UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:16-cv-01045-JLS-KES Date: May 11, 2017
Title: Brown and Streza LLP et al. v. Ironshore Specialty Insurance Company

Present: **HONORABLE JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Doc. 39)

Before the Court is a Motion for Summary Judgment filed by Plaintiffs and Counter-Defendants Brown & Streza LLP and Matthew G. Brown. (Mot., Doc. 39.) Defendant and Counter-Plaintiff Ironshore Specialty Insurance Company has submitted an Opposition (Opp'n, Doc. 45), and Brown & Streza has offered a Reply (Reply, Doc. 54). For the following reasons, the Court GRANTS Plaintiffs' Motion.

I. BACKGROUND

Brown & Streza is a California law firm with a "claims made" professional liability insurance policy from Ironshore Specialty Insurance Company. The original policy, which was effective from May 3, 2010 to May 3, 2011, provided two million dollars in professional liability coverage and "Full Prior Acts" coverage. (*See* Original Insurance Policy, Exh. 1, Doc. 48-1.) The premium under the original policy was $85,430 and the only endorsement relates to nuclear hazard liability. (*See id.*)

On October 26, 2010, Cheryl W. Morse, who is Brown & Streza's Office Administrator, asked Brown & Streza's retail broker, Ed Aylor, whether Brown & Streza could increase their coverage to five million dollars. (Genuine Issues ¶ 1, Doc. 46; Email B&S000084, Exh A, Doc. 39-1.) Aylor, in turn, emailed Gregg Higgins, a surplus lines broker for ELM Insurance Brokers, stating "As you can see this insured wants to increase

coverage, please advise [of] the best option." (Aylor Email, Exh. 2, Doc. 47-1.) The next day, Higgins responded that Ironshore would be willing to increase Brown & Streza's coverage and specified the additional premium to increase coverage to three, four, or five million dollars. (Higgins Email, Exh. 4, Doc. 47-1.) The email also indicated that "Retro Date for the Higher Limits will be Inception (when they bind)." (*Id.*) One day later, Aylor provided Morse with the additional premium amounts to increase the insurance policy to three, four, or five million dollars. (Email B&S 00085, Exh. A, Doc. 39-1.) Aylor did not mention Higgins's statement about a "Retro Date." (*Id.*; Genuine Issues ¶ 2.) Morse forwarded Aylor's response to Richard Streza. (Email B&S00085, Exh. A.)

Approximately four months later, on March 4, 2011, Brown & Streza sent Aylor a completed application to renew Brown & Streza's policy with Ironshore. (Renewal Application B&S000001-14, Exh. A, Doc. 39-2.) The application sought four million dollars in professional liability coverage. (*See id.* at B&S000007.) Aylor submitted Brown & Streza's renewal application to ELM, which submitted the application to Ironshore and requested a quote. (Genuine Issues ¶ 5; Email IRON00027, Exh. B, Doc. 41-2.)[1] In her email to Ironshore, however, ELM representative Jessica Fox indicated that Brown & Streza sought two million dollars in liability coverage with a "Retro Date" of "Full Prior Acts." (*Id.*)

On April 12, 2011, Fox followed up with Ironshore, stating, "I need renewal terms asap!" (Email IRON00052, Exh. B, Doc. 41-2.) On April 13, 2011, Ironshore provided ELM with a renewal indication for two million dollars in coverage. (Email IRON00050, Exh. B, Doc. 41-2.) ELM then provided Aylor with a quote for two million dollars in professional liability coverage with "Retro Date: Full Prior Acts." (First Quote AYL000094-95, Exh. D, Doc. 41-4.) Aylor responded to ELM that Brown & Streza's

[1] Ironshore disputes whether ELM forwarded Brown & Streza's full application to it. (Genuine Issues ¶ 9.) But the sole basis Ironshore provides for disputing this contention is the unsupported assertion that "[i]t is not clear whether ELM provided the Brown & Streza application when it solicited quotes in March 2011." (*Id.*) The Court rejects this assertion because Ironshore forwarded the request for a quote internally with an attachment titled "completed 2011 application.pdf." (Email IRON00027, Exh. B, Doc. 41-2.)

application asked for four million dollars in coverage. (Email, Exh. 9, Doc. 47-1.) ELM requested a four million dollar quote from Ironshore, and the insurer responded, "The new limit 2 (xs of 2) would be retro inception, but our premium on the 4/4 limit would be 100,000." (Email IRON00049, Exh. B, Doc. 41-2.) ELM then supplied Aylor with a second quote. (Second Quote AYL000099-000100, Exh. D, Doc. 41-4.) This quote for four million in coverage stated, "Full Prior Acts on the First $2MM Inception for the $2MM excess of the First $2MM." (Second Quote, Exh. D, Doc. 47-1; Email, Exh. 9, Doc. 47-1.) On April 25, 2011, Aylor sent a proposal, dated April 15, 2011, to Brown & Streza for four million dollars in coverage. Like the quote from ELM, the proposal stated "Retro Date: Full Prior Acts on the First $2MM [*next line*] Inception for the $2MM excess of the First $2MM." (Proposal AYL000096-98, Exh. D, Doc. 41-4.) The proposal cautioned that "this proposal is for illustrative purposes only. It is not, nor intended to be an insurance contract and is not considered binding." (*Id.*)

