**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| GREAT AMERICAN ASSURANCE COMPANY (formerly known as AGRICULTURAL INSURANCE COMPANY), as subrogee of PRAXAIR, INC., PARSONS CORPORATION, and MOTIVA ENTERPRISES, LLC, | ) | |
| Plaintiffs, | ) | C.A. No. 02C-05-168 JRS |
| v. | ) | |
| FISHER CONTROLS INTERNATIONAL, INC., NORTHEAST CONTROLS, INC., TEXACO DEVELOPMENT CORPORATION, | ) | |
| Defendants. | ) | |
| FISHER CONTROLS INTERNATIONAL, INC., | ) | |
| Third Party Plaintiff, | ) | |
| v. | ) | |
| BATTAGLIA MECHANICAL, INC., HYDROCHEM INDUSTRIAL SERVICES, INC., JJ WHITE, INC., MOTIVA ENTERPRISES, LLC, PARSONS CORPORATION, PARSONS ENERGY AND | ) | |

CHEMICALS, INC., PRAXAIR, INC., TEXACO AVIATION PRODUCTS, LLC, TEXACO, INC., d/b/a TEXACO GLOBAL GAS AND POWER, DAIKIN AMERICA, INC., DAIKIN INDUSTRIES, LTD., SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION, and CONECTIV OPERATING SERVICES COMPANY, INC.

Third Party Defendants.

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NORTHEAST CONTROLS, INC.,

Third Party Plaintiff,

v.

MOTIVA ENTERPRISES, LLC, PARSONS ENERGY AND CHEMICALS GROUP, INC., PRAXAIR, INC., BATTAGLIA MECHANICAL, INC., JJ WHITE, INC., HYDROCHEM INDUSTRIAL SERVICES, INC., TEXACO, INC., d/b/a TEXACO GLOBAL GAS AND POWER, DAIKIN INDUSTRIES, LTD., DAIKIN AMERICA, INC., SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION, TEXACO AVIATION PRODUCTS, LLC, and CONECTIV OPERATING SERVICES COMPANY,

Third Party Defendants.

*Upon Consideration of Third Party Defendant's Motion to Dismiss*
**GRANTED in part and DENIED in part.**

**MEMORANDUM OPINION**

Date Submitted: April 23, 2003
Date Decided: August 4, 2003

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**SLIGHTS, J.**

## I. INTRODUCTION

In this case, the Court considers the right of a defendant in a subrogation action to seek contribution from a non-subrogor who is also an insured under the subrogee's policy of insurance. Plaintiff, Great American Assurance Company ("Great American"), issued a builder's risk policy covering Parsons Corporation ("Parsons") and related companies in connection with the construction of a "repowering project" at a refinery owned by Motiva Enterprises, LLC ("the Refinery"). As a result of an explosion and fire at the Refinery on May 20, 2000 ("the fire"), Great American made payments to Parsons, Praxair, Inc. ("Praxair"), and Motiva Enterprises, LLC ("Motiva") for property and related damages incurred as a result of the fire. Great American now seeks to exercise its right of subrogation against several parties that it claims were responsible for the fire. Two of these parties, Fisher Controls International, Inc. ("Fisher") and Northeast Controls, Inc. ("Northeast"), have brought third party claims for contribution and/or indemnification against Conectiv Operating Services Company ("Conectiv").

Conectiv has moved to dismiss the third-party claims. The sole issue to be decided with respect to the contribution claims is whether Conectiv may be deemed a joint tort-feasor of Fisher and Northeast when it is not subject to a direct suit by Great American. The Court has determined that Conectiv may be held liable as a

joint tortfeasor even though it cannot be held liable to Great American. Accordingly, the Court has concluded that the third-party contribution claims are legally viable. Conectiv's motion for summary judgment as to the contribution claims must be **DENIED**.

