE COMPANY OF AMERICA**

### **A. Background**

Cato also subcontracted with Window Associates, Inc. (hereinafter referred to as "Window Associates") to, *inter alia*, furnish and install all windows, sliding doors, and window

wall units on all exterior walls of the building. Def. Selective's Resp.-Ex. A, Cato-Window Associates Subcontract. As part of its work contract, Window Associates was required to provide Cato with general liability insurance through its insurer, Defendant Selective Insurance Company of America (hereinafter referred to as "Selective"). Id.

In the insurance agreement with Window Associates, Selective promises to provide coverage to "any person or organization with whom you (Window Associates) agreed, because of written contract, agreement or permit, to provide insurance such as is afforded under this Coverage Part." Id.-Ex. B, Selective Policy at CG 72 02 (08/97), p.5 (hereinafter referred to as "Selective Policy"). Coverage, however, is only extended to "your operations, 'your work,' 'your product,' or premises owned or used by you." Id.

The Selective Policy defines "your work" as "(a) [w]ork or operations performed by [Window Associates]; and (b) [m]aterials, parts or equipment furnished in connection with such work or operations." Id. at CG 00 01 (10/93), p. 11. "Your work" also includes "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work;'" and (b) the "providing of or failure to provide warnings or instructions." Id. Additionally, "your product" is defined as "(a) [a]ny goods or products . . . manufactured, sold, handled, distributed or disposed of by [Window Associates];" and (b) "[c]ontainers, materials, parts or equipment furnished in connection with such goods or products." Id.

On or about May 1, 2000, Longport sued Cato, alleging that Cato, both directly and through its subcontractors (which includes Window Associates), failed to properly furnish the contracted-for work between mid-1998 and early 1999. As a result, the condominium units

allegedly suffered water infiltration, causing property damage to the interior walls, floors, furniture and carpet of the units and common areas.

Penn National provided a defense to Cato in the underlying action, but Defendant Selective did not.

Plaintiffs filed the present motion for partial summary judgment, seeking an order compelling Defendant Selective: (1) to provide a defense to Cato in the underlying action; (2) to reimburse Penn National for defense costs and fees incurred in the underlying litigation; and (3) to reimburse Penn National for costs and fees incurred in prosecuting the instant declaratory action.

**B. Standard of Review**

A motion for summary judgment will be granted where all of the evidence demonstrates “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 dispute about a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted is “whether reasonable minds may differ as to the verdict.” Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 (3d Cir. 1998). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson, 477 U.S. at 248.

### C. Discussion

The broad duty to defend is distinct from the insurer's duty to indemnify which depends on the basis of liability, if any, that results in the underlying case. See Pac. Indem. Co. v. Linn, 766 F.2d 754, 766 (3d Cir. 1985); Moffat v. Metro. Cas. Ins. Co., 238 F.Supp. 165, 173 (M.D. Pa. 1964). The insurance company's duty to defend is determined by the allegations in the pleadings of the underlying action. Pac. Indem. Co., 766 F.2d at 760. This obligation of the insurer arises "whenever the complaint filed by the injured party may potentially come within the coverage of the policy." Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649, 651 (Pa. Super. 1994).

Plaintiffs argue that Defendant Selective has breached its duty to defend Cato. In the underlying complaint, Longport alleged that Cato, both directly and through its subcontractors (which includes Window Associates), failed to properly furnish work (i.e., furnishing and installation of doors and windows, waterproofing) between mid-1998 and early 1999. Plaintiffs contend that the Longport Complaint potentially comes within the coverage of the Selective policy.

Plaintiffs also argue that Penn National is entitled to reimbursement of defense costs. Specifically, the Penn National policy issued to Cato provides that, in the event of other available insurance, the Penn National policy is primary and will contribute by equal shares if all other insurance provides likewise. Pls.' Mot. Partial Summ. J.-Ex. E, Penn National Policy at 9 (hereinafter referred to as "Penn National Policy"). Selective's policy has a similar provision that states that the insurance is primary and will share with all other insurance by equal shares. Selective Policy at 7. As such, Plaintiffs claim that Selective is obligated to reimburse Penn

National for one-half of the defense costs incurred from May 1, 2000 (the date the Longport Complaint was filed, since Penn National had first tendered the claim to Selective on November 5, 1999) to August 13, 2001. Pls.' Mot. Partial Summ. J. at 15. Because a third insurer became involved on August 14, 2001 when Penn National tendered the claim to Defendant Assurance, Plaintiffs submit that Defendant Selective is only responsible for one-third of the defense costs incurred from August 14, 2001 to the present. Id.

