

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 2 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HANOVER INSURANCE COMPANY,

Plaintiff-Appellant,

v.

PAUL M. ZAGARIS, INC., a California
corporation; et al.,

Defendants-Appellees.

No. 17-15477

D.C. No. 3:16-cv-01099-WHA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted February 13, 2018
San Francisco, California

Before: SCHROEDER and WATFORD, Circuit Judges, and SESSIONS,**
District Judge.

Plaintiff Hanover Insurance Company (“Hanover”) appeals the district
court’s ruling denying its motion for summary judgment and granting the
Defendants’ (the “Insureds”) motion for summary judgment.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable William K. Sessions III, United States District Judge
for the District of Vermont, sitting by designation.

1. In this insurance coverage dispute, Hanover contends that the Miscellaneous Professional Liability Policy (the “Policy”) it issued to the Insureds does not require Hanover to defend the Insureds in a third-party lawsuit filed against them. The lawsuit, a putative class action filed in the Superior Court of the State of California, County of Contra Costa (the “*Spracher* Lawsuit”), alleged that Defendant Paul M. Zagaris, Inc., a real estate brokerage company, received undisclosed kickbacks from the sale of natural-hazard disclosure reports (“NHD reports”) to its clients. *See Spracher v. Zagaris*, No. CIVMSC15-02030 (Cal. Super. Ct. filed Nov. 5, 2015). The *Spracher* Lawsuit alleged claims for breach of fiduciary duties, aiding and abetting such breaches, violations of Section 1710(3) of the California Civil Code (prohibiting “deceit” by omission when obligated to disclose), violations of Section 17200 of the California Business and Professions Code, constructive fraud, unjust enrichment, civil conspiracy, and accounting. Hanover agreed to defend the Insureds in the *Spracher* Lawsuit subject to a reservation of rights.

Hanover’s first reservation of rights letter cited certain provisions of the Policy and mistakenly cited a version of Exclusion 1 that had been superseded by the version in the Real Estate Professionals Endorsement appended to the Policy. Hanover’s second reservation of rights letter focused on Exclusion 11, stating that “[b]ased on Policy 11, Hanover is defending under a reservation of rights those

counts for violations of California’s deceptive practices act [*sic*] and business code prohibiting unfair, unlawful or fraudulent and unfair competition.”

Hanover filed the instant action seeking, *inter alia*, declaratory relief that it has no duty to defend or indemnify the Insureds in the *Spracher* Lawsuit based on Exclusion 11 of the Policy. Exclusion 11 exempts Hanover’s duty to defend claims “arising out of false advertising, misrepresentation in advertising, antitrust, unfair competition, restraint of trade, unfair or deceptive business practices, including but not limited to, violations of any local, state or federal consumer protection laws.” The district court explained that

Hanover contends the *Spracher* action is entirely excluded from coverage by Exclusion 11 because each cause of action therein arises out of “deceptive business practices.” Our insureds respond that the *Spracher* action is a “mixed action” because there remains a potential for coverage for some causes of action – for breach of fiduciary duty and constructive fraud – which will *not* rely on a finding of deceptive business practices. Thus, they argue, Hanover has a duty to defend *all* claims.

Both parties moved for summary judgment, and the district court denied Hanover’s motion and granted the Insureds’ motion.

2. California law dictates that “any limitation on the coverage provided by a liability insurance policy must be express and consistent with the reasonable expectations of the insured.” *Am. Safety Indem. Co. v. Admiral Ins. Co.*, 220 Cal. App. 4th 1, 4 (2013). “Doubts concerning the potential for coverage and the existence of [a] duty to defend are resolved in favor of the insured.” *Reg’l Steel*

Corp. v. Liberty Surplus Ins. Corp., 226 Cal. App. 4th 1377, 1389 (2014) (citation omitted). In an action seeking declaratory relief on the issue of the duty to defend, “the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.” *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 300 (1993). In an action with potentially-covered claims and excluded claims, the insurer has a “duty to defend the entire ‘mixed’ action prophylactically, as an obligation imposed by law in support of the policy.” *Buss v. Super. Ct.*, 16 Cal. 4th 35, 48–49 (1997).

3. The district court correctly reasoned that the *Spracher* causes of action for breach of fiduciary duty and constructive fraud do not necessarily “arise out of . . . deceptive business practices” such that Exclusion 11 certainly excludes coverage for them. These causes of action rely on the Insureds’ omissions—whether or not fraudulent or deceptive. As the district court explained, it remains possible that the Insureds could be found not to have engaged in deceptive business practices even if they are found to have breached their fiduciary duties by failing to disclose their interest in the sales of the NHD reports, or engaged in constructive fraud via the same omission. Hanover has not met its burden to demonstrate that

there is no possible scenario in which the claims in the *Spracher* Lawsuit fall within the Policy.

Thus, Hanover has a duty to defend the *Spracher* Lawsuit, and the district court's decision is **AFFIRMED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
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* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk