IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

UNIVERSITY MECHANICAL & ENGINEERING CONTRACTORS INCORPORATED	**: NOVEMBER TERM, 2000**
	: No. 1554
v.	
	: Commerce Program
INSURANCE COMPANY OF NORTH AMERICA	
	: Control No. 102415

O R D E R

AND NOW, this 1st day of May 2002, upon consideration of the Motion by the defendant, Insurance Company of North America ("INA"), to Dismiss this Action for Failure to Join Indispensable Parties, the response in opposition by plaintiff, University Mechanical and Engineering Contractors ("UMEC"), and the supplemental filings and stipulation and the respective memoranda and all matters of record, it is hereby **ORDERED** that the Motion to Dismiss is **Granted without prejudice** for the reasons set forth in the Opinion issued contemporaneously with this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... May 1, 2002

I. Introduction

Presently pending is a motion by defendant, Insurance Company of North America ("INA"), to dismiss a declaratory judgment action brought by University Mechanical & Engineering Contractors, Inc. ("UMEC"), on the ground that there is a lack of subject matter jurisdiction due to failure to join all indispensable parties.[1] Because the record at this early stage in a complex case was unclear as to the relationship of various entities and the status of the underlying litigation, additional briefs and stipulations were requested and received by the court. After consideration of INA's motion, plaintiff's response in opposition and all supplemental filings and matters of record, this court concludes for the reasons set forth that it presently lacks subject matter due to failure to join indispensable parties.

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[1] INA previously filed a motion to dismiss on the grounds of forum non conveniens which this court denied by Order and Opinion dated December 7, 2001.

II. Background

This dispute arises out of a hospital construction project in California. Mercy Healthcare Ventura County ("Mercy Healthcare"), a California non-profit public benefit corporation, had contracted in 1989 with Bateson-Golden, a California joint venture, for construction of a hospital. In February 1996, Mercy Healthcare filed a lawsuit against Bateson-Golden and other defendants because it alleged the hospital after construction had significant defects such as leaking windows, weeping walls, defective shower systems and defective HVAC systems.[2] Bateson-Golden subsequently filed cross-claims against UMEC, the plaintiff in this case. According to UMEC's Amended Complaint, INA funded a settlement and obtained releases on UMEC's behalf. Now, UMEC wants a declaration that it does not owe this money back to INA.[3]

INA contends, however, that UMEC's declaratory judgment action should be dismissed because it does not include indispensable parties. According to INA, the absent indispensable parties that should be joined can be classified into three different categories:

(1) The claimants in the underlying action: Mercy Healthcare and Bateson-Golden;
(2) Other insurance companies who either helped fund a settlement (that INA now characterizes as a "tentative" settlement) or whose policies were in effect during the relevant--as yet undefined-- period;
(3) EMCOR, who is the parent company of UMEC, and either the named insured, successor in interest to the named insured or the signatory of the policies under which UMEC claims coverage.

INA's 10/26/02 Motion to Dismiss, Memorandum at 1-2, 7.

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[2] Complaint, Mercy Healthcare Ventura County v. Bateson Golden et al., No. 168140 (Cal. Sup. Ct. 3/1997) paras. 1-2 & 13- 14(hereinafter "Mercy Healthcare Complaint"), attached to INA 10/26/02 Motion to Dismiss as Ex. C. See also INA 10/26/02 Memorandum at 2.

[3] Amended Complaint, United Mechanical & Engineering Contractors v. Insurance Company of North America, November 2000, No. 1554 (Phila. Ct. Common Pleas 4/19/2001)(hereinafter "UMEC Amended Complaint"), para. 16.

Unfortunately, INA's initial motion and pleadings were unclear as to certain factual details and issues such as the scope and status of the settlement of the underlying action as it relates to the relevant parties (i.e., UMEC, EMCOR, Mercy Healthcare and Bateson-Golden). The potential interests of other insurers were also unclear, especially since UMEC's Amended Complaint provides only a meager outline of its insurance dispute with INA. Moreover, the UMEC Amended Complaint fails to mention the role of EMCOR despite the references to EMCOR in the policies UMEC attached to its complaint. See UMEC Amended Complaint, Ex. A (Endorsement 45, dated 2/14/95 with an effective date of 12/15/94 stating that the named insured is amended to EMCOR Group, Inc.); Ex. C (Amendment #3 to CIPA signed by EMCOR Group Inc.). In its Answer, INA outlines other insurers involved in the underlying dispute and notes more specifically that the settlement fund referenced in paragraph 16 of UMEC's Amended Complaint was funded by Indemnity Insurance Company of North America ("IINA") and ACE Property & Casualty Insurance Company ("ACE P & C"). INA Answer to UMEC Amended Complaint, para.16.

III. ANALYSIS

A. Declaratory Judgment Actions and Indispensable Parties

Declaratory judgment actions are frequently initiated to resolve disputes over an insurance company's duty to defend or indemnify an action brought against an insured. Harleysville Mutual Ins. Co. v. Madison, 415 Pa. Super. 361,*365, A.2d 564, *566 (1992). As the Pennsylvania Supreme Court recently observed, the "purpose of the Declaratory Judgments Act is 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.'" General Accident Insurance Co. v. Allen, 547 Pa. 693, *701, 692 A.2d 1089, *1092-93 (1997)(citations omitted). The General Accident court outlined a court's procedure for a declaratory judgment action:

> A court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover. The duty to defend also carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy. Although the duty to defend is separate from and broader than the duty to indemnify, both duties flow from a determination that the complaint triggers coverage.

