

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**LIGHTHOUSE IMAGING, LLC,** )  
 )  
 **Plaintiff** )  
 )  
 v. )  
 )  
 **ONEBEACON AMERICA INSURANCE** )  
 **COMPANY,** )  
 )  
 **Defendant** )

**No. 2:13-cv-237-JDL**

**RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Both sides have moved for summary judgment in this case in which the plaintiff seeks a judgment declaring that the defendant is obligated under a particular insurance policy to defend the plaintiff in another action now pending in another court. Oral argument was held before me on May 7, 2014. Supplemental briefs addressing the effect, if any, of a ruling by the court in the other action for which the plaintiff seeks insurance coverage from the defendant were filed on May 16, 2014. I recommend that the court grant the plaintiff’s motion in part and deny that of the defendant.

**I. Applicable Legal Standards**

**A. Federal Rule of Civil Procedure 56**

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving

party.” *Rodríguez-Rivera v. Federico Trilla Reg’l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). “A fact is material if it has the potential of determining the outcome of the litigation.” *Id.* (quoting *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(c). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

“This framework is not altered by the presence of cross-motions for summary judgment.” *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 6 (1st Cir. 2003). “[T]he court must mull each motion separately, drawing inferences against each movant in turn.” *Id.* (citation omitted); *see also, e.g., Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996) (“Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se*. Cross motions simply require us to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. As always, we resolve all

factual disputes and any competing, rational inferences in the light most favorable to the [nonmovant].”) (citations omitted).

### **B. Local Rule 56**

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the local rules of this district. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(f). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or

consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id.*; see also, e.g., *Sánchez-Figueroa v. Banco Popular de P.R.*, 527 F.3d 209, 213-14 (1st Cir. 2008); Fed. R. Civ. P. 56(e)(2) ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]").

## II. Factual Background

The defendant, OneBeacon America Insurance Company ("OneBeacon"), issued a policy of insurance, which it calls an @vantage for MedTech Policy, bearing policy number 711-01-22-34-0002, to the plaintiff as a named insured for the policy period from August 23, 2012, to August 23, 2013 (the "Policy"). Joint Stipulated Record and Facts (ECF No. 23) ¶ 1.

On March 15, 2013, InSyte Medical Technologies, Inc. d/b/a Trice Orthopedics, Inc., filed an action captioned *Insyte Medical Technologies, Inc. d/b/a Trice Orthopedics, Inc. v. Lighthouse, LLC*, No. 2:13-cv-01375-MAM, in the United States District Court for the Eastern District of Pennsylvania (the "underlying lawsuit"). Statement of Material Facts Not in Dispute ("Plaintiff's SMF") (ECF No. 25) ¶ 3; Defendant OneBeacon America Insurance Company's Response to Plaintiff's Statement of Material Facts and Statement of Additional Undisputed Material Facts ("Defendant's Responsive SMF") (ECF No. 31) ¶ 3. The plaintiff accepted service of the underlying lawsuit and entered an appearance on June 19, 2013. *Id.* ¶ 6.

After being notified of the underlying lawsuit, the defendant denied coverage on April 15, 2013, and again, following a request for reconsideration from the plaintiff's lawyer, on May 16, 2013. *Id.* ¶ 5.<sup>1</sup> To date the plaintiff has spent \$23,054.50 plus court costs in defending the

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<sup>1</sup> The defendant's qualification in response to this paragraph of the plaintiff's statement of material facts does not dispute any of the facts set forth in this sentence.

underlying lawsuit. *Id.* ¶ 13.<sup>2</sup>

The Policy contains three types of coverage forms: (1) a Technology Errors or Omissions Coverage Form; (2) a Commercial General Liability Coverage Form; and (3) a Commercial Umbrella Liability Coverage Form. OneBeacon’s Statement of Additional Undisputed Material Facts (“Defendant’s SMF”) (included in Defendant’s Responsive SMF, beginning at 4) ¶ 15; Plaintiff’s Response to Defendant’s Statement of Additional Undisputed Material Facts (“Plaintiff’s Responsive SMF”) (ECF No. 36) ¶ 15.