On April 27, 2011, Ironshore provided ELM with binder on the renewal policy. The binder provided for four million dollars of coverage with a "Retroactive Date" of "Full Prior Acts (Inception of 2nd 2,000,000)." (Binder IRON00083-85, Exh. B, Doc. 41-2.) Although the binder mentions "Manuscript Endorsement – Separate Prior Acts for Excess Limit[,]" Endorsement #1 was blank. (*See id.* at IRON00085.) Between May 2 and May 4, 2011, Ironshore's underwriters exchanged drafts of Endorsement #1, and Tom Monaghan ultimately approved the Endorsement on May 4, 2011. (Email IRON00167, Doc. 41-2.) On May 16, 2011, Ironshore internally circulated a draft cover letter and final policy for Brown & Streza. (Email IRON00146, Exh. B, Doc. 41-2.) Like the final policy, this draft shows that the "Retroactive Date" is "Full Prior Acts." An Ironshore underwriter commented, "The manuscript should read $2,000,000 as the 2nd number, not $4,000,000 – all else is good." (IRON00166, Exh. B, Doc. 41-2.) On May 17, 2011, Ironshore provided ELM with the renewal policy, but Brown & Streza did not receive a copy of the policy until July 15, 2011. (Genuine Issues ¶ 18; IRON00148, Exh. B, Doc. 41-2.)

In its final form, the Declarations page of the renewal policy provides that Brown & Streza has $4,000,000 in coverage "for all claims made or deemed made during Policy

Period" and the Retroactive Date listed in Item 6 is "Full Prior Acts." (Renewal Insurance Policy, Exh. 17, Doc. 48-2.) Endorsement #1, the sole endorsement to the policy, reads:

> In consideration of the premium charged, it is hereby understood and agreed that with respect to the $2,000,000 excess of $2,000,000 of the Limit of Liability stated in the Declarations, the **Insurer** shall not be liable to make any payments in connection with any **Claim** made against any **Insured** prior to the below Retroactive date listed in Item 6 of the Declarations page:
>
> **Prior Acts Exclusion:** May 03, 2011.

(*Id.*)

On May 18, 2011, Morse contacted Aylor about how to submit the underlying claim—in the form of a letter from a former client—to Ironshore. (Genuine Issues ¶ 27; Morse Decl. ¶ 5.) Aylor informed Brown & Streza to submit the claim to ELM. (Genuine Issues ¶ 27.) That day, Brown & Streza tendered the underlying claim to Ironshore through ELM. (*Id.* ¶ 28.) Brown & Streza requested a copy of the Ironshore policy, which the firm had not yet received. (*Id.* ¶ 29.) On July 11, 2011, Ironshore's initial adjuster accepted coverage for the underlying claim, noting that policy "has a Limit of Liability of $4,000,000 for each Claim and in the aggregate for all Claims . . . ." (Letter, Exh. F, Doc. 39-2 (emphasis omitted).) The insurance adjuster's letter did not mention Endorsement #1 or suggest that the maximum professional coverage would be limited to two million dollars. (*See id.*) On July 15, 2011, Brown & Streza finally received a copy of the renewal policy. (Genuine Issues ¶ 32.) On January 23, 2012, after Ironshore changed insurance adjusters, the new adjuster submitted a letter that "supplement[ed]" the original letter. (Adjuster Letter B&S000071, Exh G, Doc. 39-2.)

In this letter, Ironshore first raised the argument that Endorsement #1 limited coverage for the underlying claim to two million dollars. (*Id.*)

On June 2, 2016, Brown & Streza filed suit, seeking a declaratory judgment that Ironshore was obligated to provide up to four million dollars in coverage for the underlying claim. (Compl. ¶¶ 19-21, Doc. 1.) Plaintiffs also filed claims for breach of contract and breach of the implied covenant of good faith and fair dealing. (*Id.* ¶¶ 22-31.) Around a month later, on June 2, 2016, Ironshore settled the underlying lawsuit with a full reservation of rights. (Genuine Issues ¶ 37.) Ironshore then filed a counterclaim, alleging that Endorsement #1 limited Brown & Streza's coverage to two million dollars. (Counterclaim ¶¶ 26-29, Doc 15.) Plaintiffs now move for summary judgment on Ironshore's counterclaim. (Mot.)