General Accident Insurance Co. v. Allen, 547 Pa. at *706, 692 A.2d at *1095 (citations omitted). Before reaching the substantive merits, however, there is a requirement that all indispensable parties with an interest in the action be joined. This flows from the Declaratory Judgment Act which provides:

> **General rule.**-- When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding.

42 Pa.C.S.A. section 7540(a).

The Pennsylvania Rules of Civil Procedure provide that the defense of failure to join an indispensable party may not be waived. Pa.R.C.P. 1032(a). Under Pennsylvania precedent, failure to join an indispensable party to a declaratory judgment action deprives a court of subject matter jurisdiction. Vale Chemical Co. v. Hartford Accident and Indemnity Company, 512 Pa. 290, *292, 516 A.2d 684, *685 (Pa. 1986); Insurance Co. of Pa. v. Lumberman's Mutual Casualty Co., 405 Pa. 613, *616, 177 A.2d 94, *95 (1962).[4]

[4] For a general discussion of declaratory judgment actions, see Howard, "Declaratory Judgment Coverage Actions: A Multistate Survey and Analysis," 21 Ohio N.U.L.Review 13, 18 (1994)(observing that "Pennsylvania is perhaps the state that most stringently adheres to the mandatory joinder requirement").

As the Vale court explained:

> [E]ssential to the adversary system of justice and one of the basic requirements of due process, is the requirement that all interested parties have an opportunity to be heard. Thus all parties whose interest will necessarily be affected must be present on the record.

Vale, 512 Pa. At *296, 516 A.2d at *688.

Consequently, Pennsylvania appellate courts will reverse a trial court that rules on the substance of a declaratory judgment action where it lacks jurisdiction to do so. Moreover, a court may raise this issue of subject matter jurisdiction sua sponte if the parties do not raise it. See, e.g., Erie Insurance Group v. Cavalier, 380 Pa. Super. 601, *602 & *605, 552 A.2d 705, *705 & *707 (1989)("Finding the trial court lacked subject matter jurisdiction over this action as a result of appellant's failure to join the insureds as party defendants, we vacate the trial court's order and dismiss the action"); PIGA v. Schreffler, 360 Pa. Super. 319, *322 n.4 & *323, 520 A.2d 477, *479 & n. 4 (1987) (42 Pa.Cons. Stat.Ann. 7540 "constitutes a jurisdictional requirement with respect to joinder of indispensable parties"). The party seeking a declaratory judgment has the burden of proving that all interested parties have been made parties. Moraine Valley Farms, Inc. v. Connoquenessing Woodlands Club, 296 Pa. Super. 277, *281, 442 A.2d 767, *769 (1982).

B. Threshold Choice of Law Issue

The parties disagree on the substantive law that should be applied in this case. INA argues that New York law applies under a choice of law analysis focusing on New York's greater interest in the insurance policy. See 3/30/02 INA Memorandum at 2-9. UMEC argues that Pennsylvania substantive law applies because that was the law the parties selected in one of the agreements at issue, the

Casualty Insurance Program Agreement ("CIPA").[5]

In Pennsylvania, the first step in a choice of laws analysis is to determine whether the laws of the competing states conflict. If the laws do not conflict, no further analysis is necessary. Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, *702 (Pa. Super. 2000), app. denied, 785 A.2d 90 (Pa. 2001). If the laws of the relevant states conflict, then the "flexible conflicts methodology" must be applied to insurance contracts to determine which state has the most significant contacts or relationships with the particular issue. Caputo v. Allstate Ins. Co., 344 Pa. Super. 1, 495 A.2d 959, **961 (1985), citing Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). See also McCabe v. Prudential Property and Casualty Ins. Co., 356 Pa. Super. 223, 514 A.2d 582, 585-86 (1986). However, if the parties have designated that the law of a particular state should apply to their agreement, then Pennsylvania courts typically will apply that choice of law provision. See Miller v. Allstate Ins. Co., 2000 Pa. Super. 350, 763 A.2d 401, *403 (2000)("We need not decide which state had the most significant contacts" because "Pennsylvania local rules of law as to procedure and evidence were properly applied through the parties' choice of law provision in the insurance contract"); Restatement (Second) of Conflict of Laws, Section 187.

Applying these principles to the narrow issue of whether all indispensable parties have been joined, this court concludes that on the preliminary record before it, Pennsylvania law should apply because of the choice of Pennsylvania law in the CIPA agreement that the plaintiff invokes in its Amended Complaint.

Notwithstanding, INA stresses three arguments to support its claim that the CIPA choice of law provision should not be applied, namely: (1) UMEC is not a party to the CIPA and thus lacks standing to

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[5] See 3/8/02 UMEC Memorandum at 1; UMEC Amended Complaint, Ex. B., section 7.04(A).

enforce it, (2) The CIPA's choice of law provision applies only to the CIPA and not to the insurance contracts involved in this case, (3)The CIPA does not replace or supersede the INA contract and both contracts are entirely separate. INA 3/30/2002 Memorandum of Law at 10- 16. These, however, are substantive issues that go to the merits of the parties' dispute. It would be premature to resolve these substantive issues prior to a determination of whether all indispensable parties have had an opportunity to present their arguments. The most prudent course is to apply the choice of law provision in the CIPA agreement that is specifically invoked in the UMEC Amended Complaint to resolve this threshold issue by applying its choice of Pennsylvania law.

Alternatively, an analysis of relevant Pennsylvania and New York precedent suggests, on the one hand, that there is no conflict as to whether the other interested insurers or the named insured (i.e., EMCOR) are indispensable parties. However, New York precedent on whether claimants in the underlying action are indispensable parties to a declaratory judgment action is unclear and may conflict with Pennsylvania law. Pennsylvania law, however, is quite clear as to the indispensability of such parties.

