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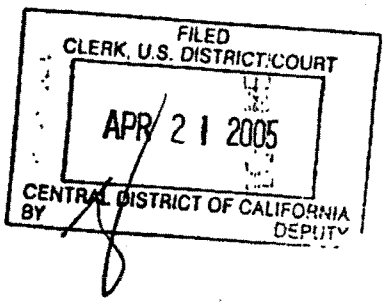

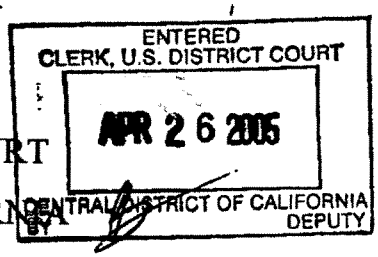

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SID KAMRAVA, M.D.,

Plaintiff,

vs.

GENERAL STAR INDEMNITY COMPANY, a Connecticut corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No. CV 04-7048 CAS (PJWx)

ORDER GRANTING GENERAL STAR'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This action arises out of a coverage dispute regarding a professional liability insurance policy issued by defendant General Star Indemnity Co. ("General Star") to plaintiff Sid Kamrava, M.D. Plaintiff asserts that under the terms of the policy General Star has a duty to defend and indemnify him against a medical malpractice suit filed after the policy expired, because he provided General Star with notice of the claim during the policy period. General Star responds that it has no duty to defend or indemnify plaintiff because the policy is a "claims made and reported" policy and the

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

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claim giving rise to the suit against plaintiff was not made until after the expiration of the policy period.

II. FACTUAL AND PROCEDURAL BACKGROUND

General Star issued Policy No. IJG-388450 ("the Policy"), a physicians and surgeons professional liability insurance policy, to plaintiff for the period covering April 1, 2003, to April 1, 2004. Defs.' Statement of Uncontroverted Facts ("DSUF") ¶ 1. The Policy provides coverage on a "claims-made and reported" basis:

> NOTICE
>
> THIS IS A CLAIMS MADE AND REPORTED FORM
> PROFESSIONAL LIABILITY INSURANCE POLICY
> CLAIMS MADE — DEFENSE AND DAMAGES WITHIN LIMITS
>
> THIS PROFESSIONAL LIABILITY POLICY PROVIDES COVERAGE ON A "CLAIMS-MADE" AND REPORTED BASIS. THE COVERAGE PROVIDED BY THIS POLICY IS LIMITED TO ONLY THOSE CLAIMS WHICH ARISE FROM PROFESSIONAL SERVICES RENDERED AFTER THE RETROACTIVE DATE STATED IN THE DECLARATIONS AND WHICH ARE FIRST MADE AGAINST THE INSURED AND REPORTED TO US DURING THE POLICY PERIOD OR ANY APPLICABLE EXTENDED REPORTING PERIOD.

Policy at 1 (Notice).[1] The Insuring Agreement of the Policy provides, in pertinent part:

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[1] The Policy is attached as Exhibit 1 to the declaration of Patricia Hughes ("Hughes Decl.") submitted in support of General Star's Motion for Summary Judgment, as Exhibit 1 to Plaintiff's Statement of Uncontroverted Facts & Conclusions of Law ("PSUF"), and as Exhibit 1 to the declaration of William K. Hanagami ("Hanagami Decl.") in support of plaintiff's Motion for Partial Summary Judgment. Patricia Hughes is an assistant vice president for General Star. Hughes Decl. ¶ 1. William Hanagami is counsel for plaintiff. Hanagami Decl. ¶ 2.

> [S]ubject to all the terms of this policy, the Company agrees to pay on behalf of the insured those sums the named insured becomes legally obligated to pay as damages because of claims made against the insured for bodily injury or property damage arising out of professional services as described in Section II...and reported to us during the policy period or Extended Reporting Period (if applicable)[.]

Policy at 3 (emphasis omitted).

Under the terms of the Policy, a "claim" is defined as follows:

> "Claim" means a written demand for money from the insured which alleges bodily injury or property damage as a result of professional services rendered by the insured.
>
> Claim includes the service of suit or receipt of written notice of a legal proceeding, civil proceeding, arbitration proceeding or any other alternative dispute resolution proceeding seeking damages because of bodily injury or property damage to which this insurance applies.
>
> A claim shall be considered to have been first made at the time it is reported to us in writing.

Policy at 9-10 (emphasis omitted).

