UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRADEN PARTNERS, LP, et al.,

Plaintiffs,

v.

TWIN CITY FIRE INSURANCE COMPANY,

Defendant.

Case No. 14-cv-01689-JST

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

Re: ECF No. 66

Before the Court is Twin City Fire Insurance Company's ("Twin City") Motion for Judgment on the Pleadings. ECF No. 66. For the reasons set forth below, the Court will grant the motion.[1]

I. BACKGROUND[2]

Twin City issued a general partners' liability policy ("Policy") to Braden Partners, LP, doing business as Pacific Pulmonary Services ("Braden"). Compl., ECF No. 1, ¶¶ 1, 9. That Policy, which is at issue here, was effective August 15, 2011 to June 1, 2012. Id. The Policy[3]

[1] The Court having concluded that this motion is suitable for disposition without oral argument, the hearing scheduled for April 9, 2015 is vacated. Civil L.R. 7-1(b).

[2] For the purpose of deciding this motion, the Court accepts as true the following factual allegations in Braden's complaint. See Navarro v. Block, 250 F. 3d 729, 732 (9th Cir. 2001).

[3] Twin City asks the Court to take judicial notice of: (1) the Policy; (2) the complaint in the underlying *qui tam* action ("underlying complaint"); (3) an email from D. Teshima to D. Benfield itemizing what Braden claims as expenses incurred under the Policy to this date; and (4) the fact that the underlying complaint remains under seal and the court before which that complaint was filed has not entered an order authorizing service of the complaint on Braden. ECF No. 66 at 6. The Court will take judicial notice of the first two items, as they are documents incorporated by reference into Braden's complaint. See O'Connor v. Uber Techs., Inc., --- F. Supp. 3d ---, 2014 WL 4382880, at *3 (N.D. Cal. Jan. 1, 2014) (citations omitted). The Court will also take notice of the fact that the complaint in the underlying action remains under seal, and that the court has not ordered service of the underlying complaint on Braden. Both of these matters are matters of court record that are capable of ready and accurate determination pursuant to Federal Rule of Evidence 201. The Court will not take notice of the email, as it does not factor into the Court's ruling on

provides that Twin City will "pay on behalf of the Partnership all Loss which the Partnership shall become legally obligated to pay as a result of a Claim first made against the Partnership and reported to the Insurer during the Policy Period." Id., Ex. 1, Endorsement 4. The Policy required Twin City to advance defense costs incurred in conjunction with any "Claim." Id. ¶ 14.

On February 28, 2012, the Department of Justice issued subpoenas to Braden, requesting documentation related to Braden's sales practices and claims for payment from federally funded healthcare programs. ECF No. 34 at 5. In response, on March 9, 2012, Braden provided timely notice of those subpoenas to Twin City, as required by the Policy. Id. ¶ 17. On April 15, 2012, Twin City denied coverage for defense costs related to the subpoenas on the basis that they did not constitute "Claims" under the Policy. Id. ¶ 18.

On August 21, 2013, Braden notified Twin City of a pending lawsuit against it by providing a redacted copy of the underlying *qui tam* complaint filed by the Department of Justice. Id. ¶ 20. The underlying complaint alleged violations of the Federal and California False Claims Acts. Id. In January 2014, Twin City issued a formal coverage letter to Braden, in which it conceded that the underlying complaint constituted a "Claim" under the Policy, but denied coverage based on several policy exclusions. Id. ¶¶ 21-22. As a result of the refusal to advance defense costs related to both the subpoenas, id. ¶ 19, and the underlying complaint, id. ¶ 28, Braden incurred substantial legal fees in defending the lawsuit, id. ¶¶ 19, 21.

Braden brought this action on April 11, 2014, alleging that Twin City breached the Policy by refusing to advance defense costs for the subpoenas and underlying complaint. Id. ¶ 23. Braden requested declaratory relief establishing that Twin City must advance defense costs and indemnify Braden for those costs. Id. ¶¶ 29-37. Braden also alleged breach of contract and breach of the covenant of good faith and fair dealing claims. Id. ¶¶ 38-49.

On June 6, 2014, Twin City moved to dismiss Braden's complaint on the grounds that the subpoenas were not "Claims" and the underlying complaint is excluded from coverage under two separate policy exclusions. ECF No. 25 at 12. This Court granted the motion with respect to

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Twin City's motion.