In the interest of clarity, this issue will be discussed in the section addressing the joinder of claimants Mercy Healthcare and Bateson-Golden. As a practical matter, however, since this court concludes that Pennsylvania law applies under the CIPA, this area of conflict as to the indispensability of the claimants is not significant.

C. EMCOR, the parent of UMEC and Signatory of the INA Policy, as an Indispensable Party

Pennsylvania precedent recognizes that an insured should be joined as an indispensable party where a declaratory judgment action has been brought to determine the scope of coverage. The

Pennsylvania Supreme Court in Insurance Co. of the State of Pa. v. Lumberman's Mutual Casualty Co., 405 Pa. 613, 177 A.2d 94 (1962), concluded that a declaratory judgment brought by one insurer against another insurer should be dismissed for lack of jurisdiction due to failure to join the insured as an indispensable party. The plaintiff/insurer's had argued that the insured need not be joined because the only issue between the insurers concerned division of coverage. The Lumberman court countered that the insured had serious interests in the action for at least two reasons: (1) the claimant might obtain a judgment in excess of the insured's policy with plaintiff, or, (2) the plaintiff or defendant insurer might become bankrupt.

Similarly, in Erie Insurance Group v. Cavalier, 380 Pa. Super. 601, 552 A.2d 705 (1989), the Pennsylvania Superior Court dismissed a declaratory judgment action brought by an insurance company because it failed to include either the named insured or the insured party under the policy in its lawsuit. In raising sua sponte the issue of failure to join an indispensable party, the Erie court explained that "clearly an insured has an interest in a declaratory judgment action where the insurer seeks to limit his amount of coverage as he does in an action where the declaration is sought to deny coverage" because the insured is interested in securing the maximum coverage. Id., 552 A.2d at *707. See also PIGA v. Schreffler, 360 Pa. Super. 319, 520 A.2d 477 (1987)(where insurer brought declaratory judgment action to limits its liability towards its insured tavern owner, the insured was an indispensable party to that action).

As a threshold matter, New York courts -- like Pennsylvania courts-- conclude that a declaratory judgment action may be dismissed for failure to join an indispensable party. Terner v. City of Peekskill, 124 N.Y. S.2d 24, *26 (N.Y. Sup. Ct. 1953)("this court is of the opinion that it should not assume jurisdiction of this action where these vitally interested property owners have not been made parties"); Cadman

Memorial Congregational Society of Brooklyn, 111 N.Y.S.2d 808, **812, 279 A.D.1074, *1076 (N.Y. App. Div. 2d Dept. 1952)("A court may, and ordinarily must, refuse to render a declaratory judgment in the absence" of indispensable parties whose interest may be effected thereby). The New York Supreme Court, Appellate Division stated that:

> A declaratory judgment serves a legitimate purpose only when all interested persons who might be affected by the enforcement of rights and legal relations are parties.

White v. Nationwide Mutual Ins. Co., 228 A.D. 2d 940, 644 N.Y.S. 2d 590, *591 (N.Y App. Div. 3d Dept. 1996)(citations omitted).

In Bello v. Employees Motor Corp., 240 A.D.2d 527, 659 N.Y.S.2d 64 (N.Y. App.Div.2d Dept. 1997), the New York Supreme Court, Appellate Division for the Second Department, dismissed a declaratory judgment action concerning insurance coverage for failure to join the insured under the policy in dispute. As the Bello court observed, "the plaintiff failed to name Raphael Torres, an insured under the disputed policy and active tortfeasor. This was an error because Torres' rights 'might be equitably affected by a judgment in this action.'" Bello, 659 N.Y.S.2d at 65. See also White v. Nationwide Mutual Insurance Co., 228 AD 2d 940, 644 N.Y.S.2d 590 (N.Y. App.Div. 3d Dept. 1996)(declaratory judgment action brought against insurance company by injured party is dismissed for failure to join the insured); American Home Assurance Co. v. Employers Mutual of Warsaw, 64 A.D. 2d 563, 406 N.Y.S.2d 826, *827 (N.Y. App.Div. 1st Dept.1978) (scope of insurance coverage should not be determined in a declaratory judgment action in the absence of the injured party and the insured).

INA asserts that EMCOR must be joined as an indispensable party because it is a named insured under each insurance contract issued to University Mechanical and because INA and other insurers,

identified by INA, funded a settlement on behalf of EMCOR and UMEC. INA 10/26/2002 Memorandum at 7. An analysis of the documents UMEC attaches to its Amended Complaint supports the conclusion that EMCOR Company was a named insured under the policies that are the basis for UMEC's claims. The policy attached as Exhibit A initially lists as its named insured "JWP, Inc." but it subsequently contains the following amendment dated 2/14/95:

> It is hereby agreed and understood that the Named Insured under the policy is amended to read as follows:
>
> EMCOR, Group, Inc.

UMEC Amended Complaint, Ex. A, Endorsement # 45.

The CIPA policy attached as Ex. B to the UMEC Amended Complaint is signed by JWP, Inc. or EMCOR's predecessor. Finally, the policy attached as Exhibit C to UMEC's Amended Complaint is entitled "Amendment #3 to Casualty Insurance Program Agreement Effective October 1, 1993 among JWP, Inc. [NKA EMCOR Group, Inc.] as the Insured." The policy is signed by Rex Thrasher for "EMCOR Group, Inc." after the words "The INSUREDS." See UMEC Amended Complaint, Ex. C. Hence, under 2 of the 3 policies that UMEC relies upon, the named insured or signatory is EMCOR. EMCOR must therefore be joined as an indispensable party.

