Filed 7/7/15 Associated Indemnity Co. v. Argonaut Ins. Co. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ASSOCIATED INDEMNITY CORPORATION, Plaintiff and Respondent, v. ARGONAUT INSURANCE COMPANY, Defendant and Appellant.	B254858 (Los Angeles County Super. Ct. No. BC474684)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Black Compean & Hall, Michael D. Compean and V. René Daley for Defendant and Appellant.

Tresslor, Paul S. White and Jeanne Kuo Riggins for Plaintiff and Respondent.

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This is an equitable contribution action between two coinsurers, plaintiff Associated Indemnity Corporation (AIC) and defendant Argonaut Insurance Company (Argonaut). AIC claims that Argonaut had a duty to defend the insureds along with AIC, and having failed to do so, Argonaut must now contribute to the defense and settlement costs that AIC incurred on behalf of the insureds. The trial court granted summary judgment for AIC. We affirm.

FACTS AND PROCEDURE

1. Allegations of the Underlying Complaint

In May 2008, Los Angeles Unified School District (LAUSD) filed a complaint against numerous defendants alleging they were liable for environmental response costs that LAUSD incurred in cleaning up contaminated parcels of land (the site). (*Los Angeles Unified School District v. Pozas Bros. Trucking Co., et al.*, May 22, 2008, No. BC391342 (underlying action).) LAUSD intended to build a state-of-the-art school on the property to serve the City of South Gate. Collectively, the defendants previously owned the 35 contiguous parcels making up the site and operated industrial and manufacturing businesses there. LAUSD named Joseph, Sharon, and Thomas Tedesco among the defendants and alleged they owned "Parcel 18" within the site and/or operated a business there.

In pertinent part, the underlying complaint alleged: "Defendants are former owners and operators of the 35 contiguous, real property parcels that comprise the Site. The Site has been used for industrial and manufacturing operations for more than half a century. During this time, Defendants used a variety of hazardous substances and other materials at the Site . . . . [¶] . . . The industrial and manufacturing activities of the Defendants at the Site have resulted in widespread contamination there. Investigations at the Site, under the active supervision of the California Department of Toxic Substances Control ('DTSC'), have discovered contamination in the groundwater, soil, and soil gas at levels that exceed, and in many instances, substantially exceed, applicable regulatory limits."

The complaint further alleged "LAUSD ha[d] discovered Hazardous Substances in the Site's soil and groundwater, including on, in and/or under each of the parcels referenced herein. LAUSD's investigation of the Site remains ongoing and LAUSD may discover more Hazardous Substances at levels that require remediation. [¶] . . . [¶] . . . Defendants, and each of them, at all relevant times hereto, owned, maintained, operated or controlled certain property, buildings, equipment, underground storage tanks, sumps, vats, drums, drains, aboveground storage tanks, containers, filters, vaults, clarifiers, trenches, vehicles and other such items and infrastructure in and around the Site. As such, Defendants, and each of them, and/or their tenants or other persons occupying their property, used, processed, produced, stored, treated, and/or generated one or more Hazardous Substances in the course of their respective operations on, and/or during their ownership of, one or more parcels at the Site. [¶] . . . Defendants, and each of them, and/or their tenants or other persons occupying their property, arranged for, caused or contributed to the spilling, leaking, disposal, release and threatened release of one or more Hazardous Substances, thereby contaminating the Site."

2. The AIC and Argonaut Insurance Policies

The Tedescos tendered defense and indemnity of the underlying action to AIC and Argonaut. AIC issued a comprehensive general liability policy that covered the Tedescos from May 1, 1984, to January 17, 1985. Argonaut issued a comprehensive general liability policy that covered the Tedescos from January 17, 1986, to January 17, 1987.

Under the Argonaut policy, Argonaut would pay all sums that the insureds became legally obligated to pay as damages for bodily injury or property damage caused by an "occurrence," and Argonaut "ha[d] the right and duty to defend any suit against the insured seeking damages on account of . . . **bodily injury** or **property damage**." Under "**Exclusions**," the policy contained a so-called "qualified pollution exclusion," which excluded coverage for damage caused by pollution, *except* where a "sudden and accidental" release of pollutants caused the damage. Specifically, the policy stated that it excluded coverage for "**bodily injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals,

liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental*." (Italics added.)

