

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

M. DIANE KOKEN, AS LIQUIDATOR )  
ON BEHALF OF RELIANCE INS. CO. )  
(IN LIQUIDATION), )  
 )  
Plaintiff )  
 )  
v. ) Civil No. 02-83-B-C  
 )  
AUBURN MANUFACTURING, INC., )  
et al., )  
 )  
Defendants )

**RECOMMENDED DECISION ON  
BLACK & VEATCH'S MOTION FOR SUMMARY JUDGMENT (Docket No. 71)  
AND REDCO AND O'CONNOR'S MOTIONS FOR SUMMARY JUDGMENT  
(Docket Nos. 63 & 70)**

In 1998, Androscoggin Energy, LLC, undertook to build an electric and steam generating facility in Jay, Maine and hired Black & Veatch Construction, Inc., to serve as contractor on the project. The construction contract required that Androscoggin Energy obtain insurance covering all risks to the project and also required that the policy of insurance include the contractor and its subcontractors as additional insureds. During a torch cutting operation associated with the project, a fire broke out and steps taken to extinguish it damaged the project. In the course of cleaning up debris from the fire, a welding blanket that was intended to prevent the fire was discarded by the employees of a subcontractor. In this action, M. Diane Koken, as Liquidator on behalf of Reliance Insurance Company, pursues through subrogation a products liability suit against the presumed manufacturer of the welding blanket, Auburn Manufacturing, Inc., and its

distributor, Inpro, Inc.<sup>1</sup> Simultaneously, the Liquidator recites tort and contract claims against Black & Veatch and its subcontractors on the ground that they allegedly “destroyed” Reliance’s products liability claim by discarding the welding blanket following the fire. In this Recommended Decision I address the motions for summary judgment filed by Black & Veatch and its subcontractors, Redco, Inc., and O’Connor Constructors, Inc., who contend that the tort claim was waived in the insurance contract and that the contract claim is antithetical to basic tort, contract and insurance law principles. I recommend that the Court grant the motions.

### **Facts<sup>2</sup>**

This lawsuit arises from the construction of an electric and steam generating facility in Jay, Maine, otherwise known as the Androscoggin Energy Center Project. The owner of the facility and project, Androscoggin Energy, LLC, contracted with Defendant Black & Veatch to engineer, procure and construct the project. Black & Veatch, in turn, subcontracted certain work to Defendants Redco, Inc., and O’Connor Constructors, Inc. The construction contract required Androscoggin Energy to procure builders risk insurance that insured “against Fire, Extended Coverage and All Risk Perils.” Reliance Insurance Company issued a policy covering these risks to Androscoggin Energy. The policy identifies Androscoggin Energy as the “Named Insured.” It further designates Black & Veatch and its subcontractors as “Additional Insureds” under the policy. The policy insured against all risk of direct physical damage of or to insured property, subject to applicable terms, exclusion, limitations and conditions. The policy’s subrogation provision provides, “In the event of any payment made hereunder, [Reliance] shall

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<sup>1</sup> In a companion recommended decision, I address motions for summary judgment filed by Auburn Manufacturing and Inpro, and recommend that they be denied.

<sup>2</sup> The factual statement recited herein is drawn from the parties’ Local Rule 56 statements of material facts in accordance with the Local Rule. The factual statement construes the available evidence in the light most favorable to the non-movants and resolves all reasonable inferences in their favor. Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 276 (1st Cir. 2003).

be subrogated to all the Insured's rights of recovery therefore against any person or organization . . . . The Insured shall do nothing after the loss to prejudice such rights." It further provides that "subrogation is waived as respects the relationship [among] Androscoggin Energy, LLC, Black & Veatch and all respective subcontractors as required under the EPC Contract."<sup>3</sup>

On May 17, 1999, during the construction of the generating facility, a union millwright employed by Redco was cutting a hoisting lug off a metal frame with a torch and was positioned above one of several generators owned by Androscoggin Energy. Molten metal, or slag, landed on a welding blanket positioned beneath the work, burned through the blanket and set fire to a wooden frame situated beneath it. The fire was extinguished by use of a chemical fire extinguisher. Chemicals sprayed from the extinguisher entered the cavity of the generator and coated its electrical components, with resulting contamination of the generator. After the fire was extinguished, Redco's general foreman assigned two or three people to clean up the area, including the generator. These individuals disposed of the subject welding blanket in addition to other debris. It appears that Black & Veatch was aware of the fire prior to the final disposal of the blanket, which has never been recovered. The Liquidator admits that the blanket was not discarded for any improper purpose. However, according to the Liquidator's retained expert, it is common construction industry practice to retain welding blankets for inspection when such "incidents" arise.