UMEC counters that INA has advanced no theory or case law "requiring that the parent company of an insured be joined in the subsidiary's coverage action." UMEC 12/24/01 Response, para. 3, It argues, moreover, that UMEC and not EMCOR was named as a party to the underlying action. UMEC 12/24/01 Memorandum at 9. This argument, however does not explain why EMCOR as an admittedly named insured, successor in interest to a named insured, or signatory under the policies that UMEC has relied upon in its dispute with INA would not have an interest in making sure the policy terms are honored

by INA. Indeed, one of the substantive issues may be, as INA suggests, whether UMEC can assert claims under policies issued to EMCOR. On the present record, therefore, the motion should be granted for failure to join EMCOR, a named insured[6], a successor in interest to the named /signatory insured[7] or a signatory [8] under the policies that UMEC invokes for its coverage.

D. Plaintiffs/Claimants in the Underlying Action -- Mercy Healthcare and Bateson-Golden -- As Indispensable Parties to an Insurance Declaratory Judgment Action Under Pennsylvania Law

INA argues that the claimants in the underlying action, Mercy Healthcare and Bateson- Golden, should be joined as indispensable parties. This argument is supported by Pennsylvania precedent. New York precedent on this issue, however, is conflicting. Pennsylvania courts consistently hold that the plaintiff claimants who sue an insured are indispensable parties to any declaratory judgment action brought to determine the scope of an insurer's coverage of the insured. The lead Pennsylvania case, as INA points out, is Vale Chemical Co. v. Hartford Accident and Indemnity Co., 512 Pa. 290, 516 A.2d 684 (1986). In Vale, the Pennsylvania Supreme Court dismissed a declaratory action brought by two insurers of Vale

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[6] See UMEC Amended Complaint, Ex. A INA Policy HDO G1 658789-8. Initially the named insured on this policy's first page is "JWP, Inc., Royal Executive Park, Six International Drive, Rye Brook, N.Y. 10573 but under endorsement #45 with an effective date of 12/15/94, the named insured was amended to EMCOR Group, Inc. 101 Merritt 7 Corporate Park, 7th Floor, Norwalk CT 06851.

[7] See UMEC Amended Complaint, Ex. B Casualty Insurance Program Agreement ("insured" is listed as "JWP, Inc. with a signature by Rex Thrasher, Director of Risk Management dated 9/8/94 on page 13 of 13).

[8] See UMEC Amended Complaint, Ex. C "Amendment #3 to Casualty Insurance Program Agreement Effective October 1993 among JWP, Inc. [NKA Emcor Group, Inc.] as the Insured . . . with a signature by Rex Thrasher for EMCOR Group, Inc. after the words "THE INSUREDS on page 3 of 3).

Chemical, which manufactured DES and had been sued by an Illinois plaintiff for allegedly causing her cancer, for failure to join the Illinois plaintiff. The court held that this failure to join was fatal and the declaratory judgment action had to be dismissed.[9] The Vale court emphasized:

> Our Supreme Court has consistently held that where claims are asserted against an insured, the persons asserting the claims are indispensable parties in a declaratory judgment action on the issue of coverage between the insured and the insurance carrier. The failure to join a claimant whose interest would be affected has been held to be fatal error.

Vale, 516 A.2d at *686 (quoting Pleasant Township v. Erie Ins. Co., 22 Pa. Cmwlth. 307, 348 A.2d 477, 479-80 (1975)).

This result is consistent with numerous other Pennsylvania cases recognizing that plaintiff/claimants in an underlying action are indispensable parties to a declaratory judgment action over coverage of an insurer and its insured who has been sued by the claimant. See, e.g., Keystone Insurance Co. v. Warehousing & Equipment Corp., 402 Pa. 318, 324, 165 A.2d 608, 611 (1960)(Failure to join administrator of wrongful death action against insured was a fatal defect in the declaratory judgment action as to the insurer's coverage of the insured); Township of Pleasant v. Erie Ins. Ex., 22 Pa. Cmwlth. 307, *311, 348 A.2d 477, 480 (1975)(Claimant state agencies who brought action against Township were indispensable parties to declaratory judgment action brought by Township against its insurer). See also Richards v. Trimbur, 374 Pa. Super. 352, 543 A.2d 116 (1988), app. denied, 522 Pa. 620, 563 A.2d 888 (1989)(suggesting that injured plaintiff in underlying action would have been indispensable party to a

[9] Significantly, the Vale court expressed no concern or interest in whether a Pennsylvania court could assert jurisdiction over the Illinois resident, suggesting the in personam jurisdiction over a particular party is not to be factored into an indispensable party analysis. See Vale, 516 A.2d at *688 ("It is clear that if personal jurisdiction of the Illinois plaintiff could have been had, her joinder would have given the court jurisdiction, under our Declaratory Judgment Act, to entertain this action").

declaratory judgment action brought by insureds to determine the scope of coverage by defendant insurer if that action had not been discontinued).

A court that took a different position, Northbrook Ins. Co. v. Sanders & Thomas, Inc., 49 Pa. Cmwlth. 389, 411 A.2d 278 (1980), concluded that where PennDot sued a construction company and engineering consulting firm for faulty construction of a bridge, PennDot was not an indispensable party to a declaratory action brought by the construction company's insurers to determine which policy covered the claim. This result is contrary to the Pennsylvania Supreme Court's subsequent ruling in Vale. Moreover, the Northbrook holding may have been influenced by the Commonwealth Court's reluctance to extend its jurisdiction over the declaratory judgment action by virtue of PennDot's status as a Commonwealth Agency because of the general principle that the Commonwealth should not be declared an indispensable party unless "such action cannot conceivably be concluded with meaningful relief without the sovereign state itself becoming directly involved." Northbrook, 411 A.2d at *279 (citations omitted)(emphasis added).

