SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CARLYLE INVESTMENT MANAGEMENT L.L.C, *et al*., Plaintiffs, v. ACE AMERICAN INS. CO., *et al*., Defendants.	Case No. 2013 CA 003190 B Judge Frederick Weisberg

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the court on Defendants' motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Sup. Ct. Civ. R. 12(b)(6). Plaintiffs are three limited liability companies operating under the banner of The Carlyle Group, which is the trade name of a global private equity firm. Defendants are liability insurance companies, which insured Plaintiffs against various risks associated with their business, providing primary coverage and multiple tiers of excess coverage.[1] In 2006, Plaintiffs organized a new company called Carlyle Capital Corporation ("CCC"), located on the island of Guernsey in the Channel Islands. Plaintiff Carlyle Investment Management L.L.C. ("CIM") served as CCC's investment manager pursuant to an Investment Management Agreement ("IMA"). Shares of CCC were sold to Carlyle insiders and to wealthy individual and institutional investors, first in a private offering

[1] For purposes of the motion before the court, the insurance contracts for primary and excess coverage are identical.

and later by way of a public offering and public trading. The business of CCC was to invest primarily in residential mortgage-backed securities in heavily leveraged transactions financed by repurchase loan agreements. In the spring of 2008, the market for these types of investments collapsed. CCC could not meet its margin calls, defaulted on its repurchase agreements, and eventually slid into bankruptcy. A number of individual and institutional investors in CCC and the CCC liquidators in bankruptcy filed lawsuits against Plaintiffs, alleging various forms of misrepresentation and mismanagement. Plaintiffs duly notified the Defendant insurers of these claims and asked for "defense costs" under the policies. Defendants denied coverage. This litigation followed.

On a Rule 12(b)(6) motion the court must construe the complaint in the light most favorable to the plaintiff and must accept as true all of the well-pleaded allegations of the complaint. *Larijani v. Georgetown University*, 791 A.2d 41, 43 (D.C. 2002). The court may dismiss the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Owens v. Tiber Island Condo. Ass'n.*, 373 A.2d 890, 893 (D.C. 1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In this action Plaintiffs seek a declaration that the claims against which they have been required to defend in actions relating to CCC are covered losses under their contracts of insurance, for which the Defendant insurers are liable for settlements or judgments and "defense costs."[2] Defendants have moved to dismiss, arguing that all of the claims against Plaintiffs in the related CCC litigation fall within an exclusion of coverage in the insurance contracts called the Carlyle Capital Corp Exclusion ("the Exclusion"), which provides:

[2] These insurance contracts do not include a duty to defend. Instead, Plaintiffs control their own defense, and the contracts define a covered loss to include "damages, settlements, judgments … and **Defense Costs**." Contract § 2(y).

> In consideration of the premium charged, it is hereby understood and agreed that the **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Professional Services Claim** arising from **Professional Services** provided to Carlyle Capital Corp.[3]

The dispute between the parties in this case is over the meaning of this Exclusion. If the contract is unambiguous and susceptible of only one meaning, the court's duty is to apply it as it is written, even if the parties disagree about what it means. *Holland v. Hannan,* 456 A.2d 807, 815 (D.C. 1983). The question of whether a contract is or is not ambiguous is a question of law for the court. *Id*.; *see also Dodek v. CF 16 Corp*., 537 A.2d 1086, 1092-93 (D.C. 1988). In deciding that question, the court looks first to the language of the contract, giving that language its plain meaning. *See Capitol City Mort. Corp. v. Habana Village Art & Folklore, Inc*., 747 A. 2d 564, 567 (D.C. 2000). Under the "objective law of contracts" followed in this jurisdiction, the court, in deciding whether a contract is ambiguous, may use extrinsic evidence of what a reasonable person in the position of the parties would have understood the contract to mean, but extrinsic evidence of the subjective intent of the parties is admissible only if the contract is found to be ambiguous. *Id.*; *see also Aziken v. Dist. of Columbia*, 70 A.3d 213, 218-19 (D.C. 2013); *Patterson v. Dist. of Columbia*, 795 A.2d 681, 683 (D.C. 2002). The burden is on Defendants to prove that the underlying claims are within the Exclusion and, on a motion to dismiss, to prove that such claims are barred unambiguously. *Cameron v. USAA Prop. & Cas. Ins. Co*., 733 A.2d 965, 969 (D.C. 1999).

[3] Words appearing in boldface are defined terms in the policy.