The supplier of the generator inspected it and concluded that the chemical contamination was conductive and corrosive and that the generator would have to be repaired or replaced.

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<sup>3</sup> The policy can be found appended to Black & Veatch's Memorandum of Law in Support of [its] Motion for Summary Judgment, or Plaintiff's Opposition to O'Connor's Motion for Summary Judgment, or Plaintiff's Opposition to Black & Veatch's Motion for Summary Judgment. (Docket No. 77, Ex. 6; Docket No. 71, Ex. 2; Docket No. 99, Ex. 3.) The subrogation provision can be found in the Completed Value Builder's Risk/Installation Floater at page 12, ¶ 20. The construction contract referenced therein can be found attached to the Affidavit of John C. Davisson. (Docket No. 73, Ex. 1.)

Roughly one month after the fire, Reliance's adjuster approved certain repairs to the generator and, subsequently, Reliance paid \$1,599,293.51 to Androscoggin and Black & Veatch for repairs to the generator. On May 29, 2001 and October 3, 2001, Reliance was placed into rehabilitation and liquidation, respectively. M. Diane Koken, as Liquidator on behalf of Reliance filed the instant action on May 16, 2002. The first four counts recited in the Second Amended Complaint (Docket No. 12) seek to recover damages against Auburn Manufacturing and Inpro, the alleged manufacturer and distributor of the subject welding blanket, for strict product liability, breach of warranties (express and implied) and negligence. Auburn Manufacturing and Inpro have filed motions for summary judgment, contending, among other things, that judgment must enter against these claims because the Liquidator cannot prove that the subject welding blanket was manufactured or distributed by them. (Def. Inpro, Inc.'s Mot. Summ. J., Docket No. 74; Auburn's Mot. Summ. J. on Product Identification, Docket No. 75.) Those summary judgment motions are addressed in a companion recommended decision. The remaining counts request tort and contract remedies against Black & Veatch, Redco and O'Connor for failing to preserve the welding blanket, thereby impairing or destroying Reliance's subrogated cause of action against Auburn Manufacturing and Inpro.

### **Discussion**

Summary judgment is warranted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002). The pending motions call into question whether the Liquidator can maintain a contract or tort claim against the insured contractors for engaging in acts that may

have undermined subrogated claims against third parties. According to Black & Veatch, Redco and O'Connor ("the Contractors"), neither cause can be maintained because (1) there is no cause of action in tort for negligent spoliation of evidence; (2) even if there were such a claim, Reliance expressly waived its right to be subrogated to Androscoggin Energy's claims against the Contractors; (3) there is nothing in the insurance contract authorizing a spoliation claim for damages; and (4) recognition of such a contract claim would be antithetical to established insurance law principles. (Def. O'Connor Constructors, Inc.'s, Mot. Summ. J., Docket No. 63; Def. Redco, Inc.'s Mot. Summ. J., Docket No. 70; Mem. of Law in Supp. of Black & Veatch's Mot. Summ. J., Docket No. 71.) These contentions are valid.

There is no precedent in Maine, state or federal, recognizing a tort cause of action for negligent destruction of a cause of action or for negligent spoliation of evidence prior to litigation. Although most state courts of last resort have not addressed the issue, it appears that of those that have been asked to recognize the cause, most have declined the invitation. See, e.g., Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 424-25 (Mass. 2002) (declining to recognize a tort cause of action for intentional or negligent spoliation of evidence); Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 514-21 (Ca. 1998) (declining to recognize a tort cause of action for "intentional first party spoliation that is or reasonably should have been discovered before trial of the underlying action"); Goff v. Harold Ives Trucking Co., Inc., 27 S.W.3d 387, 391 (Ark. 2000) (finding it "unnecessary and unwise to recognize . . . spoliation of evidence as an independent tort"); Meyn v. State, 594 N.W.2d 31, 33-34 (Iowa 1999) (declining to recognize negligent spoliation of evidence cause of action in a third-party context); Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997) ("declin[ing] the invitation to create a new tort claim"); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1183 (Kan. 1987) (declining to