Unfortunately, New York precedent on the indispensability of claimants in the underlying action is more complicated. INA argues that under New York law the underlying claimants would not be indispensable parties to this insurance coverage action. In support of this assertion, INA relies on Clarendon Place Corp. v. Landmark Ins. Co., 182 App. Div. 2d 6, 587 N.Y.S. 2d 311 (App. Div. 1st Dept. 1992) and N.Y.[Ins.] Law Section 3420(b)(McKinney's 2001). In Clarendon, the representative of persons who died in a fire brought a personal injury and wrongful death action against the owner of the building, Clarendon Corporation. Clarendon then brought a declaratory judgment action against its insurers who had disclaimed coverage. In so doing, it joined the representative of the people who had been killed

in the action (i.e., the claimants in the underlying action). The New York Supreme Court, Appellate Division for the First Department, concluded that under the Insurance Law section 3420, the claimant/representative of the deceased fire victims had no rights against the insurers unless and until a judgment was entered against the insured in the underlying tort action. The Clarendon court reasoned that section 3420[10] created a direct statutory claim by an injured party against the insurer of the party who injured them provided that certain conditions were met such as a final unsatisfied judgment against the insured. Id., 182 A.D. at *9, 587 N.Y.S. 2d at *313. Otherwise, these claimants would have no direct claim against the insurer due to lack of privity. From this conclusion, the court made the leap that these tort claimants had no standing in the declaratory judgment action because they had not satisfied the requirements of section 3420(b)(1). Id., 182 A.D. at *9-10, 587 N.Y.S. 2d at *313.

INA fails to acknowledge, however, that a contrary position was taken by the New York Supreme Court, Appellate Division for the Second Department,[11] in Watson v. Aetna Casualty & Surety Co., 675 N.Y.S. 2d 57, 675 N.Y.S.2d 367 (N.Y. Sup.Ct. App. Div. 2d Dept. 1998). The Watson court

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[10] The relevant portions of section 3420 provide:

> (b) Subject to the limitations and conditions of paragraph two of subsection (a) hereof, an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance which is governed by such paragraph, to recover the amount of a judgment against an insured or his personal representative:
>
> > (1) any person who, or the personal representative of any person who, has obtained a judgment against the insured or his personal representative, for damages or injury sustained or loss or damage occasioned during the life of the policy or contract.

N.Y.[Ins.] Law section 3420(b)(1)(Mckinney's 2001).

[11] In Nap, Inc. v. Shuttletex, Inc., 112 F.Supp. 2d 369 (S.D. N.Y. 2000), the federal district court noted the split between the departments of the New York Court of Appeals on this issue. The Nap court concluded that the Clarendon court's analysis was more "compelling." Id., 112 F.Supp. 2d at *378.

concluded that the "Clarendon Place Rule" was too rigid and unsupported by the statutory language:

> We read Insurance Law section 3420 as prohibiting, by its plain terms only a direct cause of action to recover money damages, and not prohibiting a declaratory judgment action by the plaintiff in the underlying tort action seeking a declaration that a disclaiming insurance company owes a duty to defend or indemnify the tortfeasor.

Watson, 246 A.D.2d at *61, 675 N.Y.S.2d at *370.

The Watson court noted that leading commentators and prior precedent had recognized the appropriateness of a declaratory judgment action brought by an injured plaintiff to determine who should defend the action. Id., 246 A.D.2d at *62-63, 675 N.Y.S.2d at *370 (citations omitted).

This conflicting precedent concerning whether the injured plaintiff in an underlying action can maintain a declaratory judgment action against an insurer is indirectly relevant to the issue of whether such a claimant plaintiff must be joined as an indispensable party in a declaratory judgment action involving insurance coverage. At best, this precedent suggests that such joinder would be merely permissive. See, e.g., Lieberman v. New Amsterdam Casualty Co., 284 A.D. 1051, 135 N.Y. S. 2d 850 (1954)(action will not be dismissed for failure to join underlying claimant but if insurer believes he is indispensable, it should join him). There is, however, New York precedent suggesting that the interests of claimants should be given special consideration.

In at least three New York cases, courts have ruled that plaintiff claimants in an action underlying an insurance declaratory judgment dispute were interested or indispensable parties to the declaratory judgment action. In Argonaut Insurance Co. v. Occidental Petroleum, 106 Misc. 2d. 5, 430 N.Y.S.2d 982 (N.Y. Sup. Ct. 1980), the Supreme Court, Niagra County concluded that a New York declaratory judgment action by an insurer to determine whether it was required to defend its insured Hooker Chemicals

& Plastics Corporation in a personal injury action for Hooker's alleged dumping of waste into Love Canal should not be stayed until resolution of a similar California action. The Argonaut court reasoned that only in the New York forum could the individual plaintiff/claimants be joined. As the court explained:

> The question of whether or not the damage insurance carriers will be required to pay the judgments the damage plaintiffs may recover or whether the carriers will be excluded from this obligation under their insurance contracts is of paramount concern to the damage litigants. At this time, the ability of Hooker to shoulder the entire financial burden in the event of a total recovery by the damage plaintiffs is unknown.

Argonaut, 430 N.Y.S. 2d at *986-987.