On May 6, 2014, the day before the oral argument, counsel for the defendant provided the court with a copy of a ruling by Judge McLaughlin of the United States District Court for the Eastern District of Pennsylvania in the underlying action, granting a motion to dismiss all but the breach of contract claim against Lighthouse in the underlying action. Memorandum [dated March 11, 2014], *Insyte Medical Technologies, Inc. v. Lighthouse Imaging, LLC*, Civil Action No. 13-1375, copy attached to letter dated May 6, 2014, from John T. Harding to Magistrate Judge John H. Rich III (ECF No. 45).

### **III. Discussion**

#### **A. Insurance Coverage Law**

The complaint asks this court to find that OneBeacon has a duty to defend the plaintiff in the underlying lawsuit. Complaint for Declaratory Relief (ECF No. 1) at 5. The parties agree that Maine law applies to this issue. Plaintiff’s Motion for Summary Judgment (“Plaintiff’s Motion”) (ECF No. 24) at 4; Defendant OneBeacon America Insurance Company’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and In Support of Cross-Motion for

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<sup>2</sup> The defendant purports to qualify this paragraph of the plaintiff’s statement of material facts, asserting that it “denies that it has an obligation to reimburse Lighthouse for such fees[.]” Defendant’s Responsive SMF ¶ 13. As written, this paragraph of the plaintiff’s statement of material facts merely states the costs it has incurred in the underlying lawsuit; it says nothing about the defendant’s obligation to reimburse it for these costs.

Summary Judgment (“Defendant’s Motion”) (ECF No. 32) at 7.

Under Maine law, the duty to defend is determined by a comparison test: the complaint in the underlying lawsuit is compared with the insurance policy to determine whether any legal or factual basis exists that could be developed at trial that would obligate the insurer to pay under the policy. *York Ins. Group of Maine v. Lambert*, 740 A.2d 984, 985 (Me. 1999); *Metropolitan Prop. & Cas. Ins. Co. v. McCarthy*, \_\_\_ F.3d \_\_\_, 2014 WL 2535077, at \*1 (1st Cir. June 5, 2014). “If the complaint shows even a possibility that the events giving rise to it are within the policy coverage, the insurer must defend the suit,” and “[a]ny ambiguity must be resolved in favor of a duty to defend.” *Auto Europe, LLC v. Connecticut Indem. Co.*, 321 F.3d 60, 66 (1st Cir. 2003).

## **B. Technology Errors or Omissions**

The plaintiff first argues that the Technology Errors or Omissions Coverage Form of the Policy covers one or more of the claims in the underlying lawsuit, and that none of the exclusions in the Policy applies. Plaintiff’s Motion at 6-13. The defendant does not address the issue of coverage under the terms of the Policy, choosing to focus on several exclusions that it contends take the claims raised in the underlying action out of coverage under the Policy. Defendant’s Motion at 10-18. Accordingly, I will address each of the exclusions invoked by the defendant.

The defendant begins by emphasizing the importance of the introductory language in the Technology Error or Omissions portion of the Policy, which bars coverage for “any claim based upon, arising out of or in any way related to” any specified exclusions. Policy (ECF No. 1-1) at 21 (Technology Errors or Omissions Coverage Form § I.2).

### **1. Delay**

The defendant relies on exclusions in this section of the Policy for delay in delivery of “your technology offerings” and delay in performance of “your technology offerings.”

Defendant's Motion at 12-14. The term "your technology offerings" is defined as "your products" and "your work," which are defined in turn as "goods, programs, designs, products, services or components which you . . . manufactured, sold, handled, or disturbed," and "work, service or operations performed by you . . . for others[,]" respectively. Policy at 27.

The defendant contends that the plaintiff "fails to identify a single claim Trice advances in the underlying complaint that is *not* either 'based upon,' 'arising out of' or 'in any way related to'" the plaintiff's alleged delay in delivery or delay in performance. Defendant's Motion at 13 (emphasis in original).

First, as the party moving for summary judgment based upon the exclusion, it is the defendant's burden to show that all of the allegations in the underlying lawsuit are barred by this exclusion, rather than the plaintiff's burden to prove that one or more of the claims is not barred. Second, the defendant's argument paints with too broad a brush. *See, e.g., American Guar. & Liab. Ins. Co. v. Timothy S. Keiter, P.A.*, 360 F.3d 13, 20 (1st Cir. 2004).