Braden's claims for subpoena-related costs, but denied dismissal of Braden's claims related to the underlying complaint. ECF No. 52 at 10.

On October 29, 2014, Twin City changed its coverage position, agreed to advance defense costs to Braden, and reasserted this position when it filed its answer on December 1, 2014. Answer, ECF No. 59, ¶ 30. On January 30, 2015, however, Twin City asserted for the first time that the underlying complaint neither qualifies as a "Claim" nor has it been "first made" against Braden because it is sealed and remains unserved.[4] Teshima Decl., ECF No. 69-23, Ex. I. On these grounds, Twin City now moves this Court to dismiss Braden's complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. ECF No. 66.

II. JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1332. The parties are completely diverse and the alleged amount in controversy exceeds $75,000. ECF No. 1 ¶ 7.

III. LEGAL STANDARD

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The analysis for Rule 12(c) motions for judgment on the pleadings is "substantially identical to [the] analysis under Rule 12(b)(6) . . . ." Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012) (quotation omitted). To evaluate a Rule 12(b)(6) motion to dismiss, the court accepts the material facts alleged in the complaint, together with reasonable inferences to be drawn from those facts, as true. Navarro, 250, F.3d at 732. But "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The court need not [] accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001), opinion amended on denial of reh'g, 275 F.3d 1187

[4] Braden emphasizes throughout its opposition that Twin City previously conceded that the underlying complaint constitutes a "Claim" under the Policy, but cites no legal authority making this fact relevant. See ECF No. 69-5. It is well established under California law that "coverage under an insurance policy cannot be established by estoppel or waiver." Manneck v. Lawyers Title Ins. Corp., 28 Cal. App. 4th 1294, 1303 (1994).

(9th Cir. 2001) (citation omitted).

In sum, a "district court will render a judgment on the pleadings when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 529 (9th Cir. 1997) (internal citations omitted).

IV. DISCUSSION

Twin City argues that it has no obligation to advance defense costs for the underlying complaint because it does not qualify as a "Claim" under the Policy, ECF No. 66 at 7-9, and the underlying complaint has not been "first made" because it has not yet been served on Braden, id. at 9-11. Twin City also insists that the Policy's notice provision does not create coverage for a "Claim" that has not been "first made." Id. at 11. The Court finds that the underlying complaint is a "Claim," but that the Claim has not been "first made."[5]

A. Construction of Insurance Policy Provisions

"Insurance contracts . . . are still contracts to which the ordinary rules of contractual interpretation apply." Bank of the W. v. Super. Ct., 2 Cal. 4th 1254, 1264 (1992).[6] "When determining whether a particular policy provides a potential for coverage and a duty to defend, [the court is] guided by the principle that interpretation of an insurance policy is a question of law." Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 18 (1995), as modified on denial of reh'g, (Oct. 26, 1995), (citing AIU Ins. Co. v. Super. Ct., 51 Cal. 3d 807, 818 (1990)).

In California, courts apply a three-step process to analyze insurance contracts. In re K F Dairies, Inc. & Affiliates, 224 F.3d 922, 925 (9th Cir. 2000). First, courts "look to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." Waller, 11 Cal. 4th at 18; Cal. Civ. Code § 1638. "[I]f the meaning a layperson

[5] Because the issue of whether the underlying complaint was "first made" on Braden is dispositive, the Court does not address the parties' other arguments, such as Twin City's argument that there can be no coverage for any "Loss" relating to the underlying complaint. See ECF No. 66 at 13-14.

[6] Both parties rely on California law in support of their arguments regarding interpretation of the Policy. See ECF No. 69 at 9-10; ECF No. 72 at 6. The Court relies on California law as well.

would ascribe to contract language is not ambiguous, [courts] apply that meaning." K F Dairies, 224 F.3d at 925–26. If a term is ambiguous, courts move to the second step: looking to the expectations of a reasonable insured in order to resolve ambiguity. Id. at 926 (internal quotations omitted). "Under California law, an insurance policy provision is ambiguous when it is capable of two or more constructions both of which are reasonable." Id. (internal quotations omitted). If an ambiguity remains after the first two steps, the term is "construed against the party who caused the ambiguity to exist." Id. Due to California's general policy of resolving ambiguities in favor of coverage, the party causing the ambiguity in the third step is "almost always the insurer." Id.