In American Home Assurance Co. v. Employers Mutual Warsaw, 64 A.D. 2d 563, 406 N.Y.S. 2d 826 (N.Y. App.Div. 1978), the court found that both the insured and injured plaintiff who brought an action against the insured were indispensable parties to a declaratory judgment action by the insurer seeking a determination of its obligation to the insured. The court, however, did not overrule the trial court for reaching the merits without dismissing the action for failure to join the insured or plaintiff claimant. Finally, in Glenns Falls Indemnity Co. v. Bellinger, 142 N.Y.S.2d 401 (N.Y. Sup. 1954), the New York Supreme Court for Oneida County concluded a judgment that had been entered in favor of an insurer in a declaratory judgment action should be set aside for failure to join the infant daughter of the deceased, because she was an indispensable party as beneficiary to the underlying wrongful death action.

As a practical matter, however, the potential conflict between New York and Pennsylvania law as to the indispensability of a claimant in the underlying action is not determinative in light of this court's conclusion that Pennsylvania law applies by virtue of the choice of law provision in the CIPA. Consequently, under Pennsylvania law, Mercy Healthcare and Bateson-Golden as claimants in the underlying action should be joined.

The instant action is further complicated by a factual dispute as to the exact status of a "settlement" with Mercy Healthcare that has been referenced in both UMEC's Amended Complaint and INA's Answer. In its Amended Complaint, for instance, UMEC states that "Defendant [INA] defended and paid $637,000 to effectuate a settlement with Mercy Healthcare and Defendant obtained a release of UMEC in the Underlying Action." UMEC Amended Complaint, para. 16. In response, INA states: "INA admits only that it, Indemnity Insurance Company of North America ("IINA"), and ACE Property & Casualty Company funded a settlement of the Underlying Action and obtained releases and other protections for the plaintiff." INA Answer, para. 16.

In its motion to dismiss, however, INA characterized the settlement as "tentative" and funded by INA, Zurich, IINA and Ace P & C to protect the interests of EMCOR and its subsidiary UMEC. It then states that the action has not yet been settled, that the money has been held in escrow for a year and that the underlying matter is still pending in California. INA 10/26/01 Memorandum at 3. INA supports its characterization of the underlying settlement as "tentative" with a Reply Affidavit by Julie Bernard, an employee of ACE USA, the parent of INA.[12] In a subsequent affidavit filed January 7, 2002, she seeks to "clarify" earlier affidavits in which she had suggested that the underlying action was settled[13] with the explanation that when she submitted the earlier affidavits, "the status of the Underlying Action was not at

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[12] See INA 10/26/01 Motion. Ms. Bernard's 10/22/01Affidavit is attached immediately after the Motion. In it she characterizes the settlement as "tentative." See id., para. 7.

[13] See, e.g., UMEC's Response, Ex. 2, Affidavit of Julie Bernard dated March 20, 2001 with a caption for the New York Supreme Court in which she stated: "In November 2000, INA, IINA and ACE P&C--in an effort to ensure the interests of EMCOR and University Mechanical were protected--funded the settlement of the Underlying Action on EMCOR's and University's behalf, and paid $637,000." Bernard Affidavit, para. 5.

issue either here or in the more comprehensive insurance-coverage action pending in New York"-- even though both UMEC's complaint and INA's Answer had focused on the funds expended for the settlement. Compare Bernard 1/7/2002 Affidavit at para. 2 with UMEC Complaint and INA Answer, para. 16. These ostensibly conflicting statements serve to undermine Ms. Bernard's credibility. See, e.g., Bernard 1/7/2002 Affidavit at 3 (noting that "[n]ow INA is seeking to dismiss this action on the grounds that the Underlying Action was not settled and therefore that UMEC has failed to join the underlying claimants--Mercy Healthcare and Bateson-Golden).

Rather than resorting to conflicting affidavits, to gain a clearer view of the scope and status of any settlement of the underlying California action this court requested additional memoranda and a stipulation about that settlement. The parties responded by submitting the following statement as to the California settlement:

> 2. As of March 8, 2002, the Settlement Agreement has not been signed by all parties, the settlement funds have not been disbursed out of escrow, and the Underlying Action has not been dismissed.

Stipulation, para. 2, dated March 9, 2002 (signed by attorneys for defendant) and Stipulation dated March 8, 2002 (signed by attorneys for plaintiff).

The stipulation signed by defense counsel attached a copy of the "Confidential Settlement Agreement and Release" as Exhibit A. In the interest of maintaining the confidentiality of this agreement, the specific terms will not be discussed. What is significant for purposes of deciding whether Mercy Healthcare and Bateson-Golden are indispensable parties in this action is the broad scope of the proposed settlement. Initially, it appears as if a narrow settlement had been carved out just for UMEC. UMEC's Amended Complaint stated, for instance, that $637,000 had been expended to fund the settlement and a

release had been obtained for UMEC.[14] The document tendered by the defendants, however, suggests that the settlement agreement had a more global scope and involved numerous defendants involved in the California action.

Thus, if as the parties stipulate, the Underlying Action has not been dismissed and a trial is pending, the plaintiffs still have an unsettled claim against UMEC who has not negotiated some separate peace. Indeed the settlement agreement itself provides that the plaintiff may terminate the agreement if the requisite funds were not placed in escrow by December 1, 2000. Settlement Agreement, para. 1(e)(2). These California claimants must therefore be joined as indispensable parties.