The AIC policy was identical to the Argonaut policy in pertinent part. That is, it contained the same coverage language and the same qualified pollution exclusion excluding coverage for damage caused by pollutants, except where a "sudden and accidental" release of pollutants caused the damage.

Both policies contained one other potentially pertinent exclusion, the so-called "owned property" exclusion. This excluded coverage for property damage to "property owned or occupied by or rented to the insured."

AIC agreed to participate in the defense of the Tedescos in the underlying action. Argonaut, by contrast, denied coverage and refused to participate in the defense and indemnification of the Tedescos. Based on the allegations of the underlying complaint, Argonaut argued that the qualified pollution exclusion applied and thus no coverage was available unless the exception for a "sudden and accidental" release of pollutants was implicated. Argonaut determined that the sudden and accidental exception did not and could not apply. The key document on which Argonaut relied was LAUSD's "Final Preliminary Environmental Assessment" (PEA). According to Argonaut, the PEA indicated that at all relevant times, a business called Twin Palms Sandblasting and Powdercoating (Twin Palms) occupied the parcel apparently owned by the Tedescos, Parcel 18. Argonaut argued that, as a business engaged in sandblasting and powdercoating, Twin Palms' discharge of pollutants would have been known and expected, not sudden and accidental. It therefore found no evidence that Twin Palms' activities implicated the sudden and accidental exception.

AIC sent a letter to Argonaut arguing that Argonaut had a duty to defend the Tedescos and requesting that Argonaut participate in the Tedescos' defense. Argonaut responded with another letter standing by its decision to deny the tender of defense and indemnity. AIC eventually settled the underlying action against the Tedescos for

$95,000, with AIC paying $94,750 and the Tedescos paying their $250 deductible. AIC incurred $301,181.43 in defense fees and costs on behalf of the Tedescos. It requested that Argonaut contribute a pro rata share of the settlement and defense costs. Argonaut reaffirmed its coverage position and declined AIC's request for contribution.

3. Instant Action and Summary Judgment Motion

In December 2011, AIC filed the instant action against Argonaut for declaratory relief and equitable contribution to the defense and settlement amounts incurred on behalf of the Tedescos in the underlying action. AIC moved for summary judgment, or alternatively summary adjudication, on the ground that Argonaut had a duty to defend and a duty to settle the underlying action because a potential for coverage existed. Argonaut did not dispute any of the facts in the separate statement but countered, as it did earlier, that there was "absolutely no evidence that the 'sudden and accidental' exception" to the qualified pollution exclusion applied.

The court granted AIC's summary judgment motion. The court held that it was apparent the potential for coverage existed because the underlying complaint alleged the Tedescos had contributed to the release of toxic chemicals on the site and thereby caused property damage. The bare potential or possibility of coverage was enough to trigger the duty to defend, unless Argonaut conclusively negated the possibility of coverage through undisputed facts showing there was no sudden and accidental release of pollutants. Argonaut had not met its burden of establishing the absence of coverage. The court entered a judgment for AIC finding that Argonaut had a duty to defend and duty to settle the underlying action against the Tedescos. It further found that Argonaut's "time-on-the-risk share" was 58.5 percent, which translated into a share of the defense fees and costs totaling $187,746.95, and a share of the settlement amount totaling $55,428.75. Argonaut filed a timely notice of appeal.

STANDARD OF REVIEW

The trial court properly grants a motion for summary judgment when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c,

subd. (c).) We review a grant of summary judgment de novo and independently determine whether the undisputed facts warrant judgment for the moving party as a matter of law. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1301.) Moreover, "[t]he interpretation and application of an insurance policy to undisputed facts presents a question of law subject to this court's independent review." (*State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 577.) We view the evidence in the light most favorable to the nonmoving party, liberally construing the nonmoving party's evidence, and strictly scrutinizing the moving party's. (*Chavez v. Glock, Inc., supra,* at p. 1302.)

DISCUSSION

We agree with the trial court that AIC was entitled to judgment as a matter of law. Argonaut had a duty to defend the Tedescos in the underlying action, and as a result, it must contribute to the defense and settlement fees and costs.