In insurance coverage disputes, we follow the so-called "eight corners rule." *Stevens v. United Gen.eral Title Ins. Co*., 801 A.2d 61, 66 n.4 (D.C. 2002); *see also Fogg v. Fidelity Nat'l. Title Ins. Co.*, No. 13-CV-0216, (D.C. Apr. 24, 2014). Under that rule, the duty to defend (or, as here, the duty to advance defense costs) is determined by reference to the four corners of the contract of insurance and the four corners of the complaint against the insured. Moreover, it is the allegations of the complaint that matter, not the facts that may be developed during the course of the litigation or even the ultimate outcome of the suit. *Stevens*, 801 A.2d at 67 (quoting *Travelers Ins. Co. of Ill., v. United Food & Commercial Workers Int'l. Union*, 770 A.2d 978, 977 (D.C. 2001)).[4]

Although the court's function at this stage is to interpret the Exclusion to determine whether it unambiguously excludes coverage of the losses for which Plaintiffs are seeking coverage, the Exclusion cannot be interpreted in a vacuum. It contains terms that are defined elsewhere in the contract. Those definitions control the analysis. If the contract definitions of terms such as **Loss**, **Claim**, and **Professional Services** bring this case within the scope of the Exclusion, it does not matter whether those same terms might mean something else – or lead to a different result – in the context of a different case or a different contract. In order to enforce the

[4] In their opposition to the motion, Plaintiffs argue that insurance contracts are generally construed liberally in favor of coverage. *See In re Estate of Corriea*, 719 A.2d 1234, 1243 (D.C. 1998). The rule is relaxed somewhat where it is clear from the evidence that the parties bargained for the terms of the contract at arm's length and from positions of relatively equal strength. *See Meade v. Prudential Ins. Co*., 477 A.2d 726, 728 n. 1 (D.C. 1984). Here, Defendants point out that the policy in question bears the word "Manuscript," meaning that both parties participated in the drafting of the contract language. Plaintiffs dispute the relevance of that descriptor, asserting that the Exclusion was first inserted into the contract in 2007, at which time the policy did not bear the "Manuscript" endorsement. It is unnecessary to resolve this dispute, nor is it appropriate to resolve it on a motion to dismiss. Regardless of which party drafted the language of the Exclusion, it is clear that Defendants wanted it and Plaintiffs agreed to it. If the words of the Exclusion are not ambiguous, the contract must be construed according to the plain meaning of those words and, absent ambiguity, there is no occasion to give the non-drafting party the benefit of any doubt. *See Capitol City Mort. Corp.*, 747 A.2d at 567; *Cameron*, 733 A.2d at 968-69; *Meade,* 477 A.2d at 728; *1901 Wyoming Ave. Coop. Ass'n. v. Lee*, 345 A.2d 456, 463 (D.C. 1975).

parties' bargain as it is written, it is the definitions of the relevant terms in *this* contract that must control the decision.

The contract excludes coverage for "**Loss** in connection with any **Professional Services Claim** arising from **Professional Services** provided to Carlyle Capital Corp." "**Loss**" means "damages, settlements, judgments …and **Defense Costs.**" Contract § 2(y). A "**Claim"** includes a "civil … proceeding … commenced by: A) service of a complaint or similar pleading," and expressly includes any **Professional Services Claim**, which is defined as "a **Claim** made against any **Insured** arising out of, based upon or attributable to **Professional Services** provided by an **Insured**." Contract §§ 2(d) and 2(kk). "**Professional Services**" is defined in Section 2(jj) of the policy. That definition states, in pertinent part:

> (1) the giving of financial, economic or investment advice regarding investments in any debt, equity or convertible securities, collateralized debt obligations, collateralized loan obligations, collateralized bond obligations, collateralized mortgage obligations, asset-backed securities, limited partnership, limited liability company, private placement, entity, mutual fund, exchange traded fund, hedge fund, private equity fund, fund of funds, asset, liability, debt, bond, note, real property, personal property, commodity, currency, futures contract, index futures contract, option, option on a futures contract, warrant, swap, credit default swap, contract for differences (**CFD**), currency contract or other derivative instrument or contract, or any combination of any of the foregoing, including without limitation the giving of financial advice to or on behalf of any **Fund** (or any prospective **Fund**) or any separately managed account or separate account holder or any limited partner of any **Fund** (or prospective **Fund**) or any other investor or client of, in or with an **Organization**;
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> (2) the rendering of or failure to render investment management services, including without limitation investment management services concerning any of the foregoing investments, and including without limitation, the rendering of or failure to render investment management services to or on behalf of any **Fund** (or any prospective **Fund**) or any separately managed account or separate account holder or any limited partner of any **Fund** (or prospective **Fund**) or the rendering or failure to render investment management services to or on behalf of any other

investor or client of, in or with an **Organization**;

