

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

RICHARD R. COOCH  
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE  
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Re: **Delaware Insurance Guaranty Association v. WHX  
Corporations, Handy & Harman and Camdel Metals  
Corporation  
C.A. No. 07C-02-236 RRC**

Submitted: November 21, 2007

Decided: February 7, 2008

On Defendants' Motion for Summary Judgment.

**DENIED.**

Dear Counsel:

This is an action brought by Plaintiff Delaware Insurance Guaranty Association ("DIGA") against Defendants WHX Corporation, et. al.<sup>1</sup> DIGA

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<sup>1</sup> For the purposes of this motion, the Defendants are treated collectively. Defendant Camdel Metals Corporation is a wholly owned subsidiary of Handy & Harmon, and Handy & Harmon is a wholly owned subsidiary of WHX Corporation.

seeks a declaratory judgment requiring Defendants to reimburse DIGA for workers' compensation benefits that DIGA has paid to three of Defendants' employees over a period of several years. DIGA made these payments after Defendants' workers' compensation insurer, Reliance National Insurance Company ("Reliance"), became insolvent. DIGA makes its claims pursuant to 18 *Del. C.* § 4211(a)(2)(a), the "Net Worth Statute," which gives DIGA the right to obtain reimbursement from an insured with a net worth of \$25 million or more when its insurer has become insolvent.

Before the Court is Defendants' motion for summary judgment, in which Defendants claim that DIGA's action is barred by the three year statute of limitations under 10 *Del. C.* § 8106, which both parties agree is applicable.<sup>2</sup> The issue presented is the determination of the date at which time the three year limitation period of § 8106 began to run.

Another pertinent statute of limitations is 19 *Del. C.* § 2361(b), which provides that a worker has five years after the date of the last payment made to that worker to bring a subsequent workers' compensation claim for the same injury. The Court must now determine how these two statutes of limitations interact (if at all) with respect to the claims DIGA has made here, insofar as § 8106 applies.

For the reasons that follow, the Court holds that pursuant to § 2361(b), a worker has five years, starting from the date of the last workers' compensation payment, in which to make a claim; and, pursuant to § 8106, DIGA then has three years, starting from the end of the five year statute of limitations of § 2361(b), in which to pursue an action for reimbursement under 18 *Del. C.* § 4211(a)(2)(a) for payments against the employer.

Under this analysis, DIGA's complaint and amended complaint were both timely filed, and therefore Defendants' motion for summary judgment is **DENIED**.

## **I. FACTUAL AND PROCEDURAL HISTORY**

Steven Burton, Steven Richardson, and Otis French were injured while employed by Defendants at Defendants' facility in Camden, Delaware. Their injuries occurred on March 19, 1998; December 4, 1998; and June 2,

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<sup>2</sup> This motion was originally filed as a motion to dismiss, but was converted to a motion for summary judgment (which both parties have agreed is the correct procedural approach) after DIGA included copies of payment logs in its response; this raised additional facts that had not been included in the original motion. *See, e.g., Highland Capital Management, L.P. v. T.C. Group, LLC*, 2006 WL 2128677 (Del. Super.).

1999, respectively.<sup>3</sup> Defendants' insurance company, Reliance, began making workers' compensation payments to these employees. On October 3, 2001, after Reliance had begun making the payments, Reliance was declared insolvent by the Commonwealth Court of Pennsylvania.

As a result of Reliance's insolvency, and pursuant to 18 *Del. C.* ch. 42, the "Delaware Insurance Guaranty Association Act," DIGA assumed Reliance's rights and obligations for the workers' compensation payments to the employees and began making those payments. The last payments DIGA made were: to Burton on June 4, 2002; to French on November 9, 2002; and to Richardson on June 10, 2003. The total amount DIGA claims to have paid to the employees is \$62,819.47.<sup>4</sup>

DIGA filed a complaint against Defendants on February 23, 2007, seeking reimbursement for payments it made to Burton<sup>5</sup>; DIGA filed an amended complaint on April 2, 2007, adding the claims for payments it made to Richardson and French.<sup>6</sup> DIGA made these claims pursuant to the Net Worth Statute.