Conectiv has also moved to dismiss Fisher and Northeast's indemnification claims. Because the Court finds that the third party complaints failed to allege any factual bases to support these claims, Conectiv's motion to dismiss as to the indemnification claims must be **GRANTED.**

## II. FACTS

Great American issued a builder's risk insurance policy to Parsons and related companies to cover designated losses which might arise during the "repowering project" at the Refinery.[1] On May 20, 2000, a fire occurred during the repowering project, causing considerable property damage to the Refinery. As a result of the losses sustained in the fire, Great American made payments to Parsons Corporation, Praxair, and Motiva under the policy. Subsequently, Great American brought a subrogation action against Fisher and Northeast, Conectiv, and Texaco Development Corporation ("Texaco Development"), alleging that their negligence proximately

[1]The Court has provided a more extensive discussion of the facts in *Olson v. Motiva*, 2003 Del. Super. LEXIS 260.

caused the fire and requesting reimbursement of the payments made under the policy and related damages. Great American then dismissed the claim against Conectiv after determining that Conectiv was an "insured" under Great American's policy. Immediately thereafter, Northeast and Fisher filed third party complaints against Conectiv for contribution and/or indemnification. Conectiv has moved to dismiss both third party complaints.

## III. DISCUSSION

### A. The Parties' Contentions

In support of its motion to dismiss, Conectiv argues that because it cannot be deemed a joint tortfeasor with Fisher and Northeast, it cannot be subject to a claim of contribution from Fisher or Northeast. Specifically, as an additional insured under Great American's policy, Conectiv is immune from suit by Great American by virtue of the "anti-subrogation rule."[2] And, because the anti-subrogation rule bars a direct action, Conectiv contends that a contribution claim should also be barred. Furthermore, Conectiv argues that Fisher and Northeast have not supplied any bases for their indemnification claims and that further discovery with respect to this issue should not be permitted.

[2] *See Lexington Ins. Co. v. Raboin*, 712 A.2d 1011, 1015 (Del. Super. Ct. 1998)("No right of subrogation exists. . . against the insured, co-insured, or where the wrongdoer is an insured under the same policy.").

Fisher and Northeast make essentially the same two arguments in response to Conectiv's motion. First, they contend that this motion should be converted to a motion for summary judgment because matters extraneous to the pleadings have been presented in support of Conectiv's motion. They maintain that a Rule 56[3] motion is premature and that they should be permitted additional time for discovery to test Conectiv's allegation that it is an "insured" under Great American's policy. Fisher and Northeast also request more time to look for a contract from which they may assert a right to indemnification against Conectiv as third party beneficiaries of the contract or otherwise.

Second, Fisher and Northeast argue that even if the anti-subrogation rule would bar a direct subrogation claim against Conectiv, the rule does not bar a claim for contribution which arises from the injuries or damages to the other insureds under Great American's policy. According to Fisher and Northeast, when analyzing their contribution claims against Conectiv, the Court should focus on whether Conectiv contributed to the common injury to the subrogors (Parsons, Praxair, and Motiva) to whom payments have been made. The injury to the subrogee is not relevant to the determination of Conectiv's joint tortfeasor status. As further support for this argument, Fisher and Northeast cite the principles that a subrogee stands in the shoes

[3]SUPER. CT. CIV. R. 56

of its subrogors and may not acquire greater rights than its subrogors. If Parsons, Praxair, and Motiva did not have insurance, they could sue Conectiv as a joint tortfeasor to recover their losses. Removing Conectiv from this case would cause the remaining defendants and third party defendants who were not insured by Great American to pay a greater share of the verdict in this case because Conectiv's share of fault would be distributed to those parties in Conectiv's absence. In essence, then, Great American would be entitled to recover a greater amount from each of the joint tortfeasors than its subrogors could recover in a direct action against all potentially liable parties (including Conectiv). Fisher and Northeast urge the Court to prevent this inequitable result.[4]

**B. The Contribution Claim**

**1. Standard of Review**

Conectiv has brought this motion as a motion to dismiss under Superior Court Civil Rule 12(b)(6) ("Rule 12(b)(6)"). Fisher and Northeast argue that the motion should be converted to a motion for summary judgment because Conectiv has relied

[4]Fisher and Northeast also argue that the policy considerations at the heart of the anti-subrogation rule are not implicated in this instance and, therefore, the Court should not extend the protections of the rule to Conectiv (notwithstanding that Great American voluntarily has elected to do so). The Court is satisfied that the anti-subrogation rule applies to all parties insured under the subrogee's policy. There is no need to engage in a lengthy analysis of the purposes of the rule; the Court's analysis assumes that the anti-subrogation rule applies here. *See Baugh-Belarde Constr. Co. v. Coll. Utils. Corp.,* 561 P.2d 1211, 1215 (Alaska 1977).

upon facts and documents outside of the pleadings.[5] Conectiv counters by arguing that the documents attached to its motion meet the exception to Rule 12(b)(6), which allows a movant to attach documents "integral to a plaintiff's claim and incorporated in the complaint."[6]