(3) the organization or formation of, the purchase or sale or offer or solicitation for the purchase or sale of any interest(s) in, the calling of committed capital to, a **Fund** or prospective **Fund**;

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(5) the providing of advisory, consulting, management, monitoring, administrative, investment, financial or legal advice or other services for, or the rendering of any advice to, or with respect to, an **Organization**, a **Fund** (or any of its limited partners or members) or a **Portfolio Entity** (or a prospective **Organization**, **Investment Fund** or **Portfolio Entity**); … or

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(8) other similar or related services.

Defendants argue that Plaintiffs bargained for the broadest possible coverage for losses attributable to their provision of **Professional Services** to any **Fund**, **Organization** or **Portfolio Entity**, and they are stuck with that definition as it applies to the exclusion for losses attributable to **Professional Services** they provided to CCC. Plaintiffs counter that the Exclusion is narrower than the coverage and was intended to exclude only claims arising from professional services in the nature of those provided by lawyers and accountants ("E&O" claims), not "management-liability claims," such as those alleging acts, errors, or omissions in corporate governance, often referred to as "directors & officers claims" ("D&O" claims). The relevant question, however, is not what the parties – or one of the parties – may have intended or thought that the words meant. If the contract is unambiguous, it must be interpreted according to its plain language, even if one party to it thought it meant something else.

Whether or not the contract definitions of "**Professional Services**" and "**Professional Services Claim**" are as broad as they are because Plaintiffs bargained for those broad definitions for coverage purposes, and whether or not the words mean something else in the insurance industry outside of the context of this particular contract, those terms are specifically defined in the contract, the definitions are broad and unambiguous and, as used in the Exclusion, they operate to exclude coverage for all of the losses (and defense costs) at issue in this case.

Although plead in a plethora of different legal theories and multiple counts, the gravamen of all of the underlying complaints is that Plaintiffs enticed the investors into unsafe investments by falsely promising high returns with minimal risk, misled or failed to warn investors about increasing risk, and mismanaged the investments by failing to guard against their inherent risk, even after deteriorating market conditions should have dictated a variety of conservative strategies designed to decrease leverage and prevent the insolvency of the company and investor losses that occurred in 2008. Plaintiffs argue that if one analyzes the underlying complaints count by count, as the law requires, it becomes clear that some of the claims are arguably within the Exclusion while the majority plainly are not.[5] The problem with Plaintiffs' analysis is that it assumes Plaintiffs' premise that so-called "management-liability claims" – those related to acts, errors, and omissions in corporate governance or "D&O" claims – are not excluded. Whatever might be true in the insurance industry generally, in *this* insurance contract, "**Loss** in connection with any **Professional Services Claim** arising from **Professional Services** provided to Carlyle Capital Corp." was expressly excluded from coverage. Those terms were defined in the contract broadly enough to include virtually all of the conduct alleged against Plaintiffs (and those they

[5] Of all the lawsuits and all the claims against Plaintiffs brought by the Liquidators, shareholders, and investors, Plaintiffs concede that only one count – count 10 in the Liquidators' nineteen-count Complaint, which alleges that CIM breached the IMA – states a claim that is within the Exclusion.

are indemnifying) in the underlying lawsuits, whether or not such conduct would be characterized as professional services or corporate management in the industry generally or in some other insurance contract. Stated differently, even if the terms "professional services" and "professional services claim" could be considered ambiguous in another contract, necessitating the admission of extrinsic evidence as to the subjective intent of the contracting parties in using those terms, in this contract the terms are not ambiguous because they are specifically defined. Thus, the question is not whether Plaintiffs thought those terms did not mean the same thing in the Exclusion as they meant in the coverage sections of the contract; by using defined terms in bold letters in the Exclusion, those terms can have only one meaning, and that is the meaning the contract assigns to them.[6]

Plaintiffs' argument invites the court to get down in the weeds to see if there may be some clever parsing of the language in any count in the many multiple-count complaints against them that could take that count outside of what would otherwise be the unambiguous language of the Exclusion. Plaintiffs are correct that the court is required to consider each claim in each complaint in deciding the coverage issue presented, but the "eight corners rule" neither requires nor permits the court to scrutinize each count in each complaint with a dictionary in one hand and The Chicago Manual of Style in the other to see if there is an allegation that could be