Equitable contribution "apportion[s] costs among insurers that share the same level of liability on the same risk as to the same insured. [Citation.] It 'arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others.' [Citation.] 'The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others.'" (*Maryland Casualty Co. v. Nationwide Mutual Ins. Co.* (2000) 81 Cal.App.4th 1082, 1089.) In an action by one insurer to obtain contribution from another insurer for defense fees and costs, we look to whether the nonparticipating insurer had a duty to defend under its policy. (*Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, 879.) The burden is on the participating insurer to show the nonparticipating insurer had a duty to defend. (*Ibid.*)

The principles defining the duty to defend are well settled. An insurer has a duty to defend the insured against any suit that even potentially seeks covered damages. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295 (*Montrose*).) This means the duty to defend arises whenever the suit seeks damages on any theory that,

if proved, would be covered by the policy. (*Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1068 (*Mirpad*).) The insurer has no duty to defend "only when 'the third party complaint can *by no conceivable theory raise a single issue* which could bring it within the policy coverage.'" (*Ibid*.) "'Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded.'" (*Montrose, supra*, at p. 295.) The duty to defend may exist even when coverage is in doubt and ultimately does not develop because the facts known to the insurer at the inception of the suit revealed a bare potential for coverage. (*Ibid.*) As our Supreme Court has noted, "[t]he insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability. As a consequence, California courts have been consistently solicitous of insureds' expectations on this score" (*id.* at pp. 295-296), and have imposed a duty to defend that arises on tender of defense and continues until the suit concludes or the insurer has shown there is no potential for coverage (*id.* at p. 295).

We determine whether a duty to defend a suit exists by comparing the factual allegations of the complaint with the policy terms. (*Montrose, supra*, 6 Cal.4th at p. 295.) The "duty to defend arises when the facts alleged in the underlying complaint give rise to a potentially covered claim." (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 510.) Facts extrinsic to the complaint may also give rise to a duty to defend when they reveal a potential for coverage. (*Ibid.*) Conversely, extrinsic facts may defeat the duty to defend when they conclusively negate the potential for coverage. (*Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.* (1998) 68 Cal.App.4th 1030, 1037 (*Wausau*).) We must resolve any doubts about whether the facts establish a duty to defend in the insured's favor. (*Montrose, supra*, at pp. 299-300.)

To summarize, in an action seeking a determination of the duty to defend, "the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show

that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*. Facts merely tending to show that the claim is not covered, or may not be covered, but are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales." (*Montrose, supra*, 6 Cal.4th at p. 300.) If coverage depends on the resolution of a disputed factual issue, "the very existence of that dispute would establish a possibility of coverage and thus a duty to defend." (*Mirpad, supra*, 132 Cal.App.4th at p. 1068.)

Here, AIC carried its burden of showing Argonaut had a duty to defend the Tedescos. The allegations of the underlying complaint gave rise to a potentially covered claim. The action sought damages for the Tedescos causing or contributing to the "spilling, leaking, disposal, release and threatened release" of hazardous substances at the site, which then allegedly contaminated the groundwater, soil, and soil gas at the site. When the release of pollutants is "sudden and accidental," Argonaut's policy covers property damage caused thereby. The allegations that the insureds released pollutants at the site and caused damage to the groundwater, soil, and soil gas therefore gave rise to a potential for coverage under the sudden and accidental exception to the qualified pollution exclusion. The underlying complaint did not have to specify whether the release was sudden and accidental. The allegations sufficed to raise the possibility that the release was so, and that was all that was required to trigger the duty to defend. (*Montrose, supra*, 6 Cal.4th at pp. 292-293, 304 [the third party complaint did not specify whether the insured negligently or intentionally disposed of waste, but its allegations that the insured's operations caused environmental contamination were sufficient to raise the possibility of coverage for accidental injury to property].)

Argonaut contends extrinsic evidence established that there was no potential for coverage under the sudden and accidental exception. Not so. The evidence on which Argonaut relies is the PEA, which represented LAUSD's findings after a preliminary environmental investigation of the site. The PEA indicates that Twin Palms occupied

Parcel 18 from September 1986 to March 1987, a period that overlapped with Argonaut's policy period.[1] Therefore, Argonaut argues, the only potentially polluting activities carried out on Parcel 18 during the relevant period were sandblasting and powdercoating—activities that involved the release of pollutants as normal business operations, but not suddenly and accidentally.