II. LEGAL STANDARD

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is proper "if the [moving party] shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the non-movant's favor, and a fact is "material" when it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. But "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828 (9th Cir. 2013) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (internal quotation marks omitted)).

The role of the Court is not to resolve disputes of fact but to assess whether there are any factual disputes to be tried. The moving party bears the initial burden of demonstrating the absence of a genuine dispute of fact. *Celotex Corp. v. Catrett*, 477

U.S. 317, 323 (1986). "Once the moving party carries its initial burden, the adverse party 'may not rest upon the mere allegations or denials of the adverse party's pleading,' but must provide affidavits or other sources of evidence that 'set forth specific facts showing that there is a genuine issue for trial.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Fed. R. Civ. P. 56(e)).

III. DISCUSSION

This case entirely revolves around the enigmatic "Endorsement #1," which provides:

> In consideration of the premium charged, it is hereby understood and agreed that with respect to the $2,000,000 excess of $2,000,000 of the Limit of Liability stated in the Declarations, the **Insurer** shall not be liable to make any payments in connection with any **Claim** made against any **Insured** prior to the below Retroactive date listed in Item 6 of the Declarations page:
>
> **Prior Acts Exclusion:** May 03, 2011.

(Renewal Insurance Policy, Exh. 17.) This provision is perplexing in at least three respects: First, the Declarations page nowhere mentions "$2,000,000 [in] excess of $2,000,000" in coverage. To the contrary, the Limit of Liability on the Declarations page simply provides "4,000,000 Each Claim [*next line*] $4,000,000 aggregate limit of liability for *all Claims* made or deemed made during Policy period." (*Id.*) Second, Endorsement #1 concerns "any **Claim** *made* against any **Insured,"** and—by bolding and capitalizing "Claim"—the Endorsement incorporates the Policy's definition of this word, which is "a demand received by an **Insured** for money or services." (*Id.*) Nowhere does Endorsement #1 restrict coverage for the insured's "acts or omissions" that occurred prior

to the policy period. Thus, Endorsement #1, though purportedly altering the policy, seems merely to reiterate a basic attribute of a claims-made policy. Third, and most puzzling, Endorsement #1 cross-references Item #6 in the policy, which says that the policy provides "Full Prior Acts" coverage. (*Id.*)

In opposing summary judgment, Ironshore relies heavily on the contention that its statements to ELM should be imputed to Brown & Streza for purposes of construing Endorsement #1. (Opp'n at 11-20.) In other words, even though Brown & Streza never communicated with ELM (or Ironshore for that matter) during the negotiation of the contract (Genuine Issues ¶ 35), and Brown & Streza never learned of Ironshore's statements to ELM, ELM's potential understanding of Endorsement #1 based on its conversations with Ironshore should be imputed to Brown & Streza for purposes of interpreting the policy. Ironshore has not cited—nor can this Court find—an authority applying California insurance law that has imputed statements made by an insurer to a subagent to construe an unintelligible policy provision that was *drafted by the insurer in its favor*. But even if such a rule existed, Endorsement #1 was not drafted and submitted to ELM until May 17, 2011 (Genuine Issues ¶ 18; IRON00148, Exh. B, Doc. 41-2), well after the renewal policy had gone into effect. Although the Endorsement became retroactively effective as of the beginning of the policy period, Ironshore's statements to ELM are not probative of Brown & Streza's reasonable understanding of a provision that had not yet been written.

More importantly, however, whether Ironshore's statements to ELM should be imputed to Brown &Streza is immaterial because Endorsement #1 is neither plain nor clear. "If there is any conflict between an endorsement and the body of a policy, the endorsement controls, *provided* that any reduction in coverage reasonably expected under the body of a policy *must* be "'conspicuous, plain and clear.'" *Frontier Oil Corp. v. RLI Ins. Co.*, 63 Cal. Rptr. 3d 816, 838 (Ct. App. 2007) (emphasis added); *see also* California Practice Guide 4:485 (The Rutter Group 2016) ("Endorsements reducing benefits or limiting coverage are subject to the conspicuous, plain and clear requirement.").[2] "This

[2] There remains some tension between the "reasonable expectations of the insured" and "conspicuous, plain, and clear" standards. In *20th Century Insurance Co. v. Liberty Mutual*

rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1213 (Cal. 2003). Similarly, a California Court of Appeal has specifically held that prior acts exclusions in claims-made policies are subject to the "conspicuous, plain, and clear" standard, observing that "these hybrid policies incorporate the worst features of their co-parents [*i.e*, occurrence policies and true claims-made policies] and it would be a rarity to ever have meaningful coverage under such terms." *Merrill & Seeley, Inc. v. Admiral Ins. Co.*, 275 Cal. Rptr. 280, 283-84 (Ct. App. 1990).

