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United States District Court,
N.D. California,
San Jose Division.

First Mercury Insurance Company, Plaintiff,
v.
Great Divide Insurance Company, Defendant.

Case No. 16-CV-02114-LHK
|
Signed August 29, 2016

Synopsis

Background: Primary commercial general liability (CGL) insurer for named insured security services provider at football stadium filed suit against primary CGL insurer for insured football team, that was also additional insured under provider's policy, seeking declaratory judgment that team's insurer had duty to defend and share defense costs with provider's insurer in underlying state court action brought by football game attendees who were injured during physical altercation with other attendees while waiting in line to use restroom at stadium, that team's insurer had duty to participate in settlement discussions in good faith regarding underlying action, and that team's insurer had duty to share in indemnity with provider's insurer in underlying action. Team's insurer moved to dismiss for failure to state claim or, alternatively, to stay.

Holdings: The District court, Lucy H. Koh, J., held that:

[1] team's insurer had duty to share in defense of underlying action;

[2] claim for declaratory judgment regarding settlement was not ripe;

[3] claim for declaratory judgment regarding indemnity was not ripe; and

[4] stay was not warranted pending resolution of underlying action.

Motions granted in part and denied in part.

West Headnotes (22)

[1] **Evidence**
Proceedings in other courts

Court filings from cases in other courts are a proper subject of judicial notice.

Cases that cite this headnote

[2] **Federal Civil Procedure**
Complaint

A district court may deny leave to amend a complaint due to undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment. Fed. R. Civ. P. 15(a).

Cases that cite this headnote

[3] **Declaratory Judgment**
Grounds for involuntary dismissal in general

Federal Courts
Declaratory judgment

Based on the permissive language of the Declaratory Judgment Act, district courts have broad discretion to dismiss a federal declaratory judgment action when the questions in controversy can better be settled in a pending state court proceeding. 28 U.S.C.A. § 2201(a).

Cases that cite this headnote

[4] **Federal Courts**
Presumptions and burden of proof

There is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically. 28 U.S.C.A. § 2201(a).

Cases that cite this headnote

[5] **Declaratory Judgment**
Necessity, utility and propriety
Declaratory Judgment
Pendency of other action
Federal Courts
Declaratory judgment

In deciding whether exercise of Declaratory Judgment Act jurisdiction is proper, district court should consider the three factors: (1) avoiding needless determination of state law issues, (2) discouraging litigants from filing declaratory actions as a means of forum shopping, and (3) avoiding duplicative litigation. 28 U.S.C.A. § 2201(a).

Cases that cite this headnote

[6] **Declaratory Judgment**
Necessity, utility and propriety
Declaratory Judgment
Existence and effect in general

Considerations that may weigh in favor of district court's decision to dismiss or stay an action for declaratory relief, under the Declaratory Judgment Act, include whether the declaratory action will settle all aspects of the controversy, whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue, whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a res judicata advantage, whether the use of a declaratory action will result in entanglement between the federal and state court systems, the convenience of the parties, and the availability of and relative convenience of other remedies. 28 U.S.C.A. § 2201(a).

Cases that cite this headnote

[7] **Declaratory Judgment**
Discretion of Court
Federal Courts
Declaratory judgment

In deciding whether to exercise jurisdiction in action for declaratory relief under the Declaratory Judgment Act, district court must balance concerns of judicial administration, comity, and fairness to the litigants. 28 U.S.C.A. § 2201(a).

Cases that cite this headnote

[8] **Insurance**
In general;standard

Under California law, an insurer has a duty to defend its insureds in a lawsuit if some of the claims are at least potentially covered by the insurance policy.

Cases that cite this headnote

[9] **Insurance**
In general;standard
Insurance
Tender or other notice

Under California law, an insurer's duty to defend is broader than its duty to indemnify, and the duty to defend arises as soon as tender is made.

Cases that cite this headnote

[10] **Insurance**
Persons covered

Under California law, where an additional insured policy applies only to the extent that the additional insured is held liable for the named insured's acts or omissions arising out of and in the course of operations performed for the additional insured, that basic additional insured provision created the limited vicarious liability coverage for the additional insured.

Cases that cite this headnote

[11] **Insurance**
Effect of other insurance

Under California law, where the underlying action involves a potential that the additional insured would be vicariously liable for the named insured's alleged negligence and a potential that the additional insured would be liable for its own negligence, the insurance providers for the named insured and the additional insured share a duty to defend the underlying action.

Cases that cite this headnote

[12] **Insurance**
Persons covered
Insurance
Effect of other insurance

Under California law, negligence claim against named insured security services provider, additional insured football team, city, and city's stadium authority by football game attendees who were injured while waiting to use restroom at stadium, and their claim against city and authority for dangerous condition of public property from inadequate number of restrooms, were potentially covered by team's commercial general liability (CGL) policy, triggering team insurer's duty to share with provider's CGL insurer costs of defending attendees' suit; provider's policy limited additional insured coverage only to liabilities traceable at least in part to acts or omissions of provider or those acting on provider's behalf, and attendees' suit could potentially result in liability for team and city, but not provider.

Cases that cite this headnote

[13] **Insurance**
Duty to settle within or pay policy limits

Under California law, the covenant of good faith and fair dealing imposes a duty upon insurers to accept reasonable settlement offers.

Cases that cite this headnote

[14] **Insurance**
Insurer's settlement duties in general

Under California law, in the absence of a settlement demand or any other manifestation that the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement, an insurer is not liable for failure to settle.

Cases that cite this headnote

[15] **Insurance**
Insurer's settlement duties in general

Under California law, where the injured party has not expressed an interest in settlement, an insurer cannot be liable for bad faith failure to settle due to the insurer's failure to initiate settlement discussions.

Cases that cite this headnote

[16] **Declaratory Judgment**
Liability or indemnity insurance in general

Under California law, claim by security services provider's commercial general liability (CGL) insurer, seeking declaratory judgment that football team's CGL insurer had duty to participate in settlement discussions in good faith regarding underlying action by football game attendees who were injured during physical altercation while waiting in line to use restroom at stadium, was not ripe, since attendees had not made settlement demand or expressed any interest in settlement of underlying action.

Cases that cite this headnote

[17] **Insurance**
Insurer's Duty to Indemnify in General
Insurance
Insured's liability for damages

Under California law, although an insurer may have a duty to defend, it ultimately may have no obligation to indemnify, either because no damages were awarded in the underlying action against the insured, or because the actual judgment was for damages

not covered under the policy. Cal. Civ. Code § 2778(1).

Cases that cite this headnote

[18] Declaratory Judgment
Liability or indemnity insurance in general

Under California law, claim by security services provider's commercial general liability (CGL) insurer, seeking declaratory judgment that football team's CGL insurer had duty to share in indemnity with provider's insurer in underlying action by football game attendees who were injured during physical altercation while waiting in line to use restroom at stadium, was not ripe, since judgment had not been entered in pending underlying action, so amount of indemnity obligation could not yet be determined.

Cases that cite this headnote

[19] Federal Courts
Stay

Declaratory judgment action by security services provider's commercial general liability (CGL) insurer, regarding football team's CGL insurer's duty to share defense costs in underlying action by football game attendees who were injured during physical altercation while waiting in line to use restroom at stadium, did not warrant stay pending resolution of underlying action; balance of factors weighed against stay, including that declaratory judgment claim required application of settled principles of state law, issues concerning insurance coverage were not particularly complex or novel, provider's insurer was not seeking to avoid any adverse ruling in state court, and declaratory judgment claim was not duplicative of any issues in state court action.

Cases that cite this headnote

[20] Federal Courts
Stay

In deciding whether to stay an insurer's declaratory judgment case pending resolution of an underlying state court action, the factor of avoiding needless determination of state law issues weighs in favor of a stay if the coverage claim necessitates determinations of unsettled issues of state law; however, where the declaratory judgment claim requires application of settled principles of state law and the issues concerning insurance coverage are not particularly complex or novel, the factor weighs against a stay.