UMEC argues, however, that INA has made judicial admissions that the underlying action has settled and it must be bound by these initial statements in its Answer and the earlier affidavits of Julie Bernard because these constitute judicial admissions. UMEC 12/24/2002 Memorandum at 6. It relies on both New York and Pennsylvania precedent. The precedent as to the binding power of judicial admissions is not as monolithic as UMEC suggests. Moreover, it likely would not be dispositive to a non-waivable defense such as failure to join an indispensable party which can be raised sua sponte even by an appellate court. Admittedly, our Commonwealth Court in Kaiser v. Western States Administrators, 702 A.2d 609, *612 (Pa. Cmwlth. 1997) stated that "our Supreme Court stated that admissions contained in a party's pleading constitute judicial admissions and cannot be contradicted by the party who has made them regardless of the method by which he seeks to contradict his prior admission." It then softened this conclusion by stating that contradictions among pleadings are permitted if "the party can explain its

[14] UMEC Amended Complaint, para. 16.

contradicting averments." Id., 702 A.2d at *613. INA offers just such an explanation when it points out that its Answer did not say that the Underlying Action had settled but merely that it had funded a settlement of the Underlying Action and obtained releases for plaintiff UMEC. See INA Answer para. 16; INA 1/11/2002 Reply Memorandum at 4. It stated further that the monies have not been paid to any party because the underlying action has not been settled. In this context, the statements by INA do not constitute binding admissions that a settlement of the underlying action was actually consummated.

E. Insurers Other than INA as Indispensable Parties

Pennsylvania precedent on the necessity of joining other insurers is not as prolific as the Pennsylvania precedent relating to the joinder of claimants in the underlying action. Under both Pennsylvania and New York precedent, interested insurers have been characterized as indispensable parties to a declaratory judgment action involving insurance coverage. In Vale Chemical Company v. Hartford Accident & Indemnity Co., 512 Pa. 290, 516 A.2d 684 (1986), the Pennsylvania Supreme court concluded that a declaratory judgment action brought by two insurance companies as to their coverage of their insured who manufactured DES had to be dismissed because of failure to join the Illinois plaintiffs who had brought suit against the insured. It also suggested, albeit in dicta, that the action would have to be dismissed for failure to join all of Vale's other insurance companies. In response to the argument that the court should resolve the coverage issue despite joinder of the Illinois plaintiff since there were many similar actions pending, the Vale court cautioned:

> If this is indeed the case, and the parties would like to determine all of Vale's insurance companies' responsibilities in this case, it would have to be dismissed because the record does not indicate that all insurance companies representing Vale have been joined.

Vale, 516 A.2d at *687 (emphasis added).

New York law takes a similar position. In Staten Island Hosp. v. Alliance Brokerage Corp., 137 A.D. 2d 674, 524 N.Y.S. 2d 766 (N.Y. App. Div. 2d Dept. 1988), the New York Supreme Court, Appellate Division, concluded that reinsurers or insurers were indispensable parties to a declaratory judgment action brought by a hospital against the brokers who sold the allegedly inadequate policies to the hospital.

UMEC argues that insurers other than INA are not indispensable because under J.H. France Refractories Co. v. Allstate Insurance Co., 534 Pa. 29, 626 A.2d 502 (1993), UMEC is entitled "to select an insurance policy for a particular year under which it seeks coverage for the same risk." UMEC's 12/24/2001 Response, para. 1. This is an over simplication of the 1993 J.H. France Refractories opinion which did **not** deal with whether a particular **insurer** was an indispensable party. The issue of an indispensable party had been generally raised in a prior 1989 opinion in the same case, J.H. France Refractories Co. v. Allstate Insurance Co., 521 Pa. 91, 555 A.2d 797 (1989). There the Supreme Court observed that J.H. France, a manufacturer of asbestos, had been insured by a variety of insurers over an eleven year period. When personal injury lawsuits were filed against France, it brought a declaratory judgment action against these insurers who had refused to defend or indemnify J.H. France. There was no question raised as to the indispensability of all the insurers since ostensibly they were all parties to the declaratory judgment action. Instead, the court focused on whether claimants who filed actions against J.H. France after it filed its declaratory judgment action had to be included as indispensable parties. After concluding that these post-filing claimants were not indispensable, the court noted that the liability issues had gone to trial where the various insurance contracts could be adjudicated together because of their basically identical language.

In the subsequent 1993 J.H. France opinion upon which UMEC relies, the Pennsylvania Supreme Court was not addressing the indispensability of all insurers who had covered an insured over a relevant period. Rather, it noted that all six insurers had insured J.H. France with policies containing nearly identical language and that the injuries at issue had been caused by exposure to asbestos that occurred over an extended period time so that it was difficult to pinpoint which policy was in effect at a precise time of injury. In light of the unique nature of this latent disease injury, therefore, the Superior Court adopted a "multi-trigger" theory for determining liability among all insurers--which essentially meant that liability as to each had been determined but the allocation of damages had to be determined by some scheme. The Supreme Court did not object to this threshold determination that liability for all insurers had been established; it merely rejected the Superior Court's effort to determine damages based on a "pro-rata" division. Since under these facts all insurers were liable, the court in essence concluded that J.H. France should be free to choose the policy or policy under which it would be indemnified:

> In other words, once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at time other than when the insurer was on the risk. The insurer in question must bear potential liability for the entire claim.
>
> In keeping with this analysis, we conclude that each insurer which was on the risk during the development of an asbestosis-related disease is a primary insurer. In order to accord J.H. France the coverage promised by the insurance policies, J.H. France should be free to select the policy or policies under which it is to be indemnified.

J.H. France, 626 A.2d at *508.