True, in each count of the complaint in the underlying action, the plaintiff InSyte alleges that it has suffered financial harm in the form of delays in production or marketing. Complaint, *InSyte Medical Technologies, Inc. v. Lighthouse imaging, LLC*, No. 2:13-cv-01375-MAM (E.D. Pa.) ("InSyte Complaint") (ECF No. 1-2), ¶¶ 27, 33, 41, 46, 50, but that does not mean that each claim is "based upon," "arises out of," or is "in any way related to" delay by the plaintiff in its delivery of products to InSyte or delay in its performance. As alleged, the delays could be in InSyte's production or marketing, rather than the plaintiff's.

More important, some of the claims alleged in InSyte's complaint do not involve delay by their very nature. Specifically, negligent misrepresentation, alleged in Count II, *id.* at 8, is defined, under Maine law, as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Noveletsky v. Metropolitan Life Ins. Co.*, Civil No. 2:12-cv-00021-NT, 2013 WL 2945058, at \*9 (D. Me. June 14, 2013) (citation omitted). It is the falsity of the information at the time it is conveyed, rather than as it may be rendered by later events, including delay, that is the gravamen of such a claim.

Similarly, the allegation of fraud in Count IV of the InSyte complaint is not based upon or necessarily related to delay, nor does it arise out of delay. Under Maine law, a person is liable for fraud if he (1) makes a false representation, (2) of a material fact, (3) with knowledge of its falsity or in reckless disregard of whether it is true or false, (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff. *Glenwood Farms, Inc. v. O'Connor*, 666 F.Supp.2d 154, 171-72 (D. Me. 2009). It is particularly clear in this case that delay is not an element of this claim, as the complaint in the underlying lawsuit alleges that the plaintiff in that action reasonably relied upon false representations made by the insured and was thereby “defrauded and/or induced to accept and execute” the contract between the two. InSyte Complaint ¶ 45. These events could only have taken place before any possible delay in delivery or performance under the contract by the plaintiff here.

The same is true of the claim for breach of fiduciary duty, Count V, in the underlying lawsuit. That claim alleges a disparity of bargaining positions between InSyte and the plaintiff here that, again, could only have occurred at the time of bargaining, *id.* ¶¶ 48-49, well before any delay in the plaintiff’s delivery or performance.

The delay exclusions do not relieve the defendant of its duty to defend the plaintiff in the underlying lawsuit.

## **2. Cost to Comply With Warranties**

The defendant next contends, in a brief argument, that the exclusion in the Policy for “[t]he cost or expense to comply with any warranty, including but not limited to, the cost or expense to correct, repair, or replace your technology offerings” relieves it of any duty to defend the plaintiff in the underlying lawsuit. Policy at 22 (Technology Errors or Omissions Form § I.2.b); Defendant’s Motion at 14. The defendant equates any allegation in the InSyte complaint that the plaintiff made a representation or promise with a claim of warranty, and then asserts that “[i]nsofar as [InSyte] seeks damages from Lighthouse for any costs incurred to replace the technology device that Lighthouse failed to deliver in breach of the representations and warranties that were made by Lighthouse . . . , such damages are barred by this exclusion.” *Id.*

Bearing in mind that Maine law requires exclusionary terms in insurance policies to be construed strictly against the insurer, *Lyman Morse Boatbuilding, Inc. v. Northern Assurance Co. of Am., Inc.*, No. 2:12-cv-313-DBH, 2013 WL 5435204, at \*5 (D. Me. Sept. 27, 2013), the complaint in the underlying action cannot reasonably be construed to demand damages to replace the technology device at issue, InSyte Complaint ¶¶ 27, 33, 41, 46, 50, & Prayer for Relief at 11-12. The defendant, therefore, has not demonstrated that this exclusion applies to any of InSyte’s claims, much less all of them.

## **3. Intellectual Property**

The next exclusion upon which the defendant relies, Defendant’s Motion at 14-16, provides:

Any actual or alleged infringement, violation or misappropriation by any person or organization, including an insured, of any intellectual property

right or law, regardless of whether this insurance would otherwise apply in whole or in part in the absence of any such actual or alleged infringement, violation or misappropriation.

Policy at 22 (Technology Errors or Omissions Coverage Form § I.2.j).

The defendant asserts that “it is clear that the underlying complaint has a connection with, is related to, or is based upon a claim that Lighthouse misappropriated intellectual property rights of another company and included them within its product.” Defendant’s Motion at 15. I disagree. The underlying complaint does not allege that the plaintiff infringed any intellectual property right of InSyte, nor does it allege that the plaintiff violated any intellectual property law. Rather, reasonably construed, it alleges at most that the plaintiff knew that a third party, Clarus Medical, would not release its proprietary design of a subassembly included in the product that the plaintiff was to design for InSyte. InSyte Complaint ¶¶ 32, 39. This is an allegation that the plaintiff did *not* infringe any intellectual property right or law.

The defendant has failed to demonstrate that the intellectual property exclusion excuses it from its duty to defend the plaintiff in the underlying lawsuit.

#### **4. Termination or Change in Contract**

The Policy includes an exclusion for “[a]ny actual, alleged, or threatened termination, lapse, or change of any agreement, contract or license if such termination, lapse, or change is within the insured’s control.” Policy at 23 (Technology Errors or Omissions Coverage Form § I.2.r). In a single-paragraph argument, the defendant contends that “[t]he clear import of the allegations in [paragraphs 17-20 and 39 of the InSyte Complaint] is that changes in the Development Contract were required because Lighthouse failed to perform in accordance with its terms, and that those changes were within Lighthouse’s control.” Defendant’s Motion at 16.

Again, I disagree. Read fairly, Paragraphs 17-20 of the InSyte Complaint allege changes

in the design of the product to be produced by the plaintiff but do not allege any changes to the contract between InSyte and Lighthouse other than an alleged *proposed* revised contract “to clarify each parties’ [sic] rights and obligations.” InSyte Complaint ¶ 20. Paragraph 39 alleges anticipatory repudiation of that contract, which may constitute “termination” of the contract. However, that single paragraph, which appears in Count III of the InSyte complaint, and Paragraph 20 in the Facts section of the InSyte complaint, are not sufficient to relieve the defendant of its duty to defend the plaintiff. The duty to defend exists even if only one of the counts in the underlying complaint would, if proved, fall within the Policy’s coverage. *Donna C. v. Kalamaras*, 485 A.2d 222, 224 (Me. 1984).

## **5. Prior Knowledge**

The defendant next argues that the InSyte complaint alleges that the plaintiff “made various misrepresentations and omissions prior to the execution of and within” the contract upon which Count III of the underlying complaint is based. Defendant’s Motion at 17. This means, it contends, that coverage is barred “to the extent that [the underlying complaint] arises from errors or omissions Lighthouse knew of prior to August 23, 2012[,]” the effective date of the Policy, by the prior knowledge exclusion. *Id.* at 16-17. The exclusion in question provides that there is no coverage for “[a]ny error or omission the insured had knowledge of prior to the effective date of this policy period.” Policy at 23 (Technology Errors or Omissions Coverage Form § I.2.n).

The problem with this argument, like that above invoking the “change in contract” exclusion, is that it cannot reasonably be construed to apply to all five counts in the underlying complaint as written and, thus, does not relieve the defendant of its duty to defend the plaintiff in the underlying lawsuit.

## 6. Dishonest or Intentional Acts

The next exclusion upon which the defendant relies provides, in relevant part, that coverage is excluded for “[a]ny actual or alleged dishonest or intentional act, including fraudulent, criminal or malicious acts, committed by any insured.” Policy at 23 (Technology Errors or Omissions Coverage Form ¶ I.2.f. The defendant concedes that this exclusion applies only to Count IV of the InSyte complaint, which alleges fraud. Defendant’s Motion at 17-18. It argues, however, that coverage for each of the other four counts is barred by one or more of the exclusions already discussed. *Id.* at 18.

However, the defendant does not identify which count is barred by which exclusion. My comparison of the specified exclusions with the allegations of the complaint in the underlying lawsuit leads to the conclusion that, while the contract claim and the fraud claim (Counts III and IV) may be excluded from coverage under the Policy, the defendant has not shown that all of the other three claims are similarly barred.

## C. Damages

The defendant next contends that the Policy provides no coverage, and thus the defendant has no duty to defend the insured, because the underlying lawsuit does not seek “damages,” as that term is used in the Policy. Defendant’s Motion at 18-19. The Policy provides that the defendant “will pay damages that the insured becomes legally obligated to pay arising out of your technology offerings because of an error or omissions to which this insurance applies.” Policy at 21 (Technology Errors or Omissions Coverage Form § I.1.a). The defendant asserts that, under the Technology Errors or Omissions Coverage Form, damages “are limited to compensatory damages, and specifically *do not* include amounts paid to Lighthouse in connection with its ‘technology offerings,’ such as ‘any return of charges, fees, or amounts due under a contract.’” Motion at 19

(emphasis in original; not in policy language). It cites no passage in the insurance policy containing this definition, but I assume that it intended to refer to the Policy at 26, § VII.4.