Cases that cite this headnote

[21] Federal Courts
Stay

In deciding whether to stay a federal declaratory judgment case pending resolution of an underlying state court action, the factor of discouraging litigants from filing declaratory actions as a means of forum shopping weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules.

Cases that cite this headnote

[22] Federal Courts
Stay

In deciding whether to stay a federal declaratory judgment case pending resolution of an underlying state court action, the factor of avoiding duplicative litigation weighs in favor of a stay if the claim for declaratory judgment is duplicative of the issues being litigated in the underlying action.

Cases that cite this headnote

Attorneys and Law Firms

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ORDER GRANTING IN PART WITHOUT PREJUDICE AND DENYING IN PART MOTION TO DISMISS AND DENYING MOTION FOR A STAY

LUCY H. KOH, United States District Judge

***1** Defendant Great Divide Insurance Company ("Defendant" or "Great Divide") brings a motion to dismiss Plaintiff First Mercury Insurance Company's ("Plaintiff" or "First Mercury") complaint or, in the alternative, a motion to stay. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and VACATES the motion hearing set for September 1, 2016, at 1:30 p.m. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court GRANTS IN PART without prejudice and DENIES IN PART the motion to dismiss and DENIES the motion for a stay.

I. BACKGROUND

A. Factual Background

This case is a dispute between First Mercury Insurance Company ("First Mercury" or "Plaintiff") and Great Divide Insurance Company ("Great Divide" or "Defendant") regarding the insurers' respective duties to defend an underlying state court action brought by Amish Patel and Kiran Patel (collectively, the "Underlying Plaintiffs") against Elite Show Services Inc. ("Elite"), the San Francisco Forty Niners Football Company, the San Francisco Forty Niners Limited, the San Francisco Forty Niners II LLC, the San Francisco Forty Niners Foundation, the Forty Niners Stadium LLC, the Forty Niners Stadium Management Company, LLC, the Forty Niners SC Stadium Company LLC (collectively, the "Forty Niner Defendants"), the City of Santa Clara, and the Santa Clara Stadium Authority (collectively, the "Underlying Defendants"). ECF No. 1 ("Compl.") ¶¶ 16-19.

1. The Governing Contracts

First Mercury issued a primary commercial general liability policy to Elite effective September 21, 2014 to September 21, 2015. Compl. ¶ 8. First Mercury's insurance policy with Elite additionally covers as an additional insured "[a]ny person or organization as required by written contract or agreement." *Id.*, Ex. A. Additional insureds are covered under the First Mercury policy as follows:

> A. Section II—Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.
>
> B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:
>
> This insurance does not apply to "bodily injury" or "property damage" occurring after:
>
> 1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
>
> 2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

***2** *Id.*

Great Divide issued a primary commercial general liability policy to the Forty Niner Defendants effective March 1, 2014 to March 1, 2015. *Id.* ¶ 9. Great Divide's insurance policy with the Forty Niner Defendants additionally insures "persons or organizations that the insured agrees to indemnify by contract, any township, municipality,

county, state policy, [sic] sheriff or other law enforcement department, and any manager or lessor of the insured's premises." *Id.* ¶ 9 & Ex. B.

Elite and the Forty Niners Stadium Management entered a service agreement on April 1, 2014. *Id.* Ex. C ("Service Agreement"). In the Service Agreement, Elite agreed to provide security services at the Forty Niners football stadium in Santa Clara "subject to the reasonable prior approval of Stadium Manager [that is, the Forty Niners Stadium Management]." Service Agreement ¶ 2.D. The Service Agreement provided that "Stadium Manager shall have the sole discretion to determine appropriate staffing numbers for each role at each event." *Id.* Ex. A ¶ 1.