The option that the J.H. France court gave the insured to select from among its various insurers, therefore, was given only after the court determined the threshold liability of each insurer in light of the unique nature of the asbestosis injury at issue in the underlying case. It thus came after a trial had taken

place to determine the liability of each insurer based on a careful analysis of all the insurance policies and the nature of the asserted injury as set forth with expert testimony. None of this proof of shared liability has occurred in the present case. None of the insurance policies implicated here have been presented, let alone examined. It therefore would be improper and premature to allow UMEC to select only one of the insureds as the source of its indemnification.

Unfortunately, the task of determining which insurers should be joined is rendered difficult by the lack of a clear record as to which insurers are interested parties in UMEC's action. INA asserts that other insurers should be joined, but it does not clearly identify exactly which other insurers need to be joined. There are, for instance, discrepancies between the insurers referenced in INA's Answer to UMEC's Amended Complaint and its Motion with regard to which insurers are interested in this action and the rationale for their interest. In its Answer, INA references only two other insurers (IINA and Ace P & C) as "funding a settlement" on behalf of UMEC. See Answer para. 16. In its motion, however, it asserts that the insurer Zurich must also be joined because it funded the settlement. INA 10/26/01 Motion, para. 3. In its supporting memorandum INA adds a new insurer, CNA, as an indispensable party because its policy was at risk during the "relevant" period which has yet to be clearly defined.[15]

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[15] INA 10/26/01 Memorandum at 4. A first step in defining the period at issue would be the complaint filed in the underlying action. See INA 10/26/01 Motion, Ex. C, Complaint, Mercy Healthcare Ventura County v. Bateson- Golden et al., No.l 163140 (Cal. Superior Court). There plaintiff Mercy Healthcare sued Bateson-Golden, a California joint venture that functioned as a general contractor. Mercy Healthcare Complaint, para. 1-2. Mercy Healthcare also sued a number of other entities in their individual capacities and as members of the Bateson-Golden joint venture as well as an architectural firm, electrical engineer and various "Does 1 through 100" that were agents of the named defendants. Mercy Healthcare Complaint, paras. 3-10. In terms of setting the time frame at issue, the Complaint alleges that plaintiff entered into a contract with Bateson Golden in or about 1989 for the construction of a hospital.Mercy Healthcare Complaint, para. 13. Bateson Golden subsequently filed

One solution to this conundrum is to focus precisely on the allegations of UMEC's Amended Complaint to determine which insurers would be indispensable as to its claims. In its Amended Complaint, UMEC states that defendant INA "defended and paid $637,000 to effectuate a settlement with Mercy Healthcare and defendant obtained a release of UMEC in the underlying action." INA contended in its Answer that it was not the only insurer to fund this settlement but that Indemnity Insurance Company of North American and ACE Property and Casualty Insurance Company had contributed as well. INA Answer, para. 16. As previously discussed, UMEC and INA have submitted a stipulation on this issue. It states that ACE American Insurance Company and ACE P & C contributed to the settlement fund which was referenced in UMEC's amended complaint. Somewhat enigmatically, it also states that Zurich also contributed to the escrow settlement fund for the underlying matter. See Stipulation, paras. 3 & 4. The stipulation does not indicate that INA helped fund this settlement, although INA states that it did so in its Answer to UMEC's Amended Complaint. INA Answer at para. 16.

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cross claims against UMEC and JWP as its successor in interest in June 1997. Bateson-Golden Cross Complaint, para. 7, attached as Ex. C. to INA 10/26/01 Motion. The cross complaint alleges that UMEC executed a written subcontract with Bateson-Golden dated September 1, 1989 to perform mechanical subcontract work. Cross Complaint, para. 26. The period at risk , therefore, at its broadest would seem to extend from 1989 to 1997. This might be clarified depending on when construction actually began.

The parties were unable to stipulate as to the "relevant period." Rather, in the stipulation they submitted they stated:

> 5.UMEC contends that the relevant period at issue in the Underlying Action is September 1989 through March 2002, and that the relevant period at issue in this insurance coverage action is June 1997 through November 2000.
>
> 6. INA contends that the relevant period at issue in this insurance-coverage action runs from October 1, 1988 through the present. Stipulation filed 4/16/02 at paras. 5 & 6.

Hence, at a minimum, ACE P & C[16] should be joined as a party because of its interests in the settlement fund outlined in the UMEC Complaint and stipulated to by the parties. If Zurich funded the settlement on UMEC's behalf, it, too, should be joined. Moreover, as the litigation progresses, it may be determined that other insurers have an interest in this dispute because their policies were at risk during the relevant period. Then, they too may have to be joined as indispensable parties since as previously discussed the issue of failure to join indispensable parties may be raised at any time.

Conclusion

For these reasons, UMEC's Complaint will be dismissed without prejudice for lack of subject matter jurisdiction due to a failure to join indispensable parties. See, e.g., Damico v. Royal Ins. Co., 383 Pa. Super. 239, *241, 556 A.2d 886, *887 (1989)(where court concludes that an indispensable party was not joined, it properly dismissed the action without prejudice, thereby permitting the plaintiff to reassert the action in another lawsuit but without affecting the finality of the order).

The court will enter a contemporaneous Order in accord with this Opinion

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[16] The parties also stipulate that checks for the settlement fund were drawn on the accounts of ACE American Insurance Company as well as on ACE Property and Casualty Insurance Company. See Stipulation at para. 3. INA, however, fails to request joinder of ACE American Insurance Company. See INA 10/26/01 Motion, para. 3 and Memorandum at 6; INA 3/9/02 Memorandum at 3 & 8.