The defendant asserts that “[t]o the extent that the *InSyte* Action is not a suit seeking covered damages, OneBeacon has no duty to defend Lighthouse.” *Id.* That is a misstatement of Maine law on the duty to defend, which provides the inverse: to the extent that the underlying lawsuit seeks *any* covered damages, the defendant has a duty to defend its insured. The underlying complaint specifically seeks consequential damages. *InSyte* Complaint at 11. Nothing more is necessary to refute the defendant’s contention that it has no duty to defend the plaintiff on this basis.

#### **D. Commercial General Liability and Commercial Umbrella Liability**

The plaintiff argues that it is also entitled to a defense under the commercial general liability coverage and umbrella coverage that is part of the Policy. Plaintiff’s Motion at 13-15. Because the plaintiff is entitled to a defense in the underlying lawsuit under the terms of the Technology Errors or Omissions Coverage Form, it is not necessary for the court to reach this issue.

#### **E. Decision in the Underlying Action**

At the close of the oral argument, without objection, I directed counsel to file supplemental memoranda of law addressing two arguments raised for the first time by counsel for the defendant, based upon the dismissal by the court in the underlying action of all counts other than the breach of contract count, for which counsel for the plaintiff conceded at oral argument the Policy does not provide coverage. Those questions were whether the opinion in the underlying action could be applied retroactively and whether the doctrine of judicial estoppel requires entry of judgment for the defendant in this case. In its supplemental memorandum of law, the defendant abandons its

argument that the decision in the underlying action should be applied retroactively to absolve it of any duty to defend the plaintiff from the onset of the action. Defendant OneBeacon America Insurance Company's Supplemental Brief in Support of Motion for Summary Judgment ("Defendant's Supplemental Brief") (ECF No. 50) at 2 n.2.

### **1. Ongoing Obligation**

The question, thus, becomes whether, as the plaintiff contends, the decision in the underlying action should have no effect on the defendant insurer's duty to defend in that action until a final, unappealable judgment in the case has been entered, Plaintiff's Supplemental Memorandum ("Plaintiff's Supplemental Brief") (ECF No. 51) at 2-6, or immediately cuts off any duty to defend, as the defendant contends, Defendant's Supplemental Brief at 3-8.

I begin by rejecting the defendant's assertion that the complaint in the underlying action was "amended" by the court's decision, *id.* at 2, 3, 6, 7, and its suggestion that "the most recent complaint" in that action somehow differs from the original complaint, *id.* at 7. A court's ruling on a motion to dismiss fewer than all of the claims asserted in a complaint does not "amend" that complaint or create a new complaint. The complaint is a document that remains unchanged, even after some of its claims have been dismissed. The cases involving actual amendment of a complaint by a plaintiff that the defendant cites, *id.* at 5-6, are inapposite and unnecessary.

The plaintiff argues that the Maine Law Court would adopt the position of "a number of jurisdictions" that "the duty to defend does not terminate until a final non-appealable determination on the merits has been rendered." Plaintiff's Supplemental Brief at 2. It finds evidence to support this prediction in *Mitchell v. Allstate Ins. Co.*, 2011 ME 133, ¶ 10, 36 A.3d 876, 879. *Id.* However, the proposition for which the plaintiff cites this case, that an insurer may have a duty to defend an insured even when the underlying claims may not, on their fact, survive a motion to dismiss,

Plaintiff's Supplemental Brief at 3, does not support its contention that the Law Court, therefore, would require an insurer to continue to defend the insured *after* the court in the underlying action had in fact dismissed those claims. When the claims have been dismissed by the court, there remains no "*potential* that facts ultimately proved could result in coverage," *Mitchell*, 2011 ME 133, ¶ 10, 36 A.3d at 879 (emphasis in original), which is the linchpin of the Law Court's rationale.

The same is true of the opinion in *Maine Bonding & Cas. Co. v. Douglas Dynamics, Inc.*, 594 A.2d 1079 (Me. 1991), cited by the Law Court in *Mitchell* and by the plaintiff in its supplemental memorandum. The fact that application of the comparison test to determine the duty to defend "may sometimes require an insurer to defend when there may be no ultimate duty to indemnify," *id.* at 1080, does not mean that an insurer must continue to defend an insured after the court in which the underlying action is pending has determined that there is, in effect, no longer any potential duty to indemnify.