Additionally, the Service Agreement provided that Elite "shall indemnify and hold harmless the Authority [that is, the City of Santa Clara and Santa Clara Stadium Authority], Stadium Manager and the Additional Indemnitees...from and against all losses, costs, suits, actions, claims, damages, amounts paid in settlement, liabilities, costs and expenses, including reasonable attorneys' fees (collectively, "Losses"), resulting to, imposed upon, asserted against or incurred by any of them...in connection with or arising out of (i) any breach by Contractor [that is, Elite] under this Agreement, (ii) any activity, inactivity, work or thing done or permitted by Contractor or its employees, agents or contractors in or upon the Stadium or Related Areas, including the performance of the Services, or (iii) any injury or damage to any person or to the property of any Person caused by an action or omission of Contractor or its employees, agents or contractors." *Id.* ¶ 22.

The Service Agreement further required Elite to carry commercial general liability insurance that, *inter alia*, (1) is "primary and non-contributing with respect to any policies carried by client" and (2) covers the Forty Niners Stadium Authority, Santa Clara Stadium Authority, Forty Niners SC Stadium Company LLC, and Forty Niners Football Company LLC as additional insureds. *Id.* ¶ 23.

2. The Underlying Action

On October 5, 2014, the Underlying Plaintiffs attended a football game at the Forty Niners football stadium in Santa Clara. The Underlying Plaintiffs allegedly were injured "during a purported physical altercation with Dario Rebollero and Amador Rebollero" while waiting in line to use the restroom at the stadium. Compl. ¶ 15. The Underlying Plaintiffs filed a complaint against the Underlying Defendants in the Superior Court for the State of California, County of Santa Clara on September 25, 2015, *Patel et al. v. San Francisco Forty Niners Limited et al.* In the state court complaint, the Underlying Plaintiffs allege that the negligent acts and omissions of the Underlying Defendants were responsible for the injuries to the Underlying Plaintiffs. *Id.* ¶ 16.

***3 [1]** The complaint in the underlying action states two causes of action. *See* ECF No. 15-3 ("Patel Compl."). [1] The first cause of action is a claim for negligence brought against all Underlying Defendants. Among the allegations in the claim are allegations that the Forty Niner Defendants "negligently selected, hired, supervised, evaluated, and retained unfit and inadequate security services" and that Elite "negligently provided security services" at the Forty Niners stadium. *Id.* ¶¶ 17-18. The second cause of action is a claim for dangerous condition of public property brought against the City of Santa Clara and the Santa Clara Stadium Authority. This claim includes allegations that the City of Santa Clara and the Santa Clara Stadium Authority created an unreasonable risk of harm through "[t]he lack of an adequate number of urinal and toilet facilities in the tailgating portions of the Red, Blue and Green parking lots and immediately inside the stadium at Gate A where crowds and long lines foreseeably created frustration, anxiety and confrontation." *Id.* ¶ 24.

First Mercury accepted the defense of the lawsuit on behalf of all Underlying Defendants under a full reservation of rights. Compl. ¶ 19.

B. Procedural History

On April 21, 2016, First Mercury filed the instant lawsuit against Great Divide. *See* Compl. First Mercury seeks a declaratory judgment that Great Divide has a duty to defend in the state court action that requires Great Divide to share the defense costs with First Mercury, that Great Divide has a duty to participate in settlement discussions in good faith with respect to the state court action, and that Great Divide has a duty to share in indemnity with First Mercury in the state court action. *Id.* ¶¶ 26-41.

Great Divide filed a motion to dismiss or stay the instant action on June 2, 2016. ECF No. 15 ("Mot."). First

Mercury filed a response on June 16, 2016. ECF No. 17 ("Opp."). Great Divide replied on June 23, 2016. ECF No. 18 ("Reply").

II. LEGAL STANDARD

A. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted when a complaint does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted).

For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.2008). The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir.2000), and it "may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n. 1 (9th Cir.1995). Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir.2011) (per curiam). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.2004).

B. Leave to Amend

***4** **[2]** If the Court concludes that the complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15... [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (en banc) (internal quotation marks omitted). Nonetheless, a district court may deny leave to amend a complaint due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir.2008).