Insurance Co., the Ninth Circuit held, "While not an entirely settled issue under California law, the significant weight of California authority holds that an exclusionary clause in an insurance policy must be conspicuous, plain, and clear in order to be effective against the insured, *regardless* of the expectations of the insured." 965 F.2d 747, 753 (9th Cir. 1992) (footnote omitted). In *MacKinnon v. Truck Insurance Exchange*, after noting the uncertainty, the California Supreme Court observed, "We have no occasion to decided [*sic*] whether certain exclusionary clauses are so consistent with policy coverage language that it would be 'unnecessary if not redundant' to impose a requirement that the clauses be conspicuous, plain and clear." *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1218 n.4 (Cal. 2003). After the California Supreme Court's decision in *Haynes v. Farmers Insurance Exchange*, 89 P.3d 381 (Cal. 2004), one court of appeal observed in dicta that "[t]he rule that exclusionary language must be conspicuous, plain and clear applies only when the insured has a reasonable expectation of coverage." *Travelers Property Casualty Co. of Am. v. Superior Court*, 155 Cal. Rptr. 3d 459, 471 (Ct. App. 2013); *see also* California Practice Guide 4:465 (The Rutter Group 2016) (noting that the question remains unresolved by the California Supreme Court). This Court remains bound by *20th Century Insurance Co.*, and, in any event, Brown & Streza had a reasonable expectation of coverage based on the clear grant of four million dollars of coverage with "Full Prior Acts" under the Declarations page. *See Jauregui v. Mid-Century Ins. Co.*, 3 Cal. Rptr. 2d 21, 26 (Ct. App. 1991) (observing, in determining the reasonable expectations of the insured, a court is "not at liberty to consider the alleged subjective beliefs of the insured at the time he purchased this automobile insurance policy" but rather must consider only "the language chosen by [the insurer] and the rules of construction designed to favor the insured"); *see also Haynes*, 89 P.3d at 392 (holding that an insured's reasonable expectations are "defined by *the insurer's policy language*" (emphasis added) (citation omitted)).

Ironshore briefly asserts that the clear, plain, and conspicuous standard does not apply because "Endorsement #1 grants coverage; it does not exclude coverage." (Opp'n at 21.) This argument is without merit. Under Ironshore's interpretation, Endorsement #1 undeniably takes away coverage that the Declarations page otherwise allows: The Limit of Liability in Item 4 is "$4,000,000 aggregate limit of for *all* Claims made or deemed made during Policy Period[,]" and, under Item 6, the policy provides coverage for "Full Prior Acts." (Renewal Insurance Policy, Exh. 17.) Further, the Endorsement's use of "shall not be liable" echoes the language that the body of the policy uses to list certain exclusions. (*Id.*)

In describing the "plain and clear" requirement, the California Supreme Court has observed: "Conspicuous placement of exclusionary language is only one of two rigid drafting rules required of insurers to exclude or limit coverage. The language itself must be plain and clear. This means more than the traditional requirement that contract terms be 'unambiguous.' Precision is not enough. Understandability is also required." *Haynes v. Farmers Ins. Exch.*, 89 P.3d 381, 390 (Cal. 2004) (quoting *Jauregui v. Mid-Century Ins. Co.*, 3 Cal. Rptr. 2d 21, 24 (Ct. App. 1991)). In interpreting Endorsement #1, the Court can conceive of at least two interpretations that are much more plausible than the one offered by Ironshore:

1. Due to the Endorsement's reference to a nonexistent "$2,000,000 [in] excess of $2,000,000" in the Limit of Liability and its cross-reference to Item 6, which states "Full Prior Acts," the provision is hopelessly indecipherable.
2. Because the Endorsement refers only to "Claims *made* against the Insured," as opposed to the Insured's "acts or omissions," the provision appears to reaffirm that the entire four million dollars of coverage provides standard claims-made coverage. *See Pardee Const. Co. v. Ins. Co. of the W.*, 92 Cal. Rptr. 2d 443, 456 (Ct. App. 2000) ("[T]he insurers' failure to use available language expressly excluding completed operations coverage implies a

manifested intent not to do so."). This interpretation is essentially the exact *opposite* of Ironshore's proffered construction.

At oral argument on this Motion, Defendant admitted that Exclusion #1 was "ambiguous." The Court finds it unintelligible. It is not difficult for an insurer to draft a coherent prior acts exclusion—the California Court of Appeal has approved of certain prior acts exclusions in the past. *See, e.g.*, *Merrill & Seeley, Inc.*, 275 Cal. Rptr. at 284. What Ironshore drafted is indecipherable, and it must accept the consequences of its slapdash drafting under California insurance law. Accordingly, the Court GRANTS summary judgment in Plaintiffs' favor on Ironshore's counterclaim.

IV. CONCLUSION

For the aforementioned reasons, Plaintiffs' Motion is GRANTED.

Initials of Preparer: tg