The First Circuit made this clear in *Conway Chevrolet-Buick, Inc. v. Travelers Indem. Co.*, 136 F.3d 210 (1st Cir. 1998). In that case, the insurer participated in its insured's defense in the underlying action, but withdrew after the trial court granted the insured's motion for summary judgment on all counts other than those for which the insurance policy provided no coverage. *Id.* at 212-13. The First Circuit held that, once any claims that "would not inevitably fall within the [policy] exclusions" at issue "were dismissed by the court's grant of summary judgment, . . . only counts falling directly within the policy exclusions remained.." *Id.* at 214. Because the only "live allegations" in the underlying action fell within the policy exclusions, the First Circuit held that the insurer "did not breach its contractual duty to defend when it withdrew." *Id.* at 214 n.4, 214-15. This is precisely the situation presented here.

The plaintiff correctly points out that the First Circuit was construing Massachusetts law

in *Conway*, Plaintiff's Supplemental Brief at 3, but that is a distinction without a difference, as Massachusetts also applies the comparison test in duty-to-defend cases. 136 F.3d at 213-14; *NWS Corp. v. Hartford Fire Ins. Co.*, Civil Action No. 12-30113-KPN, 2013 WL 2325175, at \*3 (D. Mass. Apr. 25, 2013). *See also Worcester Ins. Co. v. Dairyland Ins. Co.*, 555 A.2d 1050, 1053 (Me. 1989) (summary judgment in underlying action relieves insurer of duty to defend further but does not retroactively relieve it of initial duty to defend).

*Conway* requires that the defendant reimburse the plaintiff for its costs and attorney fees reasonably incurred in the underlying action through the date of the order granting the motion to dismiss, and not thereafter. Should InSyte appeal the dismissal of the counts for which coverage under the Policy might have been available, or should it successfully revive one or more of those counts as the underlying action proceeds, the plaintiff may wish to invoke the defendant's duty to defend again. While this recommended decision does not resolve those potential questions, they are questions to be addressed at another time and are not before the court at this time.

## **2. Judicial Estoppel**

The defendant contends that the plaintiff "should be precluded from contending that the underlying complaint seeks damages for anything other than a breach of contract that is not covered by the One Beacon policy[,] because it took the position in its motion to dismiss in the underlying action that all of the other claims pleaded failed to state claims upon which relief could be granted, which the defendant characterizes as "inconsistent" with its claims in this action. Defendant's Supplemental Brief at 8-9. In support of this position, it invokes the doctrine of judicial estoppel. *Id.*

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Maine Educ.*

*Ass'n v. Maine Community College Sys. Bd. of Trustees*, 2007 ME 70, ¶ 16, 923 A.2d 914, 917; *see also Rothrock v. Turner*, 435 B.R. 70, 80 n.8 (D. Me. 2010). Three factors inform the decision whether to apply the doctrine: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in arguing its earlier position, so that acceptance of an inconsistent position in a later proceeding would create the appearance of inconsistent determinations, suggesting that one of the courts was misled; and (3) whether an unfair advantage or detriment would be created. *MEA*, 2007 ME 70, ¶ 18, 923 A.2d at 918.

Here, the plaintiff's position in this declaratory judgment action is simply not inconsistent with its motion to dismiss in the underlying action. The issue in this case is whether the terms of the Policy imposed upon the defendant insurer a duty to defend the plaintiff in the underlying action, based solely on the allegations of the complaint in that action, before any litigation has taken place, and independent of that litigation, at least until the court in the underlying action takes definitive action on the relevant claims. The motion to dismiss addressed the merits of some of the claims in the underlying action, as they were pleaded, on the basis of very different legal principles. In addition, no unfair advantage for the plaintiff insured or detriment to the defendant insurer has been created. If anything, the dismissal of the covered counts in the underlying action served the interests of the insured, because it terminated the defendant's obligation to defend the plaintiff, for the reasons discussed above.