C. Stay of Declaratory Judgment Action

[3] **[4]** The Declaratory Judgment Act provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Based on the statute's "permissive language," district courts have broad "discretion to dismiss a federal declaratory judgment action when 'the questions in controversy...can better be settled in' a pending state court proceeding." *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 975 (9th Cir.2011) (quoting *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942)); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 289–90, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) (holding that review of district court "decisions about the propriety of hearing declaratory judgment actions" is "for abuse of discretion"). "However, there is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically." *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir.1998) (en banc).

[5] **[6]** **[7]** In deciding whether to stay or dismiss an action for declaratory relief, a district court should consider the three factors set forth in the Supreme Court's decision in *Brillhart*. *See R.R. St. & Co.*, 656 F.3d at 975. Specifically, a district court should (1) avoid needless determination of state law issues; (2) discourage litigants from filing declaratory actions as a means of forum shopping; and (3) avoid duplicative litigation. *Id.* (quoting *Dizol*, 133 F.3d at 1225). The three *Brillhart* factors are the "philosophic touchstone" of the *Wilton*/*Brillhart* analysis. *Id.* In addition, the Ninth Circuit has suggested other considerations that may weigh in favor of a district court's decision to dismiss or stay an action for declaratory relief: whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve

a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a res judicata advantage; whether the use of a declaratory action will result in entanglement between the federal and state court systems; the convenience of the parties; and the availability of and relative convenience of other remedies. *Dizol*, 133 F.3d at 1225 n. 5 (quoting *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 145 (9th Cir.1994) (Garth, J., concurring)). At bottom, "the district court must balance concerns of judicial administration, comity, and fairness to the litigants." *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir.2005) (internal quotation marks omitted).

III. DISCUSSION

A. Motion to Dismiss

Defendant moves to dismiss all three of Plaintiff's claims for declaratory relief. The Court addresses each in turn.

1. Claim One: Duty to Defend

***5** Plaintiff's first claim seeks a declaratory judgment that Defendant has a duty to defend the Underlying Defendants in the underlying state court action, and if so, how defense costs should be allocated between Plaintiff and Defendant. Compl. ¶¶ 26-30. Defendant argues that Plaintiff's first claim should be dismissed because, as a matter of law, Defendant does not owe a duty to defend the Underlying Defendants.

The parties agree for purposes of this motion that Plaintiff has a duty to defend the Underlying Defendants in the state court action. *See* Mot. at 16-18; Opp. at 1-2. The dispute centers on whether Defendant also owes a duty to defend the Forty Niner Defendants, the City of Santa Clara, and the Santa Clara Stadium Authority in the state court action.

[8] **[9]** Under California law, an insurer has a duty to defend its insureds in a lawsuit if "some of the claims are at least potentially covered" by the insurance policy. *Buss v. Sup. Ct.*, 16 Cal.4th 35, 47–48, 65 Cal.Rptr.2d 366, 939 P.2d 766 (1997). An "insurer's duty to defend is broader than its duty to indemnify" and the duty to defend "arises as soon as tender is made." *Id.* at 46, 65 Cal.Rptr.2d 366, 939 P.2d 766. Thus, in order to survive the motion to dismiss, Plaintiff's claim for declaratory relief must allege that some of the claims in the state court action are at least potentially covered by Defendant's insurance policy.

Defendant argues that all of the claims in the state court action allege harms caused at least in part by Elite's provision of security services at the Forty Niners Stadium, such that Elite's insurance policy with Plaintiff is primary and non-contributing as to Defendant. *See* Mot. Plaintiff argues that the claims in the state court action potentially could result in a finding that the Forty Niner Defendants, the City of Santa Clara, and the Santa Clara Stadium Authority are liable for the harms to the Underlying Plaintiffs due to acts or omissions not caused by Elite, such that the claims are at least potentially covered by Defendant's policy with the Forty Niner Defendants but not by Plaintiff's policy with Elite. *See* Opp.