Finally, Plaintiffs argue that Cato is entitled to attorneys' fees for pursuing the instant action, as Selective's delay in acting upon Cato's tender and refusal to defend Cato constitutes bad faith. Plaintiffs cite Pennsylvania's bad faith insurance statute, 42 Pa.C.S. § 8371, in support of this argument. Id. at 16.

Selective counters by arguing that it owes Cato no defense or indemnification because the work undertaken by its insured, Window Associates, is only a small portion of the contracted project undertaken by Cato at the condominium property. Def. Selective's Resp. at 4. Selective maintains that its duty to defend Cato extends only to those allegations of the Complaint which deal with "work" and "product" furnished by Window Associates to Cato. Selective further argues that the allegations of the Complaint which are directed towards Window Associates's "work" and/or "product" are such a small portion of the overall claim, that there is at the very least a genuine issue of material fact as to whether Selective should be required to defend Cato. Id. at 6.

Additionally, Selective maintains that there are genuine issues of material fact regarding the primacy of the Penn National, Selective, and Assurance insurance policies. Id. at 8. Finally, Selective argues that Plaintiffs cannot raise a claim for attorneys' fees under 42 Pa.C.S. §

8371 because Plaintiffs were required to raise this cause of action in their initial Complaint and failed to do so. Id. at 10. Plaintiffs are only now raising this issue in their motion for partial summary judgment. If 42 Pa.C.S. § 8371 does apply, Selective argues that it has a good faith reason for refusing to defend and indemnify Cato. Id.

Based on the briefs submitted to the Court and the oral arguments, the Court grants in part and denies in part Plaintiffs' motion for partial summary judgment as to Defendant Selective.

First, Selective breached its duty to defend Cato. The Longport Complaint alleges that Longport's damages occurred as a result of the failure to properly furnish and install glass doors and windows, which constitute operations, work and/or products that Window Associates provided. The allegations in the underlying litigation potentially fall within coverage of the Selective Policy. As a result, Selective was required to defend Cato in the underlying action. Because Selective breached its duty to defend Cato in the underlying action, Selective is also required to reimburse Penn National for its defense costs.

Finally, the Court denies Plaintiffs' request for attorneys' fees under 42 Pa.C.S. § 8371, as Plaintiffs failed to raise this issue in their Complaint. Finding no bad faith on the part of Defendant Selective, the Court denies Plaintiffs' request for attorneys' fees.

### **III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT ASSURANCE AND DEFENDANT ASSURANCE'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Court has previously discussed Defendant Assurance's relationship with Plaintiffs and the standard of review for a motion for summary judgment. As such, the Court moves directly to the discussion.

Plaintiffs moved for partial summary judgment against Defendant Assurance. Plaintiffs seek an order compelling Defendant Assurance: (1) to provide a defense to Cato in the underlying action; (2) to reimburse Penn National for defense costs and fees incurred in the underlying litigation; and (3) to reimburse Penn National for costs and fees incurred in prosecuting the instant declaratory action. Assurance moved for partial summary judgment in its favor on the duty to defend, arguing that it has no duty to defend Plaintiff Cato in the underlying action, nor does it have a duty to reimburse either Plaintiff for fees or costs incurred in defending the underlying action.

Plaintiffs argue that Defendant Assurance breached its duty to defend Cato. In the underlying complaint, Longport alleged that Cato, both directly and through its subcontractors (which includes Melrose), failed to properly furnish work between mid-1998 and early 1999. Citing the insurance agreement between Melrose and Assurance, Cato argues that Assurance is obligated to defend Cato with respect to Melrose's work. Additionally, Plaintiffs argue that Assurance is required to reimburse Plaintiff Penn National for its alleged breach of the duty to defend.