Adopting the defendant's position in this regard would present insureds with a dilemma antithetical to the basic principles of American jurisprudence: in order to assure themselves of the possibility of obtaining a defense from their insurers in cases in which they are charged with claims that they reasonably believe to be covered by the insurance at issue, insureds would have to refrain from defending themselves in such actions, a course of action that would undoubtedly violate one

or more provisions of the insurance policies at issue, which usually require insureds to avoid actions that could be construed as an admission of liability. *See generally Medmarc Cas. Ins.. Co. v. Avent Am., Inc.*, 612 F.3d 607, 614 (7th Cir. 2010).

#### **F. Attorney's Fees**

The plaintiff seeks an award of the attorney's fees that it has incurred to date in the underlying lawsuit and of the attorney's fees and costs incurred in bringing this declaratory judgment action. Plaintiff's Motion at 15-17. The amount incurred in the underlying lawsuit is apparently undisputed. *Id.* at 15. The defendant opposes only the request for fees and costs incurred in the present action, arguing that the law on its duty to defend under a Technology Errors and Omissions policy is "unsettled." Defendant's Motion at 24.

The defendant has not attempted to demonstrate that there is anything unique about such an insurance policy that makes general principles of insurance inapplicable to the question of the insurer's duty to defend its insured under such a policy, as applied in this case. The absence of "Maine law interpreting the Tech E&O Form that is at the heart of Lighthouse's claim[,]” *id.*, does not automatically render an interpretation of that Form a matter of "unsettled" law.

Under Maine law, "an award of attorney fees to the insured is appropriate when it is clear from a comparison of the insurance policy and the complaint that the insurance company is potentially liable to indemnify the insured." *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 831 F.Supp.2d 367, 372 (D. Me. 2011) (citation and internal punctuation omitted). A comparison of the InSyte complaint with the terms of the Technology Errors or Omissions Coverage Form makes the defendant's duty to defend its insured more compelling here, in my view, than that duty was in *Auto Europe, LLC v. Connecticut Indem. Co.*, 321 F.3d 60, 68-69 (1st Cir. 2003), where the underlying complaint alleged deception and the policy excluded dishonest acts, but attorney's fees

were awarded by this court and the award upheld by the First Circuit.

I conclude that the defendant's duty to defend the plaintiff in the underlying lawsuit was clear because a comparison of the complaint with the defendant's insurance policy demonstrates that the defendant was potentially liable to indemnify the plaintiff on one or more of the claims asserted in the underlying action. I recommend that the court award the plaintiff its attorney's fees in connection with both actions, although limited in connection with the first action to fees incurred through March 11, 2014, the date of the decision granting the motion to dismiss all but the breach of contract claim in that action.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **GRANTED IN PART**, the defendant's motion for summary judgment be **DENIED**, and the plaintiff be awarded its attorney's fees incurred in both this action and the underlying action, in that case only through March 11, 2014.

#### **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 and request for oral argument before the district judge, if any is sought, within fourteen (14) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) 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.*

Dated this 25<sup>th</sup> day of June, 2014.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

**Plaintiff**

**LIGHTHOUSE IMAGING LLC**

represented by **CHRISTIAN T. CHANDLER**  
CURTIS, THAXTER, STEVENS,  
BRODER & MICOLEAU  
ONE CANAL PLAZA  
SUITE 1000  
P.O. BOX 7320  
PORTLAND, ME 04112-7320  
207-774-9000  
Email: cchandler@curtisthaxter.com

**STEPHANIE E. GREEN**  
CURTIS, THAXTER, STEVENS,  
BRODER & MICOLEAU  
ONE CANAL PLAZA  
SUITE 1000  
P.O. BOX 7320  
PORTLAND, ME 04112-7320  
207-774-9000  
Email: sgreen@curtisthaxter.com

V.

**Defendant**

**ONEBEACON AMERICA  
INSURANCE COMPANY**

represented by **MICHAEL H. HAYDEN**  
MORRISON MAHONEY, LLP  
250 SUMMER ST.  
BOSTON, MA 02210  
(617)-439-7500  
Email:  
mhayden@morrisonmahoney.com

**RACHEL M. DAVISON**  
MORRISON MAHONEY, LLP  
250 SUMMER ST.

BOSTON, MA 02210  
(617) 439-7541  
Email:  
rdavison@morrisonmahoney.com

**JOHN T. HARDING**  
MORRISON MAHONEY, LLP  
250 SUMMER ST.  
BOSTON, MA 02210  
617-439-7558  
Email:  
jharding@morrisonmahoney.com