B. The Underlying Complaint Meets the Policy's Definition of a "Claim"

Twin City first argues that the underlying complaint does not meet either of the Policy's definitions of a "Claim." ECF No. 66 at 7-9. The Policy defines a "Claim" as either:

> (a) a judicial or other proceeding against a General Partner for a Wrongful Act in which such General Partners could be subject to a binding adjudication of liability for compensatory money damages or other civil relief, including an appeal therefrom, or (b) a written demand against a General Partner for compensatory money damages or other civil relief on account of a Wrongful Act.

ECF No. 1, Ex. 1, § IV(G).[7]

Twin City initially argues that the underlying complaint fails to meet the first definition of a "Claim" because it is "impossible to construe that proceeding [as] against Braden," and "it is a potential Claim, not an actual one."[8] ECF No. 66 at 9. Relying on Winkler v. National Union Fire Insurance Company of Pittsburg, Pennsylvania, Twin City characterizes the underlying complaint as a "merely threatened" claim, arguing that Braden may never face liability because it has not been served. 930 F.2d 1364, 1366 (9th Cir. 1991) ("Notice that it is someone's intention to hold the insureds responsible for a Wrongful Act is an event commonly antecedent to and different in

[7] Because the Court agrees with Braden that the underlying complaint meets the definition of a "Claim" under subpart (a), and Braden does not provide any legal support for its argument that the underlying complaint constitutes a "written demand" under subpart (b), see ECF No. 69-5 at 11 n.6, the Court will not evaluate the latter subpart.

[8] Twin City does not take issue with characterizing the underlying complaint as a "judicial or other proceeding," only that its sealed and unserved status renders it a potential rather than an actual claim. ECF No. 66 at 9; see Teshima Decl., ECF No. 69-23, Ex I at 2 ("the *Qui Tam* complaint is a complaint filed in a judicial proceeding.").

kind from a claim.") (internal alterations, emphasis, and quotations omitted); ECF No. 66 at 9.

Twin City's argument fails for at least two reasons. First, it misunderstands the Policy's first definition of a "Claim," as the Policy's plain language merely requires the *possibility* of liability by adjudication, rather than absolute certainty. See ECF No. 1, Ex. 1, § IV(G) (defining a "Claim" to mean that a General Partner "*could* be subject to a binding adjudication of liability") (emphasis added). Tellingly, the Policy only references "service" with regard to when a "Claim" is deemed to have been "first made"—not to determine whether the definition of "Claim" is met. Id.

Here, there is no question that Braden *could* be subject to a binding adjudication of liability as a result of the filing of the underlying complaint. While the *qui tam* statute requires that the underlying complaint remain under seal for at least sixty days and that it "not be served on the defendant until the court so orders," it permits the Government "to intervene and proceed with the action within 60 days after it receives both the complaint and material evidence and information." 31 U.S.C.A. § 3730(c)(2). Should the Government decide not to intervene, "the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B); accord id. subsection (c)(3). In either event, Braden certainly could be subject to a binding adjudication of liability.

Second, Twin City incorrectly relies on Winkler to support its assertion that service of the underlying complaint is necessary for the underlying action to constitute a "Claim." 930 F.2d at 1364. In Winkler, the court did not conclude that formal service is required for any claim to exist. Rather, the court sought to define the term "claim," which was absent from the policy at issue in that case, and it did so "in light of the overall structure of th[at] policy and its specific provisions."[9] Id. The court found that the appellants could have received coverage if they had

[9] The Court cited Sections 7(b) and 7(c) of that policy. Section 7(b) "provide[d] coverage for 'claims' made against the insured during the policy period, so long as the insured notified the insurer 'as soon as practicable in writing.' It is under this provision that appellants s[ought] coverage." Winkler, 930 F.2d at 1366. Section 7(c) "provide[d] coverage when the insured receive[d] 'written or oral notice from any third party that it [wa]s the intention of such third party to hold the Directors or Officers responsible for the results' of wrongful acts, or learn[ed] of 'any occurrence which may subsequently give rise to a claim being made against the Directors and Officers,' so long as the insured notified the insurer while the policy was still in effect." Id.

properly notified their insurer of the relevant occurrence within the policy period, but because they failed to do so, they could not "seek coverage for these inchoate claims." Id. at 1367. Unlike the appellants in Winkler, Braden met what was required by the Policy's notice provision and its definition of a "Claim." Braden provided timely notice to Twin City regarding the underlying complaint, explained that it is a lawsuit "filed under seal in the U.S. District Court for the Northern District Court of California," qualifying it as a "judicial proceeding," and stated that compensatory money damages were being sought, indicating that Braden could be subject to a binding adjudication of liability. ECF No. 1 ¶ 20.