Defendants filed a motion to dismiss, later converted to this motion for summary judgment, asserting that DIGA's claims are barred by the three year statute of limitations of 10 *Del. C.* § 8106.

## II. CONTENTIONS OF THE PARTIES

Defendants contend that the three year limitation period of § 8106 applies to and bars DIGA's claims. Defendants argue that there are three possible dates that trigger the three year limitation period of § 8106: 1) the date of the last payment made by DIGA to the employee; 2) the date of the first payment made by DIGA to the employee, or 3) the date of insolvency of the insurer. Defendants assert that no matter which date is used, no claim was asserted within the three year statute of limitations.

DIGA agrees that § 8106's three year limitation period applies, but maintains that under 19 *Del. C.* § 2361(b), the limitation period of § 8106 began to run only when the five year period of no payments to the worker has elapsed. Only then, DIGA argues, does the employer's liability to DIGA become "fixed and discharged," and at which time a cause of action accrues under § 8106.

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<sup>3</sup> Pl. Resp. to Def. Mot. to Dismiss, at 2.

<sup>4</sup> Pl. Am. Compl., at ¶ 11.

<sup>5</sup> *Id.* at ¶ 18.

<sup>6</sup> *Id.* at ¶ 20.

### III. STANDARD OF REVIEW

Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>7</sup> Here, the parties agree that, for the purposes of this motion, there are no genuine issues of material fact.

### IV. DISCUSSION

The issue before the Court is the determination of the date on which the three year limitation period of 10 *Del. C.* § 8106 began to run on DIGA's claims for reimbursement under the Net Worth Statute, 18 *Del. C.* § 4211(a)(2)(a). This issue appears to be one of first impression in Delaware, and neither the parties nor the Court have found any cases outside of Delaware or any secondary authority directly on point. Nonetheless, a plain reading of the statute and public policy considerations clearly weigh in favor of the Court's present holding: that the three year period of 10 *Del. C.* § 8106 begins on the date that the five year period of 19 *Del. C.* § 2361(b) ends; that is, when five years have elapsed since the date of the last workers' compensation payment by DIGA.

DIGA is a legal entity created by the General Assembly pursuant to the "Delaware Insurance Guaranty Act," Delaware's version of a model act promulgated by the National Association of Insurance Commissioners "as a result over the harms to the public resulting from insurance companies becoming insolvent."<sup>8</sup> In essence, DIGA takes over insurance payments for insurance companies that become insolvent. DIGA is entirely funded by insurance companies writing business in the state of Delaware.

However, DIGA is not always required to bear the burden of these payments out of its own funding; an insured whose insurer becomes insolvent can, in certain circumstances, be required to reimburse DIGA for payments DIGA makes on behalf of the insolvent insurer. In this regard 18 *Del. C.* § 4211(a)(2)(a), the so-called "Net Worth Statute," gives DIGA the right to obtain reimbursement from an insured with a net worth of \$25 million or more. Pursuant to this statute, DIGA has made its claims against

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<sup>7</sup> Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

<sup>8</sup> *Witowski v. Brown*, 576 A.2d 669, 670-71 (Del. Super. 1989) (discussing the history of the Delaware Insurance Guaranty Association Act when holding that an insured was required to exhaust uninsured motorist coverage before bringing claim against DIGA or the insureds).

Defendants for the workers' compensation payments it made on behalf of Reliance, Defendants' insolvent insurer.

Turning first to the underlying workers' compensation claims, the relevant statute of limitations is 19 *Del. C.* § 2361(b). That section provides:

Where payments of compensation have been made in any case under an agreement approved by the [Industrial Accident] Board or by an award of the [Industrial Accident] Board, no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment for which a proper receipt has been filed with the Department.

Thus a new payment pursuant to an agreement or an award to a worker restarts the five year limitation period; only when no payment has been made for five years does § 2361(b) act to bar further claims.

The Court must next consider the applicability of 10 *Del. C.* § 8106 to DIGA's claims for reimbursement of workers' compensation payments. That section provides, in relevant part:

[N]o action based on a statute ... shall be brought after the expiration of 3 years from the accruing of the cause of such action.<sup>9</sup>

It is uncontested that DIGA's claims are "based on a statute," specifically, 18 *Del. C.* § 4211(a)(2)(a).