[6] Unlike most of the decisions Plaintiffs cite, where courts narrowly construe exclusions from coverage in insurance contracts so as to ensure that the exclusion does not swallow up the coverage, the contract in this case poses no such risk. These policies extend coverage for loss in connection with **Professional Services Claims** arising from **Professional Services** provided by an **Insured** to any **Fund**, **Organization** or **Portfolio Entity** (or their investors), but the CCC Exclusion is limited to loss arising from **Professional Services** provided to a single entity, Carlyle Capital Corp. Moreover, in *this* contract, both in the coverage and in the Exclusion, **Professional Services** include, *inter alia*, "the rendering of or failure to render investment management services," "the providing of advisory, consulting, management, monitoring, administrative, investment, financial or legal advice to, or with respect to, an **Organization**, a **Fund** … ," "the organization or formation of, the purchase or sale or offer or solicitation for the purchase or sale of any interest(s) in, the calling of committed capital to, a **Fund** or prospective **Fund**," and "other similar or related services," but the Exclusion applies only when those activities relate to CCC.

contorted so as to bear an interpretation that would take it out of the Exclusion.[7] The Exclusion is not ambiguous. It excludes **Professional Services Claims** (a defined term) arising from **Professional Services** (a defined term) provided to CCC.[8]

Each claim in each complaint arises from the provision of **Professional Services** to CCC, whether it relates to the alleged false marketing of the shares to private investors (Huffington and NIG), the alleged failure to make required disclosures to purchasers of publicly traded shares (Shareholder Class Action), CIM's alleged mismanagement of CCC under the IMA (Huffington, NIG, Shareholder Class, and Liquidators), the alleged misrepresentations or failure to warn investors and failure to take appropriate actions to maintain adequate liquidity when the market was showing signs of collapse and CCC was over-leveraged (same), or the operation of CCC with divided loyalties by acting as "*de facto* directors" or "shadow directors," allegedly for the benefit of other Carlyle interests and to the detriment of CCC and its outside shareholders (Liquidators).[9] To the extent that these claims – or some of them – would be classified as

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[7] In a confusing and somewhat convoluted argument, Plaintiffs also contend that a **Professional Services Claim** is not excluded unless it *in fact* arises from **Professional Services** provided to CCC. Plaintiffs' Memorandum at pp. 48-50. If by this Plaintiffs mean that mere allegations in a complaint of wrongful acts arising from **Professional Services** provided to CCC would not be sufficient to trigger the Exclusion, their argument goes against a long line of decisions in this jurisdiction standing for the proposition that the court looks to the allegations of the complaint to determine if the loss would be covered, not the truth or falsity of the facts underlying the allegations. *See, e.g.*, *Stevens*, 801 A.2d at 67, and cases cited.

[8] The policy defines **Professional Services**, *inter alia*, as "rendering of or failure to render investment management services to or on behalf of any **Fund**" and an "offer or solicitation for the purchase or sale of any interest(s) in … a **Fund**." Contract § 2(jj)(2) and (3). "**Fund**" is itself a defined term in the contract. Contract § 2(p). The parties appear to disagree about whether CCC was "Fund" or whether it ceased to be a "Fund" after its IPO, when its shares were publicly traded. It is noteworthy that the IMA expressly described CCC as a "Fund." In any event, the dispute is irrelevant to the disposition of the motion because under the contract, **Professional Services** includes "other similar or related services" (§ 2(jj)(8)), and the Exclusion specifically excluded claims arising from "**Professional Services** provided to Carlyle Capital Corp."

[9] Several officers and directors of Plaintiff companies were also directors of CCC. Plaintiffs do not contend that Defendants' policies cover those individuals for "wrongful acts" done in their capacity as directors of CCC. CCC had no employees, and its officers and directors, as such, were not covered under Plaintiffs' insurance contracts with these Defendants. CCC obtained other insurance to cover its officers and directors.

"management-liability claims" in the insurance industry generally or in some other insurance contract, in *this* contract they are **Professional Services Claims** arising from **Professional Services** provided to CCC. For that reason, they are excluded from coverage under the contract, and Defendants are entitled to judgment as a matter of law.

For the foregoing reasons, it is this 15th day of May, 2014,

ORDERED that Defendants' Motion to Dismiss pursuant to Super. Ct. Civ. R. 12(b)(6) be, and it hereby is, granted; and the Complaint is hereby dismissed with prejudice.

Judge Frederick H. Weisberg

Copies to all parties listed in Case File Xpress