[10] **[11]** The California Court of Appeal has held that where an additional insured policy "applies only to the extent that [the additional insured] is held liable for [the named insured's] acts or omissions arising out of and in the course of operations performed for [the additional insured,]" that "basic additional insured provision created the limited vicarious liability coverage for the additional insured." *Maryland Cas. Co. v. Nationwide Mut. Ins. Co.*, 81 Cal.App.4th 1082, 1089–90, 97 Cal.Rptr.2d 374 (2000). The California Court of Appeal concluded that where the underlying action involved "a potential [that the additional insured] would be vicariously liable for [the named insured's] alleged negligence" and "a potential [that the additional insured] would be liable for its own negligence," the insurance providers for the named insured and the additional insured shared a duty to defend the underlying action. *Id.* at 1091, 97 Cal.Rptr.2d 374.

[12] *Maryland* governs the instant case. In relevant part, the additional insured language in Plaintiff's insurance policy extends the policy to cover the additional insureds only for liability "caused, in whole or in part, by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf," where "your" refers to Elite. Compl., Ex. A. Likewise, the governing Service Agreement required Elite to indemnify the other Underlying Defendants for liabilities only "in connection with or arising out of (i) any breach by Contractor [that is, Elite] under this Agreement, (ii) any activity, inactivity, work or thing done or permitted by Contractor or its employees, agents or contractors in or upon the Stadium or Related Areas, including the performance of

the Services, or (iii) any injury or damage to any person or to the property of any Person caused by an action or omission of Contractor or its employees, agents or contractors." Service Agreement ¶ 22.

***6** Thus, Plaintiff has alleged that the additional insured provision of the policy provided by Plaintiff to Elite limited the additional insured coverage to liabilities attributable at least in part to Elite's acts or omissions, or the acts or omissions of those acting on Elite's behalf. As in *Maryland*, the language in the governing contracts does not make Elite broadly responsible for all liabilities incurred by the other Underlying Defendants, but instead makes Elite responsible only for those liabilities traceable at least in part to the acts or omissions of Elite or those acting on Elite's behalf. *See Maryland*, 81 Cal.App.4th at 1089–90, 97 Cal.Rptr.2d 374; *Am. States Ins. Co. v. Ins. Co. of the State of Penn.*, —— F.Supp.3d ——, —— – ——, 2016 WL 1138142, at *3–5 (E.D.Cal. Mar. 23, 2016) (relying on *Maryland* to hold that "the 'only to the extent [the named insured] is held liable' language in Plaintiff's policy limits coverage solely to [the additional insured's] liability for [the named insured's] conduct").

Furthermore, as in *Maryland*, Plaintiff has alleged that there is a potential that the underlying state court action in the instant case would lead to liability for the Forty Niner Defendants, the City of Santa Clara, or the Santa Clara Stadium Authority but not for Elite. For example, the second cause of action in the state court complaint alleges that the City of Santa Clara and the Santa Clara Stadium Authority created an unreasonable risk of harm through "[t]he lack of an adequate number of urinal and toilet facilities in the tailgating portions of the Red, Blue and Green parking lots and immediately inside the stadium at Gate A where crowds and long lines foreseeably created frustration, anxiety and confrontation." Patel Compl. ¶ 24. This allegation is not traceable in whole or in part to Elite, which was hired to perform only security services at the Forty Niners Stadium. Accordingly, Defendant—not Plaintiff—would be responsible for covering any potential liability due to the allegedly inadequate provision of toilet facilities as alleged in the second cause of action in the state court action. This potential for Defendant to be responsible for liability in the state court action is sufficient to trigger Defendant's duty to defend under *Maryland*.

Therefore, because Plaintiff has alleged that some of the claims in the underlying state court action are potentially covered by Defendant, Plaintiff has alleged that Defendant has a duty to defend in the state court action. *See Maryland*, 81 Cal.App.4th at 1089–90, 97 Cal.Rptr.2d 374; *Buss*, 16 Cal.4th at 47–48, 65 Cal.Rptr.2d 366, 939 P.2d 766. The Court DENIES Defendant's motion to dismiss Plaintiff's first claim for a declaratory judgment.