In a letter dated March 28, 2004 ("the March 28 letter"), three days prior to the expiration of the Policy, plaintiff wrote to notify General Star of a potential claim that had arisen almost nine months earlier, on July 1, 2003:

> RE: Policy number IJG388450
>
> Genltlemen [sic]:
>
> This is to inform you that I performed the delivery of one of my patients (Patricia Escobedo) on 7/1/03 and I encountered a difficult delivery of a very large infant (unexpected). This patient had shoulder dystocia which resulted in brachial pulsy.
> It has brought into [sic] my attention that the condition of the infant's arm is improving.
> **This is a notice of possible Mal-Practice [sic] case by the patient Patricia Escobedo** [DOB and SSN omitted].
>
> Sincerely,
>
> [signature]
>
> Sid Kamrava, M.D.

Declaration of Robert Johnston ("Johnston Decl.") in Support of General Star's Motion for Summary Judgment, Exh. 4; PSUF, Exh. 2; Hanagami Decl., Exh. 2 (emphasis in original).

By correspondence dated April 1, 2004, Robert Johnston, an assistant vice president for General Star, responded to plaintiff's March 28 letter. Johnston stated that plaintiff's letter had been received on March 31, 2004, and advised plaintiff that his policy was effective April 1, 2003, through April 1, 2004. Johnston further noted that the Policy required "that a 'claim' be first made during the policy effective dates or during the Extended Reporting Period" and that the "claim" include a request for "damages." Johnston Decl., Exh. 5; Hanagami Decl., Exh. 3.

In or about June 2004, plaintiff received a written notice of claim from Francisco, Patricia, and Victoria Escobedo ("the Escobedo claim"), dated June 21, 2004, arising from his delivery of Victoria Escobedo. PSUF ¶ 8, Exh. 4; Hanagami Decl., Exh. 4.[2] Plaintiff's counsel tendered this notice of claim to General Star on or about July 14, 2004, and requested that General Star "acknowledge coverage [of the Escobedo claim] and live up to its obligations under [the] policy." PSUF ¶ 9; Hanagami Decl., Exh. 5; Hughes Decl., Exh. 2; Johnston Decl., Exh. 6.[3]

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[2] Patricia and Francisco Escobedo thereafter filed a complaint for damages in the Los Angeles Superior Court against plaintiff and others on August 31, 2004, alleging medical negligence and negligent infliction of emotional distress. PSUF ¶ 10; see Hanagami Decl., Exh. 6 (Escobedo complaint). Plaintiff tendered his defense of the Escobedo suit to General Star on or about October 21, 2004. Hanagami Decl. ¶ 6; Exh. 7.

[3] Plaintiff's counsel noted, in pertinent part, that the Policy provided that "[a] claim shall be considered to have been first made at the time it is reported to us in writing," and asserted that "[b]ecause Dr. Kamrava reported this matter to you in writing during the General Star policy period, the Escobedos' claim 'shall be considered to have been first made' during the General Star policy period." Id.

On or about July 19, 2004, General Star denied coverage for the Escobedo claim. DSUF ¶ 11, PSUF ¶ 12. Addressing the argument of plaintiff's counsel that the claim had been made within the policy period via plaintiff's March 28 letter, General Star replied:

> [T]he information submitted on March 31, 2003 [sic] did not satisfy the definition of a claim and as such would not have triggered coverage at that time .... As there was no claim by policy definition, it could not be considered as having been "first made" at that time.
>
> Dr. Kamrava's policy expired on April 1, 2004. The notice, which was received on July 14, 2004, was after the expiration of the policy period.

Hughes Decl., Exh. 3; Hanagami Decl., Exh. 8.

On July 26, 2004, plaintiff filed a complaint against General Star for declaratory relief and breach of contract, requesting damages, attorneys' fees and costs, and a declaration that General Star indemnify and defend him against the Escobedo claim. On August 23, 2004, General Star removed the action to this Court on grounds of diversity of citizenship. On March 10, 2004, General Star brought a motion for summary judgment or, in the alternative, motion for summary adjudication, and plaintiff brought a motion for partial summary judgment. Oral argument took place on April 11, 2005, and the matter was taken under submission.

III. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. See Fed. R. Civ. P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). See also Celotex Corp., 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. See also Abromson v. American Pacific Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

IV. DISCUSSION

General Star asserts that there is no dispute as to the relevant material facts and that the issue before the Court is "solely a question of law" — namely, "whether Kamrava is entitled to coverage under the Policy for the Escobedo claim and whether General Star breached the insurance contract by denying coverage for such a claim."

Def's Mot. at 5. General Star also asserts that under California law, the Policy is a valid and enforceable "claims made and reported" policy, which requires that a claim be both made and reported to the insurer within the policy period. Id. at 5-6. General Star argues that as a matter of law, the Escobedo claim was neither made nor reported during plaintiff's policy period. Id. at 7.

General Star further argues that the March 28 letter was not a claim as defined by the Policy, in that plaintiff "had not received a written demand for money, had not been accused of any wrongdoing, and had not received notice of a legal or other proceeding." Id. at 8 (emphasis omitted). General Star contends that the March 28 letter "is merely Kamrava's speculating about a potential claim" and notes that the Policy "has no provision for notification of a potential or possible claim." Id. at 8-9.[4] General Star asserts that the Escobedo claim did not become a "claim" for purposes of the Policy until the Escobedos sent plaintiff notice of their intent to file suit on June 21, 2004, and that the claim was not reported until July 14, 2004, when plaintiff's counsel forwarded the claim notice to General Star. Id. at 9. Accordingly, General Star argues that plaintiff was not entitled to insurance coverage for the Escobedo claim under the Policy, which expired on April 1, 2004, and that General Star therefore did not breach the insurance agreement in refusing to defend or indemnify him against the Escobedo lawsuit. Id. at 9.

Plaintiff argues that the March 28 letter constitutes a claim under the terms of the Policy because it is a "written demand for money from the insured which alleges bodily injury or property damage as a result of professional services rendered by the insured." Pl's Mot. at 5; Pl's Opp. at 5-6 (emphasis added). Plaintiff bases this argument on his claim that the phrase "from the insured" creates an ambiguity

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[4] Plaintiff disputes this, but apparently only on the basis of certain language in the Policy discussed herein, namely, that a claim is "a written demand for money from the insured" and that "[a] claim shall be considered to have been first made at the time it is reported to us in writing."

regarding whether a claim is "one that is made from the insured to the insurer" or "one made by a third party against the insured." Plaintiff further argues that ambiguities in an insurance policy should be construed broadly in favor of the insured, and that the Court should "look to the expectations of a reasonable insured." Pl's Mot. at 5; Pl's Opp. at 5, 7-8. Plaintiff also points to the statement in the Policy that "[a] claim shall be considered to have been first made at the time it is reported to us in writing," arguing that "[b]ecause plaintiff first tendered and notified in writing to defendant the Escobedos' potential malpractice case...during March 2004," the claim should be considered to have been first made at that time. Pl's Mot. at 5; Pl's Opp. at 6-7.[5] Plaintiff contends that this claim therefore falls within the April 1, 2003-April 1, 2004 policy period, and that General Star has a duty to defend and indemnify him against the Escobedo lawsuit. Id.

The Court concludes that plaintiff's March 28 notification cannot, under any reasonable interpretation, be construed to be a "claim" as that term is defined by the Policy. The question of whether language in a policy is ambiguous is one of law. Pac. Employers Ins. Co. v. Superior Court of Los Angeles County, 221 Cal. App. 3d 1348, 1354 (1990) (citations omitted). Further, "[a]lthough ambiguities in a policy of insurance are to be construed in favor of the insured in those instances where the insured would reasonably expect coverage, some actual or apparent ambiguity must be present before the rule comes into play," and "[s]uch ambiguity cannot be based on a strained interpretation of the policy language." Id. (citations and internal quotation

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[5] General Star contends that this sentence "has nothing to do with the...reporting requirements of the Policy's insuring clause" but rather "is designed to and does interact with the Policy's Limits of Liability provisions...[regarding] application of the limits of liability on a 'per claim' basis." Def's Mot. at 10. General Star further contends that interpreting this sentence as the plaintiff does "ignores the very purpose of the claims made and reported Policy, [and] has the effect of rewriting the Policy," leading to an unreasonable and absurd result. Id.

marks omitted). See also Slater v. Lawyers' Mutual Ins. Co., 227 Cal. App. 3d 1415, 1421 (1991) ("Because we must look at the provisions of the policy as a whole, we conclude that the reporting and notice provisions are not ambiguous.") (citation omitted).

