UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-80512-CIV-SINGHAL/MATTHEWMAN

DC CAPITAL LAW FIRM, LLP,

Plaintiff/Counter-Defendant,

v.

THE HANOVER INSURANCE COMPANY,

Defendant/Counterclaimant.
_____/

**ORDER**

**THIS CAUSE** is before the Court on Defendant/Counterclaimant The Hanover Insurance Company's Motion for Judgment on the Pleadings (DE [25]). The motion is fully briefed and ripe for review. For the reasons discussed below, the Motion for Judgment on the Pleadings is granted.

I. INTRODUCTION

This is an action for breach of a contractual duty to defend under a professional liability insurance policy. Plaintiff DC Capital Law Firm, LLP ("DC Capital") was insured by The Hanover Insurance Company ("Hanover") under a Lawyers Professional Liability Insurance Policy LHY D 79544300 with effective dates of December 21, 2018, through December 21, 2019 (the "Policy"). *See* Complaint (DE [1], Ex. 2). On December 19, 2018, DC Capital was served with a summons and complaint in a lawsuit filed in the U.S. District Court for the Southern District of Florida captioned, *Diamond Resorts International, Inc., et. al. v. US Consumer Attorneys, P.A., et. al.*, 9:18-cv-80311 (the "Diamond Action"). *See* Counterclaim (DE [14] ¶ 19 and Answer to Counterclaim (DE [15] ¶ 19). Service was made on DC Capital's registered agent. *Id.* DC Capital made a demand on Hanover to

defend it in the Diamond Action, but Hanover denied coverage because (1) the claim was made before the Policy's effective date and (2) the Policy's Prior Notice Exclusion barred coverage.[1]

DC Capital filed suit against Hanover in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida, alleging breach of the Policy. Hanover removed the suit to this Court on the basis of diversity of jurisdiction, 28 U.S.C. § 1332(a). (DE [1]). Hanover filed an Answer and Counterclaim (DE [14]) denying the allegations of the Complaint and seeking a declaration that there is no coverage under the terms of the Policy. Hanover now seeks a judgment on the pleadings in its favor.

## II. LEGAL STANDARDS

Pursuant to Federal Rule of Civil Procedure 12(c), after the pleadings are closed, a party may move for judgment on the pleadings if no material facts remain at issue and the parties' dispute can be resolved on the pleadings and those facts of which the court can take judicial notice. *See* Fed. R. Civ. P. 12(c); *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). A motion for judgment on the pleadings is governed by the same standard as a Rule 12(b)(6) motion to dismiss. *See Hawthorne*, 140 F.3d at 1370. Under Rule 12(b)(6), the defendant may seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering such a motion, the Court must "accept the facts alleged in the complaint as true and draw all inferences that favor the nonmovant." *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998).

[1] DC Capital was insured under a professional liability policy issued by Wesco Insurance Company ("Wesco") for claims made during the policy period December 21, 2017, to December 21, 2018. That policy required notice be given to Wesco during the policy period (or any extended reporting period, if applicable). It appears the Wesco policy did not contain an extended reporting period.

## III. DISCUSSION

DC Capital is a Washington, D.C., limited liability partnership.[2] Hanover is incorporated in New Hampshire with its principal place of business in Massachusetts. Hanover argues that District of Columbia law applies, but the parties agree that a choice of law analysis is not necessary because the laws of Florida and District of Columbia are substantially similar and the outcome is the same regardless of which law is applied. Therefore, there is no true conflict and a choice-of-law analysis is not required. *Cooper v. Meridian Yachts, Ltd.,* 575 F.3d 1151, 1171 (11th Cir. 2009). In both jurisdictions, the interpretation of an insurance contract is a question of law. *Diocese of St. Petersburg, Inc. v. Arch Ins. Co.,* 188 F. Supp. 3d 1289, 1293 (M.D. Fla. 2016); *Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 366 (D.C. 1984).

"[T]he central inquiry in a duty to defend case is whether the complaint 'alleges facts that fairly and potentially bring the suit within policy coverage.'" *Hartford Ac. and Indem. Co. v. Beaver,* 466 F.3d 1289, 1292 (11th Cir. 2006) (quoting *Jones v. Florida Ins. Guar. Ass'n, Inc.,* 908 So. 2d 435, 443 (Fla. 2005)). Hartford does not argue that the factual allegations of Diamond Action fall outside the Policy's duty to defend. Instead, Hanover argues the Diamond Action Claim was made outside the effective dates of the Policy.