recognize tort of “intentional interference with a prospective civil action by spoliation of evidence” in the absence of “some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties”). Of course, there are a few notable exceptions, as the Liquidator points out in her brief. Because recognition of a new tort claim turns on questions of legal policy, predicting how the Law Court would address this issue is difficult. Fortunately, it is not necessary for the Court to seriously contemplate the matter. Reliance holds these tort claims against the Contractors solely by virtue of subrogation. Consequently, its rights as against the Contractors extend only so far as did Androscoggin Energy’s rights. N. River Ins. Co. v. Snyder, 2002 ME 146, 804 A.2d 399, 400 n.3 (defining subrogation as “the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured with respect to any loss covered by the policy”) (quoting Black’s Law Dictionary 1440 (7th ed. 1999)); Acadia Ins. Co v. Buck Constr. Co., 2000 ME 14, ¶ 17, 756 A.2d 515, 519 (“By agreeing to carry a particular type of insurance, an owner has agreed to look solely to the insurer and releases the builder from responsibility when there is loss or damage flowing from the insured risk; because the insurer can only succeed to those rights possessed by its insured, it has no right to recover from the builder.”). In its contract of insurance Reliance expressly waived subrogation “as respects the relationship between Androscoggin Energy, LLC[,] Black & Veatch and all respective subcontractors.”<sup>4</sup> Therefore, I conclude that summary judgment should enter against the claim denominated as Count VI.

Among the courts that have addressed the question of whether a spoliation tort should be recognized, several have suggested that a duty to preserve evidence might be assumed through

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<sup>4</sup> That the Liquidator’s tort claim is a subrogated claim is practically admitted by the Liquidator in her opposition to Black & Veatch’s motion for summary judgment. At page 13 of her opposition memorandum (Docket No. 99), she characterizes the underlying tort duty as the duty to perform in a workmanlike manner, a duty that clearly ran to Androscoggin Energy, not Reliance.

contract and, thus, that contract claims might arise for spoliation of evidence. See Fletcher, 773 N.E.2d at 425; Koplin, 734 P.2d at 1183. Here, the Liquidator points to language in the subrogation provision that reads, “In the event of any payment made hereunder, [Reliance] shall be subrogated to all the Insured’s rights of recovery therefore against any person or organization . . . . The Insured shall do nothing after the loss to prejudice such rights.” According to the Liquidator, the admonition that the insured do nothing to prejudice rights available through subrogation amounts to an actionable promise that exposes the Contractors (and, by logical extension, under different factual circumstances, the named insured) to contract claims for damages in the event they should fail to preserve evidence material to claims against third party tortfeasors. (Pl.’s Mem. in Opp’n to O’Connor and Redco’s Mot. Summ. J., Docket No. 77, at 2.) I disagree. The interpretation of a particular contract term is an issue of law. Gendron Realty v. New Jersey Lumber Co., 519 A.2d 723, 725 (Me. 1987). Ambiguous contract provisions are to be “construed strictly against the insurer and liberally in favor of the insured.” Pelkey v. GE Capital Assur. Co., 2002 ME 142, ¶ 10, 804 A.2d 385, 387. In my assessment, it would be offensive to the rules of construction applicable to insurance contracts for the Court to construe the “shall do nothing . . . to prejudice” language as an actionable promise rather than a mere condition precedent to indemnification. Among other concerns, the contract damages remedy requested by the Liquidator is nowhere set forth in the 12-word provision on which the Liquidator relies. The Liquidator is, thus, asking the Court to manufacture a reimbursement remedy that is not even hinted at in the policy. The creation of such a remedy on behalf of an insurer against its insured would appear to be unprecedented. The Liquidator cites no authority for the proposition and I have not been able to find a single case involving a claim of this sort. Moreover, the leading treatise on insurance law makes no reference to such a claim, even under a

section concerning subrogation rights and the bases for “recover[ing] from [an] insured/beneficiary under theories of reimbursement, recoupment, and the like.” 16 Couch on Insurance 3d, § 226.