2. Claim Two: Good Faith Participation in Settlement

Plaintiff's second claim seeks a declaratory judgment that Defendant has a duty to participate in settlement discussions in the state court action in good faith. Compl. ¶¶ 31-35. Defendant argues that Plaintiff's second claim must be dismissed because Plaintiff fails to allege an actual controversy relating to Defendant's obligation to participate in settlement discussions.

[13] **[14]** **[15]** **[16]** The complaint lacks any allegations regarding ongoing or imminent settlement discussions or settlement offers. Plaintiff correctly notes that, under California law, the covenant of good faith and fair dealing imposes a duty upon insurers to accept reasonable settlement offers. *See Johansen v. Cal. State Auto. Ass'n Inter–Ins. Bureau*, 15 Cal.3d 9, 16, 123 Cal.Rptr. 288, 538 P.2d 744 (1975). However, "[i]n the absence of a settlement demand or any other manifestation the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement," an insurer is not liable for failure to settle. *Reid v. Mercury Ins. Co.*, 220 Cal.App.4th 262, 266, 162 Cal.Rptr.3d 894 (2013). Likewise, where the injured party has not expressed an interest in settlement, an insurer cannot be liable for bad faith failure to settle due to the insurer's failure to initiate settlement discussions. *Id.* at 276–77, 162 Cal.Rptr.3d 894. Thus, absent any allegations in the complaint regarding a pending settlement offer or other indication that the Underlying Plaintiffs are interested in settlement, any declaration from this Court about Defendant's settlement obligations would be purely speculative. As such, the Court finds that Plaintiff's request for a declaratory judgment regarding settlement is not ripe. *See Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

***7** Therefore, the Court GRANTS Defendant's motion to dismiss Plaintiff's second claim. The dismissal is without prejudice to renewal once the claim is ripe.

3. Claim Three: Indemnity

Plaintiff's third claim seeks a declaratory judgment that Defendant has a duty to indemnify the Underlying Defendants in the state court action and an order designating an appropriate allocation of the indemnity between Plaintiff and Defendant. Compl. ¶¶ 36-41.

[17] The duty to indemnify in California "arises when the insured's underlying liability is established." *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 659 n. 9, 42 Cal.Rptr.2d 324, 913 P.2d 878 (1995) (citing Cal. Civ. Code § 2778(1); *Clark v. Bellefonte Ins. Co.*, 113 Cal.App.3d 326, 336–37, 169 Cal.Rptr. 832 (1980)). "Although an insurer may have a duty to defend, it ultimately may have no obligation to indemnify, either because no damages were awarded in the underlying action against the insured, or because the actual judgment was for damages not covered under the policy." *Id.* (citing *City of Laguna Beach v. Mead Reinsurance Corp.*, 226 Cal.App.3d 822, 830, 276 Cal.Rptr. 438 (1990)).

[18] In the instant case, the underlying state court action is still pending. The complaint does not allege that any settlement or judgment has been entered in the state court action. In the instant case, resolution of the state court action is necessary to determine whether and to what extent any resulting judgment falls outside Plaintiff's agreement to provide primary and non-contributing insurance coverage to the Underlying Defendants. Thus, prior to resolution of the underlying state court action, the Court is "unable to determine the amount of the insurer's indemnity obligation." *Montrose*, 10 Cal.4th at 659 n. 9, 42 Cal.Rptr.2d 324, 913 P.2d 878. Any declaration from this Court about Defendant's indemnity obligations would be purely speculative. As such, the Court finds that Plaintiff's request for a declaratory judgment regarding indemnity is not ripe. *See Texas*, 523 U.S. at 300, 118 S.Ct. 1257 ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

Therefore, the Court GRANTS Defendant's motion to dismiss Plaintiff's third claim. The dismissal is without prejudice to renewal once the claim is ripe.