The Policy is a claims-made policy. "'Claims-made' is the term generally used to describe insurance policies under which the insurer agrees to indemnify the insured party against all claims *made during the period of the policy*, regardless of whether the incident that gave rise to the claim occurred during the policy term." *Nat'l R.R. Passenger Corp. v. Lexington Ins. Co.,* 365 F.3d 1104, 1105 (D.C. Cir. 2004) (citing Black's Law Dictionary

[2] According to the Notice of Removal (DE [1]) none of the partners of DC Capital are citizens of New Hampshire or Massachusetts. There is, therefore, complete diversity.

809 (7th ed.1999) (emphasis added)). As the party seeking coverage, DC Capital has the burden of proving that the claim was made during the period of the Policy. *Burke & Reedy, LLP v. Am. Guarantee & Liab. Ins. Co.,* 89 F. Supp. 3d 1, 9 (D.D.C. 2015) *aff'd sub nom,* 637 Fed. Appx. 610 (D.C. Cir. 2016). If DC Capital establishes the existence of coverage, Hanover bears the burden of establishing that the Prior Notice Exclusion applies. *Id.*

"An insurance policy is a contract between the insured and the insurer, and in construing it [a court] must first look to the language of the contract." *Id.* at 8 (quoting *Cameron v. USAA Prop. & Cas. Ins. Co.,* 733 A.2d 965, 968 (D.C. 1999). When the terms of the policy are unambiguous, "all provisions …, even exclusion provisions, 'must be enforced even if the insured did not foresee how the exclusion operated, otherwise courts will find themselves in the undesirable position of rewriting insurance policies and reallocating assignment of risks between insurer and insured.'" *Id.* at 9 (quoting *Silver v. Am. Safety Indem. Co.,* 31 F. Supp. 3d 140, 148 (D.D.C. 2014)).

Hanover correctly argues that the Diamond Action is not a covered "Claim" as defined by the Policy because the claim was not "first made against the Insured during the Policy Period." This argument is based upon the language of the Policy:

> **A.1. Professional Services Liability**
>
> The **Insurer** will pay on behalf of the **Insured**, Loss which the **Insured** is legally obligated to pay due to a **Claim** first made against the **Insured** during the **Policy Period**, or the Extended Reporting Period if applicable, arising from a **Wrongful Act** in the rendering or failure to render **Professional Services**, provided that:
>
> 1. The **Wrongful Act** must have first occurred on or after the applicable Retroactive Date(s);
> 2. The **Insured** had no knowledge of the **Claim** or facts which could have reasonably caused such **Insured** to foresee the **Claim**, prior to the effective date of this Policy; and
> 3. The **Claim** or **Potential Claim** is reported to the **Insurer** pursuant to Section X. Reporting.
>
> **III. DEFINITIONS**
>
> **Claim** means any:
> A. Oral or written demand received by an **Insured** for monetary or non-monetary relief including injunctive relief;
> B. Civil proceeding commenced by the service of a complaint or similar pleading;
> C. Formal administrative or regulatory proceeding commenced by the filing of charges, formal investigative order or similar document;

> D. Arbitration or mediation proceeding commenced by the receipt of a demand for arbitration or mediation or similar document; or
> E. Written request first received by an **Insured** to toll or waive a statute of limitations relating to a potential **Claim** described in A. through D. above;
> Against an **Insured** for a **Wrongful Act**, including any appeal therefrom.

(DE [1] Ex. 2) (highlighting added). The Policy definition of "Claim" includes a "[c]ivil proceeding commenced by the service of a complaint or similar pleading." It is undisputed that the Diamond Action complaint was not served within the Policy Period. The Diamond Action is not, therefore, a "Claim first made against the Insured during the Policy Period." The Claim was made *before* the Policy Period began. This is fatal to DC Capital's claim for coverage.

Hanover never agreed to provide coverage for claims made before the start of the Policy Period. *See Colony Ins. Co. v. G & E Tires & Serv., Inc.,* 777 So.2d 1034, 1038 (Fla. 1st DCA 2000) ("Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for those claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs."); *S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.,* 396 A.2d 195, 197 (D.C. 1978) (duty to defend is not "larger than the scope of the policy"). The Policy, by its terms, provides no coverage for the Diamond Action Claim.

DC Capital raises several arguments in support of coverage but none of them prevail. First, DC Capital argues that a claim cannot be deemed to have been made against an insured until the insured has received actual notice of its existence. DC Capital cites generic language in case law giving the definition of a claims made policy: "With claims-made policies, coverage is provided only where the act giving rise to coverage is discovered and brought to the attention of the insurance company during the period of the policy." *Crowley Maritime Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 931 F.3d 1112, 1120-21 (11th Cir. 2019); "In essence, coverage is 'triggered' by the insured's

discovery of a claim and the provision of notice to the insurer within the policy term." *Pantropic Power Products, Inc. v. Fireman's Fund Ins. Co.,* 141 F. Supp. 2d 1366, 1369 (S.D. Fla. 2001) *aff'd sub nom. Pantropic Power Prod. v. Fireman's Fund,* 34 Fed. Appx. 968 (11th Cir. 2002). "A claims made policy is a policy wherein the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurer within the policy term." *Gulf Ins. Co. v. Dolan, Fertig and Curtis,* 433 So. 2d 512 (Fla. 1983).

But an insurance policy must be interpreted according to its terms. DC Capital ignores the governing language of the Policy, which expressly provides that to trigger coverage, there must be a "**Claim** first made against the **Insured** during the **Policy Period**[.]" In turn, "Claim" is defined as a "[c]ivil proceeding commenced by the service of a complaint or similar proceeding." The Policy identifies the precise moment a civil proceeding becomes a Claim: upon service of the complaint. It defies logic and the terms of the Policy to enlarge the definition of a covered Claim to include claims made before the Policy Period. Indeed, the nature of a claims-made policy is to cover "only claims made during the specified claim period in the policy." *Evans v. Med. Inter-Ins. Exch.,* 856 A.2d 609, 611 n.1 (D.C. 2004); *see also Office Depot, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 734 F. Supp. 2d 1304, 1308 n.1 (S.D. Fla. 2010) ("A 'claims made' policy limits coverage to claims made during the policy period and reported to the insurer within a certain period of time.").

It is not outside the "essence of a claims-made policy" to exclude from coverage a claim made prior to the date of the policy. "With a claims-made insurance policy, the insurer undertakes a more limited risk than an insurer who issues an occurrences policy; insurers typically charge higher premiums for occurrence policies to compensate for their

exposure to indefinite future liability." *Pantropic Power Prod., Inc.,* 141 F. Supp. 2d at 1369. "Occurrence policies cover acts which occur in the life of the policy, irrespective of when the claims are asserted against the insured. In comparison, a claims-made policy only protects the insured against claims *made and reported* during the policy period." *Id.* (emphasis added).

In the present case, the Policy's Declaration Page states in bold and capital letters that "**THIS POLICY APPLIES ONLY TO CLAIMS FIRST MADE AGAINST THE INSUREDS DURING THE POLICY PERIOD OR ANY APPLICABLE EXTENDED REPORTING PERIOD."** The coverage clause contains the same limitation: "The **Insurer** will pay on behalf of the **Insured**, **Loss** which the **Insured** is legally obligated to pay due to a **Claim** first made against the **Insured** during the **Policy Period,** or the Extended Reporting Period if applicable…." Hanover's determination that the Policy does not cover a Claim made before the start of the Policy Period is correct and consistent with the "essence" of a claims-made policy.

Next, DC Capital argues that the conditions of the insuring clause and the Policy's reporting requirements must be read together to expand coverage to Claims made before the Policy Period. These three conditions are as follows:

> 1. The **Wrongful Act** must have first occurred on or after the applicable Retroactive Date(s) [here, December 21, 2017];
> 2. The **Insured** had no knowledge of the **Claim** or facts which could have reasonably caused such **Insured** to foresee the **Claim,** prior to the effective date of the Policy; and
> 3. The **Claim** or **Potential Claim** is reported to the **Insurer** pursuant to Section X. Reporting.

Section X. Reporting states as follows:

> A. An **Insured** shall provide the **Insurer** with written notice of a **Claim** as soon as practicable after the **Insured** becomes aware of a **Claim** during the **Policy Period** but in no event later than:

> 1. Sixty (60) days after the effective date of expiration or termination of the Policy; or
> 2. The expiration date of the Extended Reporting Period, if applicable,
> …
> B. If during the Policy Period, or an applicable Extended Reporting Period, an Insured becomes aware of a Potential Claim and gives the Insurer notice of such Potential Claim, then any Claim subsequently arising from such Potential Claim shall be deemed made against the Insured during the Policy Period in which the Potential Claim was first reported to, and accepted by, the Insurer provided that any such subsequent Claim is reported to the Insurer in accordance with paragraph A., above.

DC Capital combines the no-prior-knowledge condition of the insuring clause and the duty to report the claim as soon as practicable to conclude that a Claim first made prior to the start of the Policy Period is nevertheless covered. This is incorrect.

The no-prior-knowledge condition of the insuring clause precludes coverage if the insured had knowledge of a claim or facts that could give rise to a claim "prior to the effective date" of the Policy. This clause is considered a condition precedent to coverage under District of Columbia law, *Capitol Specialty Ins. Corp. v. Sanford Wittels & Heisler, LLP,* 793 F. Supp. 2d 399, 410 (D.D.C. 2011), or an exclusion to coverage under Florida law. *Berkley Assurance Co. v. Expert Group Int'l, Inc.,* 779 Fed. Appx. 604, 608 (11th Cir. 2019). But it is not an extension of the Policy's coverage period. As discussed above, the Policy applies only to those Claims "first made during the Policy Period." The conditions of the insuring clause do not get reached if there was no Claim first made during the Policy Period.

Likewise, the Policy's reporting requirements do not apply to Claims not made during the Policy Period. Under Section X, the Insured must provide written notice "of a **Claim** as soon as practicable after the **Insured** becomes aware of a **Claim** during the **Policy Period."** Further, if the Insured is not aware of a Claim during the Policy Period,

Section X permits notice to be given for a specified period of time after expiration or termination of the Policy.[3] Nothing in Section X expands coverage to include claims made prior to the Policy's effective date.

DC Capital argues that its receipt of the Diamond Action complaint falls within one of the Policy's alternative definitions of "Claim," that is, an "[o]ral or written demand received by an Insured for monetary or non-monetary relief including injunctive relief." Because DC Capital first *received* the Diamond Action complaint on December 27, 2018, it argues that the claim was made *within* the Policy Period.

Several courts have recognized that when a policy contains multiple definitions of a "claim," the definitions are not mutually exclusive. *See Zucker v. U.S. Specialty Ins. Co.,* 2015 WL 11216710, at *8 (S.D. Fla. Feb. 12, 2015) ("The USSIC policy lists six possible acts that can constitute a claim separated by the word "or," and thereby allows a number of alternative methods for triggering coverage under the policy."); *Tapestry on Cent. Condo. Ass'n v. Liberty Ins. Underwriters Inc.,* 461 F. Supp. 3d 926, 934 (D. Ariz. 2020) ("Thus, while it is true that an entire judicial proceeding can constitute a Claim, it can also be true that written demands for monetary relief *within a lawsuit* can also be Claims."). But in the present case, the Policy expressly covers only "Claims *first made* against the Insured during the Policy Period." The word "first" in common usage means "preceding all others in time, order, or importance." "First." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/first. Accessed 11 Nov. 2022.[4] Even if DC Capital's receipt of the Diamond Action complaint on December 27,

[3] Notably, if the Wesco Policy that was in effect at the time the Complaint was served contained a similar clause, DC Capital would have had a period of time after that policy's expiration date within which to notify Wesco of the Diamond Action.

[4] DC Capital alludes to a possible ambiguity in the phrase "first made." But "terms of an insurance policy should be taken and understood in their ordinary sense…" *Graspa Consulting, Inc. v. United Nat'l Ins. Co.,* 515 F. Supp. 3d 1249, 1253 (S.D. Fla. 2021) (quoting *Siegle v. Progressive Consumers Ins. Co.*, 819 So.

2018, meets the definition of a Claim as a written demand for money damages, that Claim was not the "first made." The Claim first made in this case was the service of the civil proceeding. "[A]t least under the wording of the contract before us, once that first claim is made, subsequent variations of the same claim do not qualify as new claims." *Cmty. Found. For Jewish Educ. v. Fed. Ins. Co.,* 16 Fed. Appx. 462, 466 (7th Cir. 2001) (amendment to complaint during policy period did not create a new claim under terms of the policy).

In conclusion, the Court finds that the Hanover Policy does not afford coverage for the Diamond Action, as that Claim was not first made within the Policy Period. Because coverage did not exist in the first place, the Court will not address the issue of whether the Prior Notice Exclusion applies. Accordingly, it is hereby

**ORDERED AND ADJUDGED** that Defendant's Motion for Judgment on the Pleadings (DE [25]) is **GRANTED**. The Clerk of Court is directed to **CLOSE** this case and **DENY AS MOOT** any remaining motions. The Court will enter a separate final judgment in favor of Defendant pursuant to Fed. R. Civ. P. 58(a).

**DONE AND ORDERED** in Chambers, Fort Lauderdale, Florida, this 14th day of November 2022.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished counsel via CM/ECF

2d 732, 736 (Fla. 2002)). To be ambiguous, a policy's terms must "have a genuine inconsistency, uncertainty, or ambiguity in meaning after the court has applied the ordinary rules of construction." *Id*. at 1254. Further, "[j]ust because an operative term is not defined, it does not necessarily mean that the term is ambiguous." *Id.* (quoting *Amerisure Mut. Ins. Co. v. Am. Cutting & Drilling Co.*, 2009 WL 700246, at *4 (S.D. Fla. Mar. 17, 2009) (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 166 (Fla. 2003))). The Court finds no ambiguity in the definition or application of the term "first made."