This showing does not defeat the duty to defend. Argonaut's extrinsic evidence had to conclusively eliminate the potential for coverage with undisputed facts. (*Wausau, supra*, 68 Cal.App.4th at pp. 1044, 1047.) The evidence that Twin Palms occupied the relevant parcel of land for part of the policy period, and that its business involved sandblasting and powdercoating, does not eliminate the possibility of a sudden and accidental polluting event. For example, there is no undisputed evidence about who or what occupied Parcel 18 for the balance of the policy period (January 17, 1986, to September 1986) and what activities were conducted there during that period. Also, Argonaut does not explain why sandblasting and powdercoating could not involve sudden and accidental discharges of pollutants, in addition to the expected discharges when Twin Palms engaged in its normal business operations. At the very best, this evidence shows that the LAUSD claims *may not* be covered, and "[f]acts merely tending to show that the claim . . . may not be covered . . . are insufficient to eliminate" the duty to defend and "therefore add no weight to the scales." (*Montrose, supra*, 6 Cal.4th at p. 300.)

Argonaut also invokes the owned property exclusion and argues this excluded coverage. It asserts that sandblasting and powdercoating involve only solids, not liquids. If these solids theoretically spilled on the ground, they would sit on the surface and not

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[1] Argonaut requested that we take judicial notice of the full PEA (because AIC offered only a portion of it below) and other extrinsic evidence. Argonaut did not explain why it failed to offer this evidence in the summary judgment proceedings below. We previously denied this request for judicial notice. AIC has filed a motion to strike the portions of Argonaut's appellate brief that rely on these documents offered with the request for judicial notice. We grant the motion to strike.

seep into the groundwater, Argonaut contends. Because the Tedescos owned the ground (the real property), Argonaut asserts the owned property exclusion applied.[2] This argument utterly fails to convince. Argonaut presents no evidence to support the foundations of the argument—(1) that Twin Palms' operations involved only solids and (2) that solids released on the ground could not contaminate groundwater. These appear to be mere assumptions on Argonaut's part.

Argonaut further contends that AIC cannot establish a duty to defend by referencing "generic allegations [in the underlying complaint] that fail to eliminate the potential for a sudden and accidental release of pollutants." According to Argonaut, under *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183 (*Aydin*), AIC had to prove the sudden and accidental exception actually applied. Argonaut is incorrect. *Aydin* does not govern here. *Aydin* involved an insured's action seeking indemnity against its insurer and was thus about the duty to indemnify, not the duty to defend. (*Id.* at p. 1185.) As we mentioned above, the duty to indemnify is broader than the duty to defend. An insurer has a duty to indemnify claims that are *actually* covered by the policy, in light of the facts proven. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 45.) The duty arises only after an insured's liability has been established. "By contrast, the insurer's duty to defend runs to claims that are merely *potentially* covered, in light of facts alleged or otherwise disclosed." (*Id.* at p. 46, italics added.) The duty to defend requires less than proof of the insured's liability. Accordingly, an insurer may have a duty to defend even when it ultimately has no duty to indemnify, either because (1) the defense of the claim is successful and no damages against the insured are awarded, or (2) the actual judgment against the insured is for damages not covered by the policy. (*Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 454.)

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[2] Argonaut concedes that the Tedescos did not own the groundwater, and if there were contamination of groundwater, that would be injury to third party property.

In *Aydin*, the court held that the insured seeking indemnity had to prove that the claim came within the "'sudden and accidental'" exception to the general pollution exclusion. (*Aydin, supra*, 18 Cal.4th at pp. 1185-1186, 1194.) This conclusion makes sense in the context of the duty to indemnify, which requires proof of actual coverage as opposed to a mere potential for coverage. As the party advocating for actual coverage, the insured should have to prove actual coverage under the exception. But in the duty to defend context, the rule requires only potential coverage, and the insured must show only a potential for coverage. The *Aydin* court recognized that its holding was limited to the duty to indemnify context, and the duty to defend was not at issue in the case. (*Id*. at p. 1194, fn. 6.) The duty to defend does not require proof that liability will actually materialize. (*Wausau, supra*, 68 Cal.App.4th at p. 1047.)

In conclusion, AIC was entitled to judgment as a matter of law. It demonstrated Argonaut had a duty to defend the Tedescos because the allegations of the complaint revealed a potential for coverage. Argonaut's showing did not negate this potential. Once AIC proved a duty to defend, AIG was presumptively liable for both defense costs *and* settlement costs. (*Safeco Ins. Co. of America v. Superior Court, supra*, 140 Cal.App.4th at pp. 880-881.) The court did not err in granting the summary judgment motion.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.