Twin City also weakly asserts that the underlying complaint cannot be deemed a judicial proceeding *against* Braden. ECF No. 66 at 7, 9. But there is no dispute that (1) a formal complaint has been filed in the underlying action, (2) the complaint commenced a judicial proceeding, and (3) Braden is named as defendant in that action. Thus, by the plain terms of the Policy, a claim has been made against Braden.

Accordingly, the Court finds that the underlying complaint meets the Policy's first definition of a "Claim."

C. The Underlying Complaint Has Not Been "First-Made" Because It Has Not Been Served on Braden

Twin City next argues that even if the underlying complaint meets the Policy's definition of a "Claim," it has no obligation to advance defense costs to Braden because the underlying complaint has not been "first made" against Braden. ECF No. 66 at 9. Section (IV)(G) of the Policy explains that a "Claim shall be deemed to have been first made against a General Partner on the date that a summons or similar document is *first served* upon such General Partner . . . ." See ECF No. 1, Ex. 1, § IV(G) (emphasis added). Elsewhere, the Policy requires a claim to have been "first made" for coverage to begin. See ECF No. 1, Ex 1, § I.C., Endorsement 4.

Braden does not argue that the underlying complaint has been served, or that the language of section (IV)(G) has been otherwise satisfied. Instead, Braden ignores the "first made" language in the Policy, and then argues that the Policy does not require formal service, because Twin City intentionally omitted a formal service requirement from subpart (a) of the "Claim" definition in

the Policy.[10] ECF No. 69-5 at 11-12. Braden compares the language in the Policy to another one Twin City issued in HR Acquisition I Corp v. Twin City Fire Insurance Co., 547 F.3d 1309, 1312 n.5 (11th Cir. 2008). In that case, the policy defined a "Claim," as "a civil or criminal proceeding commenced by the service of a complaint or similar pleading." Id.

The Court finds Braden's argument unpersuasive. Although the two policies locate the relevant language differently—one includes the service requirement in the sentence defining a "claim," while the other includes it in a separate paragraph within the same subsection of the Policy—both unambiguously require service of summons or a similar document to trigger coverage of a claim. That the service requirement is isolated from the definition of "claim" does not mean that the former doesn't apply. See London Market Insurers v. Super. Ct., 146 Cal. App. 4th 648, 656 (2007) (explaining that, when interpreting an insurance policy, courts must "consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation.") (citation omitted); Cal. Civ. Code § 1641 (same).

The Policy explicitly requires either service of summons or a similar document for a Claim under subpart (a) of the Policy definition to be deemed "first made." ECF No. 1, Ex 1, § IV(G); see Powerine Oil Co. v. Super. Ct., 37 Cal. 4th 377, 390 (2005) ("If contractual language is clear and explicit, it governs.") (citations and internal quotations omitted). Because Braden does not dispute that the underlying complaint remains sealed and unserved, that "Claim" has not been "first made." Twin City has no obligation to advance defense costs for the underlying complaint. ECF No. 1 ¶ 20.

D. The Notice of Claim Provision Does Not Alter the Requirement of a Service of Summons for a Claim To Be "First Made"

In a last-gasp effort to avoid the Policy's "first made" language, Braden insists that the Policy's notice of claim provision creates coverage for claims that have not been "first made." ECF No. 69-5 at 17-18. Twin City rejects this assertion and argues that it has no obligation to

[10] Braden's argument that "Twin City includes this [formal service] limitation in its policies when it wants to," ECF No. 69-5 at 12, is largely directed to the question of whether the Policy defines a "Claim" as one requiring formal service, rather than the question of whether service is required for a "Claim" to have been first made. But because Braden's opposition conflates these questions, the Court will briefly address this argument. Id. at 11.

advance defenses costs incurred prior to the date a Claim is actually made. ECF No. 66 at 11.