The Delaware Supreme Court has clearly stated the exception to Rule 12(b)(6):

> The practice, however, has been viewed and justified by the federal courts as a necessary, but limited, exception to the standard Rule 12(b)(6) procedure. The exception has been used in cases in which the document is integral to a plaintiff's claim and incorporated in the complaint, such as a securities claim. . . . Federal courts consider documents outside of the pleadings when "the documents are the very documents that are alleged to contain the various misrepresentations or omissions and are relevant not to prove the truth of their contents but only to determinate what the documents stated. . . . Courts have also considered the relevant publication in libel cases, and the contract in breach of contract cases.[7]

Conectiv attached two documents to its motion to dismiss: an "Operations and Maintenance Agreement for the Delaware City Power Plant between Conectiv Operating Services Company and Motiva Enterprises, LLC" and the Agricultural Insurance Company's (predecessor of Great American) Insurance Policy issued to

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[5] *See* SUPER. CT. CIV. R. 12(b)(6)("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment. . . .").

[6] *In Re Santa Fe Pac. Corp. S'holder Litig.,* 669 A.2d 59, 69 (Del. 1995).

[7] *Id.* at 69-70(citations omitted).

Parsons.[8] These two documents do not meet the narrow exception to the prohibition against extraneous matter as articulated in *In Re Santa Fe Pacific Corp. Shareholder Litigation*.[9] Both documents clearly have been offered to prove the truth of Conectiv's assertion that it is an "insured" under Great American's policy. This fact has not been admitted as part of the pleadings and, indeed, apparently remains very much in dispute. Accordingly, Conectiv's motion to dismiss as to the contribution claims must be converted to a motion for summary judgment.

On a motion for summary judgment, the Court must consider the facts in the light most favorable to the non-moving party.[10] It is from this perspective that the Court must examine all pleadings, affidavits and discovery in support of or in response to the motion.[11] Summary judgment may only be granted if the Court determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[12] The initial burden lies on the movant to

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[8]Conectiv also attached a third document, a copy of Great American's Notice of Dismissal of Conectiv. This document, however, is already part of the Court's record, and the parties have not alleged that it affects the procedural analysis being undertaken here.

[9]669 A.2d 59 (Del. 1995).

[10]*Brzoska v. Olson,* 668 A.2d 1355, 1364 (Del. 1995).

[11]*Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.,* 312 A.2d 322, 325 (Del. Super. Ct. 1973).

[12]*Dale v. Town of Elsmere*, 702 A.2d 1219, 1221 (Del. 1997).

demonstrate the absence of a material issue of fact and a settled legal basis for relief.[13] If the movant meets this burden, the burden then shifts to the non-moving party to show that material factual issues remain in dispute.[14]

**2. Conectiv Is A Joint Tortfeasor**

A quick review of the parties' positions in this litigation places the contribution claim in its proper context. The plaintiff, Great American, has dismissed its direct action against Conectiv because it has determined that Conectiv, as a "contractor" on the repowering project, is an "insured" under its policy.[15] Defendants, Fisher and Northeast, both asserted contribution claims against Conectiv in their third party complaints for its alleged role in causing the fire at the Refinery.

Delaware recognizes by statute that a tortfeasor may sue another joint tortfeasor for contribution under the Uniform Contribution Among Tortfeasorss Law ("the Act").[16] The Act defines "joint tortfeasor" as "2 or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has

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[13] *Brzoska,* 668 A.2d at 1364.

[14] *Id.*

[15] Great American actually dismissed Conectiv with a condition: Great American reserved its right to reinstate its direct action against Conectiv if Conectiv is later found not to be an "insured" under the policy. In that instance, of course, Fisher and Northeast's third party complaints against Conectiv would be inappropriate, and cross claims would be the proper procedural vehicle to assert the contribution claims.

[16] DEL. CODE ANN. tit. 10, §§ 6301-6308 (1999 & Supp. 2002).

been recovered against all or some of them."[17] In most instances, the determination of joint tortfeasor status involves a straight-forward application of the statutory definition. The determination becomes more complex, however, in the context of a subrogation action when the anti-subrogation rule applies. This rule provides that "[n]o right of subrogation exists. . . against the insured, co-insured, or where the wrongdoer is an insured under the same policy."[18] When applied here, the anti-subrogation rule prohibits Great American from suing Conectiv directly, even if Conectiv played a role in causing the fire. Nevertheless, the question remains: does the anti-subrogation rule preclude a third-party claim for contribution against a potentially negligent party who is "insured" under the plaintiff insurer's policy?