Here, the definition of a "claim" must be read together with the Notice and insuring clause, which contemplate coverage for claims against, not by, the insured.[6] Additional reasons support this construction. The Policy defines claims as including "the service of suit or receipt of written notice of a legal proceeding, civil proceeding, arbitration proceeding or any other alternative dispute resolution proceeding seeking damages." Policy at 9-10. While the above-cited list may not necessarily be exclusive, it strongly supports the construction that the "claim" must be made by a third party against the insured. Even if the Policy could be construed as plaintiff contends, his notification does not satisfy a definition of a "claim." Plaintiff's notification is not a demand for money that alleges "bodily injury or property damage" as a result of professional services rendered by plaintiff. In sum, there is no ambiguity, and plaintiff offers no extrinsic evidence to support his claim that the Policy is ambiguous. Because the Escobedo claim was not made until June 21, 2004, when the Escobedos notified plaintiff of an impending lawsuit against him for

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[6] This construction is supported by (1) language in the Policy notice that "coverage...is limited to only those claims...which are first made against the insured and reported to us during the policy period"; (2) the terms of the insuring agreement, wherein General Star agrees to insure sums that "the named insured becomes legally obligated to pay as damages because of claims made against the insured for bodily injury or property damage arising out of professional services"; and (3) the requirement that the Policy applies to a claim only if "[s]uch claim is reported to us in writing within ten (10) days receipt by the named insured of a written notice of a claim." See Policy at 1, 3 (emphasis added).

"detriment and loss" sustained as a result of his professional services, no claim could be tendered during the policy period.[7]

Counsel for plaintiff confirmed at oral argument that plaintiff secured new malpractice insurance for the period after the Policy expired, arguing that the Court should find coverage under the Policy because the Escobedo claim, which was required to be disclosed for purposes of obtaining new insurance, was excluded under the new policy. However, the Court notes that plaintiff could have purchased "Extended Reporting Period" coverage, which is available in the event of cancellation or non-renewal of the Policy and "applies to claims first made against the named insured during twelve (12) calendar months following immediately upon the effective date of such cancellation or non-renewal...for professional services performed subsequent to the retroactive date and prior to the effective date of...cancellation." Policy at 13. This is known as "tail coverage." See Hon. Walter Croskey et al., California Practice Guide: Insurance Litigation § 7:85.1 (The Rutter Group 2004); Taub v. First State Ins. Co., 44 Cal. App. 4th 811, 818 (1995). Plaintiff had up to 30 days after cancellation or non-renewal of the Policy to obtain this coverage. Policy at 13. There is no evidence that he did so, even though he was eligible to do so. The fact that extended claims reporting period coverage was available further bolsters the

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[7] While claims-made or claims-made and reported policies can cover claims made after expiration of the policy that arose from a potential claim reported to the insurer during the policy period, such policies typically include express "awareness" provisions regarding notification of potential claims. See, e.g., Slater, 227 Cal. App. 3d at 1420 (where the policy at issue provided that "[a] claim shall be considered 'made': (1) when it is first reported to the Company or (2) when the Insured, having become aware that the Insured has committed an act, error or omission which may give rise to a claim, reports to the Company: (i) Such specific act, error, or omission") (emphasis added). No such provision exists here, and if it could be implied, the fact remains that plaintiff's notice was given to General Star almost nine months after he first had notice of a potential claim — not within ten days of his receiving a "claim," as required by the express terms of the Policy.

construction that claims are required to be made during the policy period. Otherwise, an insured could obtain the benefits of an extended reporting period without paying a premium for same. See Slater, 227 Cal. App. 3d at 1423 ("If a court were to allow an extension of reporting time after the end of the policy period, such is tantamount to an extension of coverage to the insured gratis, something for which the insurer has not bargained. This extension of coverage...in effect rewrites the contract between the two parties.") (citation and internal quotation marks omitted); Pac. Employers, 221 Cal. App. 3d at 1360 (quoting same).

Under California law, a liability insurer owes a broad duty to defend its insured against any claims that create a potential for indemnity. Montrose Chemical Corp. v. Superior Court of Los Angeles County, 6 Cal. 4th 287, 295 (1993). However, the insured must at least show a "potential for coverage." Id. at 300. In the present case, the plain language of the Policy reveals that plaintiff was not entitled to any coverage for the Escobedo claim, which was both made and reported outside the policy period. As a matter of law, therefore, General Star owed plaintiff no duty to defend or indemnify him against the Escobedo lawsuit. See id. at 295 ("[T]he duty to defend is broader than the duty to indemnify."). It also follows that General Star did not breach its contract with plaintiff in refusing to defend or indemnify him. Accordingly, the Court finds it appropriate to grant summary judgment for General Star on plaintiff's claims for breach of contract and for declaratory relief.

V. CONCLUSION

For the aforementioned reasons, defendant General Star's motion for summary judgment and/or summary adjudication is hereby GRANTED. Plaintiff's motion for partial summary judgment is DENIED.

IT IS SO ORDERED.

Dated: April 19, 2005

Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge