IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

WESCO INSURANCE COMPANY	§	
	§	
VS.	§	Civil No. 4:14-CV-572-Y
	§	
LEDFORD E. WHITE, ET AL.	§	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This insurance coverage dispute stems from a lawsuit filed in state court. See *Layton v. White, et al.*, No. 14126747413 (141st Dist. Ct., Tarrant County, Tex. Aug. 16, 2013)("the *Layton* case"). In the *Layton* case, Gwendolyn and Troylynn Layton brought various claims against their attorney and personal friend, Ledford E. White ("White"), for the unlawful actions he took to induce them into investing in two of his business ventures which ultimately failed.[1]

On February 19, 2015, a jury found White, and his law firm, Ledford E. White, P.C., liable for fraud, breach of fiduciary duty, theft, civil conspiracy, and negligence. (ECF No. 73, Br. in Supp. Pl.'s Mot. Summ. J., App. 1554-86.) On August 28, 2015, the trial court entered a final judgment on the jury verdict awarding the Laytons $680,000.00 in actual damages against White and Ledford E. White, P.C.[2]

[1] In their original petition, the Laytons also bring claims against Alton Isbell and M&M Joint Ventures. In subsequent amendments to their petition, the Laytons add Ledford E. White, P.C.; Michael Parks; and Randall Kyle Parks as parties to the lawsuit. However, for the reasons explained herein, these parties' involvement in the *Layton* case have no bearing on the Court's ultimate resolution of this coverage dispute.

[2] Based on the jury's verdict, the trial court also awarded the Laytons $100,000.00 in exemplary damages against both White and Ledford E. White, P.C., and $100,000.00 in attorney's fees and $12,008.00 in expert witness fees and costs against White. (ECF No. 73, Br. in Supp. Pl.'s Mot. Summ. J., App. 1587-95.)

In this case, plaintiff Wesco Insurance Company ("Wesco") asks the Court to enter a declaratory judgment that, under its claims-made-and-reported lawyers professional liability policy, policy number WPP1122664-00 ("the Policy"), issued to Ledford E. White, PC., it has no duty to defend or indemnify White or Ledford E. White, P.C., for the *Layton* case. See 28 U.S.C. § 2201; ECF No. 66. The Laytons bring counterclaims for breach of contract and attorney's fees under Texas Civil Practice and Remedies Code § 38.001(8).[3] See ECF No. 39.

Pending before the Court is Wesco's motion for summary judgment that there is no coverage under the Policy for the *Layton* case (doc. 72). Also pending before the Court is the Laytons'[4] opposing motion for partial summary judgment that coverage is not precluded under the Policy and that Wesco's affirmative defenses fail as a matter of law (doc. 76).

For the following reasons, Wesco's motion for summary judgment is GRANTED and the Laytons' motion for partial summary judgment is DENIED.

[3] Under § 38.001(8), a person may recover reasonable attorney's fees from an individual or corporation if the claim arises under an oral or written contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2015).

[4] Under Texas law, a party injured by an insured is a third-party beneficiary of a liability insurance policy who can enforce the policy against the insurer once she has a judgment or settlement legally obligating the insured to pay damages to her. *See Great Am. Ins. Co. v. Murray*, 437 S.W.2d 264, 265 (Tex. 1969).

I. Legal Standard

A. Summary Judgment

When the record establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is appropriate. Fed. R. Civ. P. 56(a). "[A dispute] is 'genuine' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citation omitted). A fact is "material" if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To demonstrate that a particular fact cannot be genuinely in dispute, a defendant movant who does not bear the burden of proof at trial must (a) cite to particular parts of materials in the record (e.g., affidavits, depositions, etc.) in support of its position, or (b) show either that (1) the plaintiff cannot produce admissible evidence to support that particular fact, or (2) if the plaintiff has cited any materials in response, show that those materials do not establish the presence of a genuine dispute as to that fact. Fed. R. Civ. P. 56(c)(1). However, a plaintiff movant who does bear the burden of proof at trial must (a) cite to particular parts of materials in the record (e.g., affidavits, depositions, etc.) in support of its position, and (b) if the defendant has cited any materials in response, show that those materials do not establish the presence of a genuine dispute as to that fact. Fed. R. Civ. P. 56(c)(1).

Although the Court is required to consider only the cited materials, it may consider other materials in the record. *See* Fed. R. Civ. P. 56(c)(3). Nevertheless, Rule 56 "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Instead, parties should "identify specific evidence in the record, and . . . articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

In evaluating whether summary judgment is appropriate, the Court "views the evidence in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor." *Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010) (citation omitted) (internal quotation marks omitted). "After the non-movant has been given the opportunity to raise a genuine factual [dispute], if no reasonable juror could find for the non-movant, summary judgment will be granted." *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

B. Governing Substantive Law

When federal jurisdiction is based on diversity of citizenship, as it is in this case, a federal court looks to the substantive law of the forum state. *ACE American Ins. Co. v. Freeport Welding & Fabricating, Inc.*, 699 F.3d 832, 838 (5th Cir. 2012)(citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct.

817, 82 L.Ed. 1188 (1938)). The parties do not dispute that Texas law applies to the Court's interpretation of the Policy in this case.

Under Texas law, an insurer may have two responsibilities relating to coverage – the duty to defend and the duty to indemnify. *Id*. (quoting *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 594 (5th Cir. 2011)(citation omitted)). The Texas Supreme Court has explained that the two duties are distinct, and they are to be decided separately. *Gilbane Bldg. Co.*, 663 F.3d at 594. However, the duty to defend is broader than the duty to indemnify, and in some instances, the same reasons that negate the duty to defend will also negate the duty to indemnify. *See Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 527-28 (5th Cir. 2004)(citation omitted); *see also Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997).