In the event the Court finds that the Assurance policy is excess over the Selective policy, Plaintiffs submit that the Assurance policy is not excess as to Penn National's policy. Plaintiffs rely on the provision that states "[t]his insurance (the Assurance policy) is excess over any of the other insurance . . . (4) that is available to the insured as an *additional insured* under that other insurance." Pls.' Mot. Partial Summ. J.-Ex. F, Assurance Policy at 10 (emphasis added). Cato is an additional insured under the Selective policy, and, based on the language of the Assurance policy, the Assurance policy is excess over the Selective policy. But Cato is the

insured, not an additional insured, under the Penn National policy. As such, Plaintiffs argue that the Assurance policy provides Cato with primary coverage co-extensive with that provided to it by Penn National.

Assurance counters by arguing that it has no duty to defend Cato in the underlying action. Defendant Assurance argues that the Assurance policy is not triggered, if at all, until the Selective policy is properly exhausted. The Assurance policy states that it is excess over any other insurance “that is available to the insured as an additional insured under that other insurance.” Id. As such, Assurance argues that until the Selective policy is properly exhausted, Assurance is under no present duty to share coverage obligations with Penn National.

The Court finds that Assurance did not breach its duty to defend Cato. Coverage under an excess policy is not available, or triggered, until the underlying coverage is exhausted. The Assurance policy clearly provides that “[w]hen this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any ‘suit’ if any other insurer has a duty to defend the insured against that ‘suit.’” Id. at 11. Under the clear and unambiguous terms of the Assurance policy, when the Assurance coverage is excess, Assurance has no duty to defend “if any other insurer has a duty to defend the insured.” Id. In the present case, Defendant Selective has a duty to defend Cato. Whatever obligation Assurance has to share defense costs with Penn National, no such obligation can arise until Selective’s coverage has been properly exhausted.

Assurance’s policy is clearly excess over the other insurance. In turn, the Assurance policy has not yet been triggered, as Plaintiffs have failed to offer any evidence that the underlying Selective policy has been properly exhausted. Therefore, Assurance is under no present duty to share coverage obligations with Plaintiff Penn National.

Accordingly, Plaintiffs' motion for partial summary judgment against Defendant Assurance is denied, and Defendant Assurance's cross-motion for summary judgment is granted.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant Assurance's motion to dismiss is granted, Plaintiffs' motion for partial summary judgment as to Defendant Selective is granted in part and denied in part, Plaintiffs' motion for partial summary judgment as to Defendant Assurance is denied, and Defendant Assurance's cross-motion for partial summary judgment is granted.

An appropriate Order follows.

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

ROBERT CATO & ASSOCIATES,	:	
INC. and PENNSYLVANIA NATIONAL	:	CIVIL ACTION
MUTUAL CASUALTY INSURANCE	:	
COMPANY,	:	NO. 01-CV-4182
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SELECTIVE INSURANCE COMPANY	:	
OF AMERICA and MARYLAND	:	
CASUALTY COMPANY,	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 2<sup>nd</sup> day of July, 2003, it is hereby **ORDERED** as follows:

Upon consideration of Defendant Assurance Company of America's (improperly named in the Amended Complaint as Maryland Casualty Company and hereinafter referred to as "Assurance") Motion to Dismiss (Docket No. 13), Plaintiffs' Response (Docket No. 17) and Defendant Assurance's Reply thereto (Docket No. 20), it is **ORDERED** that Defendant Assurance's Motion to Dismiss is **GRANTED**.

Upon consideration of Plaintiffs Robert Cato & Associates, Inc.'s and Pennsylvania National Mutual Casualty Insurance Company's (collectively referred to as "Plaintiffs") Motion for Partial Summary Judgment as to Defendant Selective Insurance Company of America (Docket No. 26), Defendant Selective Insurance Company of America's Response (Docket No. 27), and Plaintiffs' Reply (Docket No. 30), it is **ORDERED** that

Plaintiffs' Motion for Partial Summary Judgment is **GRANTED** with respect to the duty to defend and **DENIED** with respect to attorneys' fees.

Upon consideration of Plaintiffs' Motion for Partial Summary Judgment as to Defendant Assurance (Docket No. 26), Defendant Assurance's Response and Cross-Motion for Partial Summary Judgment (Docket No. 28), Plaintiffs' Reply thereto (Docket No. 30), and Defendant Assurance's Reply Memorandum of Law in Further Support of its Cross-Motion for Partial Summary Judgment (Docket No. 33), it is **ORDERED** that Plaintiffs' Motion for Partial Summary Judgment as to Defendant Assurance is **DENIED** and Defendant Assurance's Cross-Motion for Partial Summary Judgment is **GRANTED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.