B. Motion for a Stay

Following the Court's ruling on Defendant's motion to dismiss, the sole claim in the case is Plaintiff's claim for a declaratory judgment regarding Defendant's duty to defend in the underlying state court action. Because the Court has not dismissed Plaintiff's case in its entirety, Defendant additionally requests that the Court exercise its discretion to stay this litigation pending the resolution of the underlying state court action. Defendant argues that a stay is appropriate because the federal interest in the matter is minimal and resolution of the instant case may turn on matters to be decided in the state court action. *See* Mot. at 23-24. Plaintiff opposes Defendant's motion for a stay. *See* Opp. at 15.

In deciding whether to stay the case, the Court relies upon the three *Brillhart* factors: (1) avoiding needless determination of state law issues; (2) discouraging litigants from filing declaratory actions as a means of forum shopping; and (3) avoiding duplicative litigation. *See R.R. St. & Co.*, 656 F.3d at 975.

***8** **[19]** **[20]** None of the *Brillhart* factors favor a stay in the instant case. The first *Brillhart* factor governs in favor of a stay "[i]f the coverage claim necessitates determinations of unsettled issues of state law." *Hanover Ins. Co. v. Paul M. Zagaris, Inc.*, No. C 16–01099 WHA, 2016 WL 3443387, at *4 (N.D.Cal. June 23, 2016) (citing *Dizol*, 133 F.3d at 1225). However, where, as here, the declaratory judgment claim requires application of settled principles of state law and "the issues concerning insurance coverage are not particularly complex or novel," the first *Brillhart* factor weighs against a stay. *Id.*

[21] The second *Brillhart* factor for discouraging forum shopping does not apply to the instant case. The Ninth Circuit has held that the second *Brillhart* factor "weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1371 (9th Cir.1990). There is no indication in the instant case that Plaintiff seeks to avoid any adverse ruling in state court, and Defendant has not argued that the second *Brillhart* factor applies. Accordingly, the second *Brillhart* factor for discouraging forum shopping does not weigh in favor of a stay.

[22] Finally, under the third *Brillhart* factor, "[a] stay or dismissal is favored if the claim for declaratory judgment is duplicative of the issues being litigated in the underlying liability action." *Hanover Ins. Co.*, 2016 WL 3443387, at *3. However, Plaintiff's claim for a declaratory judgment regarding Defendant's duty to defend in the state court action is not duplicative of any of the issues in the state court action. Defendant's duty to defend is triggered not by the determination of whether Defendant is in fact liable in whole or in part for any resulting judgment or settlement in the state court action, but only by whether the state court action could potentially result in at least partial liability for Defendant. *Buss*, 16 Cal.4th at 47–48, 65 Cal.Rptr.2d 366, 939 P.2d 766 (an insurer has a duty to defend its insureds in a lawsuit if "some of the claims are at least potentially covered" by the insurance policy). The Court need not resolve any of the questions of liability in the underlying state court action in order to assess whether some of the claims in the state court action are at least potentially covered by Defendant based on the complaint in the state court action. Accordingly, "the coverage question is logically unrelated to the issues of consequence in the underlying case," such that a stay of the instant coverage action is not warranted. *Hanover Ins. Co.*, 2016 WL 3443387, at *3 (quoting *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 302, 24 Cal.Rptr.2d 467, 861 P.2d 1153 (1993)) (internal quotation marks omitted).

Thus, none of the *Brillhart* factors favor a stay in the instant case, and the Court DENIES Defendant's motion for a stay.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's motion to dismiss Plaintiff's first claim, GRANTS Defendant's motion to dismiss second and third claims without prejudice, and DENIES Defendant's motion for a stay.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2016 WL 4502809

Footnotes

1 Defendant requests that the Court take judicial notice of the complaint filed in the underlying state court action. Court filings from cases in other courts are a proper subject of judicial notice. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir.2006). Accordingly, the Court GRANTS Defendant's request for judicial notice.