Although case law on this subject is sparse, the United States Court of Appeals for the First Circuit has addressed the issue directly. In *New Amsterdam Casualty Company v. Holmes* ("*New Amsterdam*"),[19] the plaintiff insurance company issued a "builder's risk policy" to Gilbane Building Company at the outset of a construction project. In the course of construction, a fire broke out and substantially damaged the

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[17] DEL. CODE ANN. tit. 10, § 6301 (1999).

[18] *Lexington Ins. Co.,* 712 A.2d at 1015. S*ee also Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1994 Del. Super. LEXIS 695, at *5 (referring to the "anti-subrogation rule").

[19] 435 F.2d 1232 (1st Cir. 1970).

building. The plaintiff insurer made payments to Gilbane and then brought a subrogation action against several parties alleging that their negligence caused the fire. Two of the defendants were found to be subcontractors, and thus "insureds" under the policy, while the other two defendants were not "insureds." The un-insured defendants sought contribution from the insured defendants.

The trial court dismissed the insured defendants from the direct action and then dismissed the cross claims against the insured defendants, stating:

> Since New Amsterdam Casualty Company has no right of action against [the insured defendant] to recover damages for his negligence, it follows that there is no common liability in tort for said damages to New Amsterdam Casualty Company by [the insured defendants and the un-insured defendants]. In the absence of such common liability, they are not joint tortfeasors under said Act among whom a right of contribution exists under said Act.[20]

The First Circuit disagreed. The court began its analysis by interpreting "joint tortfeasor" to encompass all parties who contributed to another's injury.[21] Although the legislature may create certain situations where a party otherwise liable may be immune from suit, e.g., workers' compensation exclusivity, the legislature had not

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[20] 310 F. Supp. 374, 377 (D. R.I. 1970).

[21] Rhode Island, like Delaware, has adopted a version of the Uniform Contribution Among Joint Tortfeasors Act. *See* R.I. GEN. LAWS §10-6-1 to 10-6-11 (2003).

chosen to recognize the anti-subrogation rule as a basis to avoid liability in tort.[22] The court rejected the interpretation of "liable in tort" as requiring "present liability to whoever is the particular plaintiff."[23] Instead, the court focused on the language of "same injury" in Rhode Island's version of the Act:

> When it speaks in terms of the "same injury," this must be the initial injury occasioned by the jointly negligent parties, not something definable in terms of who brings the suit. The injury in the case at bar, and the tort liability for the negligent conduct, was to Gilbane, not to the insurer. No party, appellants or appellees, injured the plaintiff, in common, or otherwise. Plaintiff's claim is derivative, as subrogee, standing in all respects upon the rights and in the place of Gilbane.[24]

With this focus on injury to the subrogor, the court concluded that "the district court's question should have been not whether the defendants were jointly or severally liable to the plaintiff insurer, but whether they had jointly injured Gilbane, in whose shoes plaintiff stood."[25]

The First Circuit's reasoning comports with several settled principles of subrogation law. For instance, a bedrock principle of subrogation is that the "insurer

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[22]The court specifically distinguished the worker's compensation context as an area in which the legislature had determined that the employer's immunity from suit under the "exclusive remedy" provision of the workers' compensation statute should take precedence over the right of contribution allowed by the Act. *New Amsterdam*, 435 F.2d at 1234.

[23]*Id.*

[24]*Id.*

[25]*Id.* at 1234-35.

who subrogates himself to his insured stands in the shoes of his insured and can take nothing by subrogation but the rights of the insured."[26] This principle emerges from an often-cited decision of the United State Supreme Court, *Phoenix Insurance Co. v. Eerie Transportation Co.*:[27] "[t]he right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer."[28] *New Amsterdam's* interpretation of "same injury" derives from *Phoenix Insurance Co.*, which recognizes that the platform for the subrogee's right of action is the injury to the insured and the right of the insured to seek compensation in tort.

A related principle of subrogation law offers further support for *New Amsterdam's* result. A subrogee may not assert rights superior to those of the subrogors.[29] If the insured is dismissed from the case, the plaintiff insurer would be able to recover a greater percentage of its damages from each of the remaining

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[26] *Stafford Metal Works, Inc. v. Cook Paint and Varnish Co.,* 418 F. Supp. 56, 58 (N.D. Tex. 1976).