The purpose of the “shall do nothing to prejudice” provision is to prevent an insured from releasing a party against whom a subrogated claim might be asserted. The recognized consequence of prejudicing subrogated rights is that the insurer may refuse to indemnify the insured’s loss. 6 Couch on Insurance 3d § 83:30 ( “The acceptance by the insured of a policy which includes conditions imposes upon him or her the duty of complying therewith, and failure so to do releases the insurer from liability . . . .”); see also, cf., *Greenvall v. Maine Mut. Fire Ins. Co.*, 1998 ME 204, ¶¶ 10-11, 715 A.2d 949, 953-54 (concerning analogous situation arising from breach of a “no consent to settlement clause”); 14 Couch on Insurance 3d § 199:6 (concerning analogous situation arising from breach of a “cooperation clause”); *Phila. Indem. Ins. Co. v. Stebbins Five Cos.*, 2002 WL 31875596, \*5 & n.3, 2002 U.S. Dist. LEXIS 24582, \*20-21 & n.3 (N.D. Tex. Dec. 20, 2002) (finding that a breach of contract action by an insurer based on a cooperation clause did not state a cause of action and collecting Texas authorities to that effect). It would seem appropriate to construe this provision, and limit it, in accordance with its intended purpose. If Reliance intended to create a basis for a breach of contract cause of action against its insureds for prejudicing rights it might acquire as subrogee, it should have included clear policy language to that effect. Making the Contractors herein potentially liable for risks Reliance insured (in exchange for a substantial premium) goes beyond the contemplation of parties to an all risk insurance policy. I therefore recommend that the Court grant summary judgment in favor of the Contractors against Count V.

### **Conclusion**

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** Black & Veatch's motion for summary judgment (Docket No. 71), Redco's motion for summary judgment (Docket No. 70) and O'Connor Constructors's motion for summary judgment (Docket No. 63).

### NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated January 8, 2004

**U.S. District Court  
District of Maine (Bangor)  
CIVIL DOCKET FOR CASE #: 1:02-cv-00083-GC**

KOKEN v. AUBURN MANUFACTURING, et al

Assigned to: JUDGE GENE CARTER

Referred to:

Demand: \$0

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 05/16/02

Jury Demand: Defendant

Nature of Suit: 190 Contract: Other

Jurisdiction: Diversity

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**ThirdParty Plaintiff**  
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V.

**ThirdParty Defendant**  
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**Cross Claimant**  
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V.

**Cross Defendant**  
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**Cross Claimant**  
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V.

**Cross Defendant**  
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**REDCO/O'CONNOR**

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V.

**Cross Defendant**  
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**AUBURN MANUFACTURING  
INC**

**INPRO INC**

**Cross Claimant**  
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**AUBURN MANUFACTURING**

**INC**

V.

**Cross Defendant**

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**BLACK & VEATCH  
CONSTRUCTION, INC**

**INPRO INC**

**O'CONNOR CONSTRUCTORS  
INC**

**REDCO INC**

**Cross Claimant**

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**O'CONNOR CONSTRUCTORS  
INC**

V.

**Cross Defendant**

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**AUBURN MANUFACTURING  
INC**

**Cross Claimant**

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**REDCO INC**

V.

**Cross Defendant**

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**AUBURN MANUFACTURING**

**INC**

**Cross Claimant**

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**REDCO INC**

**V.**

**Cross Defendant**

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**INPRO INC**

**Cross Claimant**

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**INPRO INC**

**V.**

**Cross Defendant**

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**AUBURN MANUFACTURING  
INC**

**BLACK & VEATCH  
CONSTRUCTION, INC**

**O'CONNOR CONSTRUCTORS  
INC**

**REDCO INC**

**REDCO/O'CONNOR INC**

**Cross Claimant**

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**INPRO INC**

V.

**Cross Defendant**

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**AUBURN MANUFACTURING  
INC**

**BLACK & VEATCH  
CONSTRUCTION, INC**

**O'CONNOR CONSTRUCTORS  
INC**

**REDCO INC**

**REDCO/O'CONNOR INC**

**Cross Claimant**

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**O'CONNOR CONSTRUCTORS  
INC**

V.

**Cross Defendant**

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**INPRO INC**