§ 2361(b) states that "no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment [of workers' compensation claims]." <sup>10</sup> There is no exception made for § 8106, and the two statutes are consistent with one another; under 19 *Del. C.* § 2361(b), § 8106's limitation period begins when § 2361(b)'s five year limitation period ends. None of the Defendants' proposed accrual dates under § 8106 (*i.e.*: the date of the last payment made by DIGA to the employee; the date of the first payment made by DIGA to the employee; or the date of insolvency of the insurer) are consistent with a plain reading of the statutes.

The last payments DIGA made to the workers were on June 4, 2002, November 9, 2002, and June 10, 2003. The five year limitations period of § 2361(b) ended on June 4, 2007 and November 9, 2007, and will end on June 10, 2008, respectively, at which time the three year limitation periods of § 8106 began to run. Thus, DIGA has until June 4, 2010, November 9, 2010,

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<sup>9</sup> 10 *Del. C.* § 8106.

<sup>10</sup> 19 *Del. C.* § 2361(b).

and June 10, 2011, to file the claims it asserts in this action (assuming, with respect to employee French, that no subsequent payment is made to him before June 10, 2008.) DIGA filed its complaints on February 23, 2007, and its amended complaint on April 2, 2007. Thus, DIGA's claims are not barred by the statute of limitations of § 8106.

The dates that Defendants urge trigger § 8106 would lead to problematical results. Adopting any of Defendants' suggested dates of accrual may leave DIGA without a recourse for recovery of payments it might make after (Defendants' view of) when the three year period of 10 *Del. C.* § 8106 had ended, but before the five year period of 19 *Del. C.* § 2361(b) had ended. Under Defendants' interpretation of § 8106, DIGA might still have to make payments when the three year limitations period had ended, but when the workers might still be able to make compensation claims that DIGA would have to pay; DIGA would be precluded by the statute of limitations from seeking reimbursement for those payments. The present holding prevents such unwanted results.

The recent case of *Nationwide Gen. Ins. Co. v. Hertz Corp.*<sup>11</sup> is sufficiently analogous to give aid to the Court in its analysis of the present issue. In *Nationwide*, this Court held that, in a claim for subrogation of Personal Injury Protection ("PIP") benefits under 21 *Del. C.* § 2118(g)(4), the limitation period of § 8106 did not begin to run until the last payment had been made on the claim, when the claim had then become "fixed and discharged."<sup>12</sup> Notably, the *Nationwide* court stated that "workers' compensation and no-fault have the same ring, which can be used to draw an analogy."

In the present case, as in *Nationwide*, a workers' compensation claim for which DIGA has an obligation to pay cannot become "fixed and discharged" until there has been no workers' compensation payment made for the claim for five years. It is only at that time that § 8106's three year limitation period begins.

The Court's holding is further supported by considerations of public policy. The Delaware General Assembly created DIGA to protect the public from the danger the public faces when an insurance company becomes insolvent. Additionally, the Delaware General Assembly has allowed a

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<sup>11</sup> *Nationwide Gen. Ins. Co. v. Hertz Corp.*, 2006 WL 2673057.

<sup>12</sup> *Id.* at \*3 (quoting *Chesapeake Utilities Corp. v. Chesapeake and Potomac Tel. Co. of Maryland*, 401 A.2d 101, 102, holding that the statute of limitations "[did] not begin to run at the time of the injury," but rather, "the statute begins to run only when the cause of action for indemnity arises, or the indemnitee's liability is fixed and discharged").

certain amount of indefiniteness as to the statute of limitations for workers' compensation payments so that a worker is not left without a remedy should the worker's injuries recur. The present holding takes into account these legislative policy choices.

The Court understands that there may be some uncertainty facing "High Net Worth" employers in anticipating claims like the present ones. However, the General Assembly has placed the burden on these high net worth employers potentially to pay for the obligations of its insolvent insurers rather than placing that burden on DIGA. Any policy change in this area must come from the General Assembly.

## **V. CONCLUSION**

For the foregoing reasons, Defendants' Motion Summary Judgment is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

oc: Prothonotary