[27] 117 U.S. 312 (1886).

[28] *Id.* at 321-22.

[29] *See Myer v. Dyer,* 643 A.2d 1382, 1388 (Del. Super. Ct. 1993)("Ordinarily, a subrogee has rights no greater than a subrogor.")

defendants than the subrogors could recover in a direct action.[30]

Here, the facts line up almost exactly with *New Amsterdam*.[31] And, in keeping with the First Circuit's view of "same injury,"[32]-- a view this Court finds persuasive -- the focus must be on the initial injury to the subrogors when determining whether parties are jointly and severally liable in tort for the "same injury." Because Conectiv, Fisher, and Northeast may all have jointly injured Parsons, Praxair, and Motiva, the third-party claims for contribution against Conectiv are viable and must survive this motion for summary judgment.

Interestingly, the First Circuit in *New Amsterdam* did not reverse the district court. Instead, the court affirmed the dismissal of the cross claims and fashioned a

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[30]The concept of joint and several liability diminishes the advantage to Great American which would result from Conectiv's absence. As a practical matter, Great American could recover all of its damages from one of the joint tortfeasors against whom a direct claim was made, although this recovery would not discharge the other joint tortfeasors. *See* DEL. CODE ANN. tit. 10, §6303 ("The recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasors."). Nevertheless, Great American's ability to recover a higher percentage of its damage from each of the remaining defendants is a right recognized under the Act, a right which would not be afforded to the subrogors in a direct action against the tortfeasors.

[31]The only difference lies in the procedural posture of the cases. The plaintiff insurer in *New Amsterdam* sued both the insured and un-insured defendants, and the un-insured defendants brought cross claims for contribution. Here, the plaintiff insurer voluntarily dismissed the insured, and the un-insured defendants brought third party complaints for contribution. The distinction is of no significance to the analysis or the outcome.

[32]The General Assembly of Delaware has expressed its intent that Delaware courts should interpret Delaware's Act consistently with the courts of other states which have adopted the Act (like Rhode Island). *See* DEL. CODE ANN. tit. 10, § 6307 (1999)("This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.").

set-off remedy between the plaintiff insured and the un-insured defendants.[33] Under Delaware law, however, fault cannot be allocated to Conectiv under the Act unless Conectiv is a party to the action.[34] Therefore, while the Court finds the reasoning of *New Amsterdam* to be persuasive, the Court must separate from the First Circuit with respect to its ultimate conclusion. There will be no set-off; the contribution claims against Conectiv will not be dismissed. Whether Great American will pay for Conectiv's portion of liability to Fisher and Northeast, if found negligent, is a matter to be resolved by and between Conectiv and its insurer, Great American.[35]

### C. The Indemnification Claim

#### 1. Standard of Review

Th documents appended to Conectiv's motion have no connection to Conectiv's motion to dismiss the indemnification claims. Accordingly, the Court will

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[33] *New Amsterdam,* 435 F.2d at 1235.

[34] *See Ikeda v. Molock,* 603 A.2d 785, 787 (Del. 1991)("[T]he filing of a cross-claim is a prerequisite to the apportionment of liability between joint tortfeasors based upon relative degrees of fault.").

[35] Fisher and Northeast request additional time to pursue discovery in order to test Conectiv's assertion that it is an "insured" under the policy. By denying this motion, the Court, as a practical matter, has afforded Fisher and Northeast time to complete discovery on this question. If Fisher, Northeast, or one of the other parties discovers that Conectiv is not an "insured," the Court expects that the pleadings will be amended accordingly.

consider this aspect of the motion under Rule 12(b)(6).[36] "When considering a motion to dismiss, the Court should read the complaint generously, accept all of the well-pleaded allegations contained therein as true, and construe them in a light most favorable to the plaintiff."[37] To be considered "well-pleaded," the complaint must put the opposing party on notice of the claim being brought.[38] Delaware courts, however, will not accept mere conclusory allegations as true.[39] "Conclusory allegations alone cannot be the platform for launching an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them."[40]