The notice of claim provision provides, in relevant part, that:

> [i]f during the Policy Period the General Partners or the Partnership become aware of a specific Wrongful Act that may reasonably be expected to give rise to a Claim against any General Partner . . . then any Claim subsequently arising from such specific Wrongful Act duly reported in accordance with this paragraph shall be deemed under this Policy to be a Claim made during the Policy Period.

ECF No. 66-6, Ex. A, § VIII(A). "Notice provisions in 'claims made' policies are strictly construed because notice determines if coverage is available under such policies." Aletheia Research & Mgmt., Inc. v. Houston Cas. Co., 831 F. Supp. 2d 1210, 1220 (C.D. Cal. 2011) (citations omitted).

The parties do not dispute that the requirements of the notice provision were met. See ECF No. 1, ¶¶ 17, 20; ECF No. 66 at 9; ECF No. 69-17, Ex. F at 3. But Braden interprets the notice provision to mean that notifying Twin City of a "Wrongful Act" during the policy period automatically transforms any subsequent "Claim" arising from that "Wrongful Act" into a "Claim" "first made" during the policy period—overriding the need for the service of summons or a similar document. ECF No. 69-5 at 17. To read the Policy in this manner would be inconsistent with the plain and ordinary meaning of the provision, the Policy as a whole, and the mutual intent of the parties. The parties here bargained for a "claims-made and reported policy," ECF No. 1, Ex. 1, requiring Twin City, as stipulated in the insurance agreement, to advance defense costs that Braden is legally obligated to pay "as a result of a *claim first made*" against Braden, id., Endorsement 4. The Policy goes on to explicitly define a "Claim" and when it has been "first made." Id. § IV(G). Nothing in the language of the notice provision indicates that it functions to nullify, contradict, or serve as an exception to the requirement that a "Claim" be "first made" by service of summons in order to qualify for coverage. See Friedman Prof'l Mgmt. Co. v. Norcal Mut. Ins. Co., 120 Cal. App. 4th 17, 33 (2004) ("Courts must interpret insurance policies, like all contracts, to try to give effect to every clause and harmonize the various parts with each other.") (citation omitted).

The notice provision explains that a future claim arising out of the circumstances of the

notice will be deemed to have been made at the time the notice was originally provided to the insurer, effectively negating the need for a second notice of that claim. See Cont'l Ins. Co. v. Metro-Goldwyn-Mayer, Inc., 107 F.3d 1344, 1347 (9th Cir. 1997) (holding that, with respect to a similar provision, "the contract does not, by its terms, require notice of a claim made once notice of a wrongful act has been given."). In short, this provision defines the temporal boundaries of the Policy's coverage by identifying in which policy period a particular "Wrongful Act" triggers. See Aletheia Research & Mgmt., Inc., 831 F. Supp. 2d at 1220 (finding that the policy's written notice requirement "dictate[s] which policy must respond."); see also Office Depot, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 453 F. App'x 871, 876 (11th Cir. 2011) ("[the notice provisions] create a notification process for Claims filed both inside and outside of the Policy Period . . . [the notice provisions] determine the Policy Period that Claims are 'considered made,' rather than expand coverage to the costs incurred before a Claim is actually made.").

Accordingly, the Court concludes that the notice provision does not redefine when a "Claim" is "first made." Braden has not shown that its Claim has been "made," as is required to trigger coverage under the Policy.[11]

CONCLUSION

For the foregoing reasons, the Court concludes that under the terms of the Policy, Twin City's coverage obligations have not been triggered. Consequently, the Court hereby grants Twin City's motion for judgment on the pleadings and dismisses Braden's complaint without prejudice pursuant to Rule 12(c) of the Federal Rules Civil Procedure. Braden may re-file its complaint if

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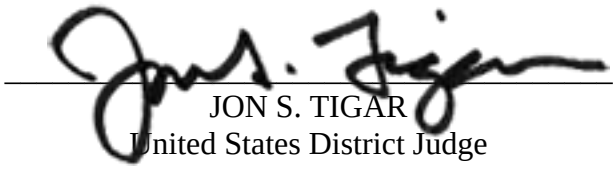
[11] Other than insisting that a Claim has, in fact, been first made, Braden offers no substantive argument to show that Twin City has an obligation to provide coverage for defense costs incurred before a "Claim" is made. ECF No. 69-5 at 18.

and when its "Claim" has been "first made" by service of summons or a similar document in the underlying action. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: April 3, 2015



JON S. TIGAR
United States District Judge