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[36]The Court may convert a portion of a motion to dismiss into a summary judgment motion and consider the remaining portion under Rule 12(b)(6). *See Yaw v. Talley*, 1994 Del. Ch. LEXIS 35, at *3 n.2 ("The parties agree that the motion to dismiss on this second ground may be treated as if converted into a motion for summary judgment."). *See also Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir. 1992)("Where a district court explicitly confines its ruling to the complaint, however, our review is as under a motion to dismiss, even where additional materials were admitted into the record."); *Brown v. Stone*, 66 F. Supp. 2d 412, 421 (E.D. N.Y. 1999)("After hearing oral argument on . . . FRCP 12(b)(6) motions to dismiss, the Court converted that part of the FRCP 12(b)(6) motion seeking dismissal of Brown's claim. . . , to a summary judgment motion, as authorized under FRCP 12(b)(6)."); *Ellerby v. State of Illinois Circuit Court*, 1988 U.S. Dist. LEXIS 2092, at *2 (W.D. Ill.)("In light of the affidavits submitted by the defendant, the court converted that part of the motion to dismiss into the partial motion for summary judgment now before the court.").

[37]*Johnson v. Cullen*, 925 F. Supp. 244, 247 (D. Del. 1996). *See also In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993)(stating that the reviewing court must accept the allegations of the complaint as true).

[38]*Savor, Inc. v. FMR Corp.,* 2001 Del. Super. LEXIS 170, at *6.

[39]*Criden v. Steinberg,* 2000 Del. Ch. LEXIS 50, at *7.

[40]*Nebenzahl v. Miller,* 1996 Del. Ch. LEXIS 113, at *9.

### 2. Analysis of Indemnification Claim

Conectiv contends that Fisher's and Northeast's indemnification claims should be dismissed because neither has alleged any facts which would give rise to express or implied indemnification. Conectiv further argues that additional time for discovery on this issue should not be granted because Fisher and Northeast have not articulated "with specificity the material facts being sought through discovery and [have not] demonstrated that those facts are both essential to its opposition and are outside of its own knowledge and control."[41] In reply, Fisher and Northeast state that they need additional time for discovery in order to search for a contract pursuant to which they may assert an indemnification claim as a third party beneficiary.

Fisher and Northeast have not alleged sufficient facts in their third party complaints to establish an indemnification claim. Although not identical, both third-party complaints aver that Conectiv had an agreement with Motiva to provide operating services at the Refinery. Then they allege that Conectiv breached its duty of due care to Parsons, Praxair, and Motiva. Based on these allegations, Fisher and Northeast both claim that they are "entitled to indemnity and/or contribution from Conectiv."[42]

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[41] *Sequa Corp. v. Aetna Cas. and Sur. Co.*, 1992 Del. Super. LEXIS 288, at *3..

[42] (D.I. 22, at 16.6; D.I. 93, at 67).

Neither of the third-party complaints allege the factual predicate for an indemnification claim. They do not allege that an express provision for indemnification existed in a contract, nor do they allege a factual basis upon which an indemnity obligation may be implied.[43] Without *any* factual basis for relief, no reasonably conceivable set of circumstances exists to allow Fisher and Northeast to prosecute an indemnification claim. If relevant facts are uncovered during discovery, Fisher and Northeast may re-file their claims for indemnity. The dismissal of this claim is without prejudice.[44]

## IV. CONCLUSION

Based on the foregoing, Conectiv's motion for summary judgment as to the contribution claim is **DENIED.** Conectiv's motion to dismiss the indemnification claim is **GRANTED** without prejudice.

**IT IS SO ORDERED.**

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Judge Joseph R. Slights, III

Original to the Prothonotary.

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[43] *See Davis v. R.C. Peoples, Inc.,* 2003 Del. Super. LEXIS 256, at *6-8 (recognizing express indemnification, implied contractual indemnification and a "special relationship" between parties as three ways to recover indemnification); *SW(Delaware), Inc. v. American Consumers Indus., Inc.,* 450 A.2d 887, 889-90 (Del.1982)(concluding that there was not a sufficient factual basis to assert indemnification through an implied contract or a special relationship).

[44] Dismissal of the indemnification claims at this time will not prejudice Fisher and Northeast's right to pursue the claim later if the facts support it. *See Council of Unit Owners of Sea Colony East v. Carl M. Freeman Associates, Inc.*, 1989 Del. Super. LEXIS 153, at *5 ("The [] Defendants' claims against [the third party defendant] are for indemnification and contribution and they only arise if any of the [] Defendants are found to be liable to the Plaintiff.").