1. Duty to Defend

Under Texas law, a district court determines an insurer's duty to defend by following the eight-corners rule. *Liberty Mutual Ins. Co. v. Graham*, 473 F.3d 596, 599 (5th Cir. 2006). Under this rule, the Court looks at only the allegations in the underlying petition and the language of the insurance policy to determine whether a duty to defend exists. *Id*. at 601. A court may not read facts into the pleadings, look outside the pleadings, or speculate as to factual scenarios that might trigger coverage or create an ambiguity. *Gilbane Bldg. Co.*, 663 F.3d at 596-97. If the facts alleged in the petition, taken as true, potentially assert a claim for coverage under the policy, an insurer is obligated to defend

the insured. *Colony Ins. Co.* v. *Peachtree Constr., Ltd.*, 647 F.3d 248, 253 (5th Cir. 2011) (citing *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Chruch*, 197 S.W.3d 305, 308 (Tex. 2006)). Any doubts are resolved in favor of the insured. *Liberty Mutual Ins. Co. v. Graham*, 473 F.3d at 602.

2. Duty to Indemnify

In Texas, unlike the duty to defend, the duty to indemnify is not based on the third party's allegations, but upon the actual facts that underlie the cause of action and result in liability. *Northfield Ins. Co. v. Loving Home Care*, 363 F.3d 523, 528-29 (5th Cir. 2004)(citing *Canutillo*, 99 F.3d at 701)). Generally, Texas law only considers the duty-to-indemnify question justiciable after the underlying suit is concluded unless "the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify." *Id*. (quoting *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997)).

II. Analysis

A. When was the Laytons' Claim First Made Against the Insured?

Wesco argues that there is no coverage under the Policy because the Laytons' claim was not first made against the insured during the policy period. The Court agrees.

It is undisputed that the Policy is a claims-made-and-reported

policy. In order to invoke coverage under such a policy, a claim must be made against the insured during the policy period and the insured must notify the insurer of the claim during the same period. *Matador Petroleum Corp., v. St. Paul Surplus Lines Ins., Co.*, 174 F.3d 353, 658-59 (5th Cir. 1999).

Here, the Policy covers[5] **claims** that are **first made** against the **insured** and **reported** to the company during the **policy period.** (ECF No. 73, Br. in Supp. Pl.'s Mot. Summ. J., App. 0013.) Under the Policy, "claim" means a written or verbal **demand** received by **the insured** for **money** or services arising out of an act or omission in rendering or failing to render **legal services** (*Id*. at App. 0014.) A "demand" includes the service of suit or the institution of an arbitration proceeding against the insured (*Id*.) "Legal services" means, among other things, those services performed by an insured in a fiduciary capacity. (*Id*. at App. 0016.)

It is undisputed that the policy period is March 14, 2014, to March 14, 2015. (*Id*. at App. 004.) On August 16, 2013, approximately seven months before the policy period began, the Laytons filed their original state-court petition seeking, among

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[5] With respect to coverage, the policy states that "[t]he Company will pay on behalf of the Insured sums in excess of the deductible that the Insured shall become legally obligated to pay as damages because of a claim that is first made against the Insured and reported to the Company during the policy period or any Extended Reporting Period arising out of an act or omission in the performance of legal services by the Insured or by any person for whom the Insured is legally liable ...." (ECF No. 73, Br. in Supp. Pl.'s Mot. Summ. J., App. 0013.)

With respect to providing a defense, the policy provides that "[t]he Company shall have the right and duty to defend, subject to and as part of the Limits of Liability, any claim against the Insured seeking damages which are payable under the terms of the policy ..." *Id*.

other things, actual damages against White, who is undisputedly an "insured"[6] under the policy. (*Id*. at App. 0050-67.)

In the preliminary statement of their original petition, the Laytons allege that "[t]his is a truly remarkable case of fraud, breach of fiduciary duty, and outright theft perpetrated by two individuals (White and Isbell) over a sixteen (16) year period." They allege that White, "a board certified real estate attorney" who, over the years, acted and served as their attorney and trusted advisor, was at the center of the scam. The Laytons allege their relationship with White was both professional and personal and that White owed them fiduciary duties. In particular, the Laytons allege that White breached his fiduciary duty to them "in connection with his serving as an intermediary in the Layton-Parks transaction and receiving monies belonging to and for" their benefit. They also allege that White breached his fiduciary duty to them "in numerous respects as set forth above [in the body of the petition]," that is, with respect to their claims that White fraudulently and negligently made false representations and failed to disclose certain information to them.

Based on the foregoing, the Court concludes that the factual allegations contained in the Laytons' original petition, when taken as true, potentially assert a claim for coverage under the Policy. However, because the claim was not timely, that is, not **first made** against the insured during the policy period, the Court concludes that Wesco has no duty to defend or indemnify White or Ledford E. White, P.C. for the *Layto*n case.

[6] *Id.* at App. 0015 (definition of "Insured").

The Laytons argue that their claim was first made during the policy period when they filed their May 30, 2014 amended petition, which added negligence claims and added Ledford E. White, P.C., as party to the lawsuit. The Court disagrees. After review of the original and amended petitions, the Court concludes that the claims asserted by the Laytons in their amended petition allege, arise out of, are based upon, or derive from the same or essentially the same facts as alleged in their original petition and were therefore not first made during the policy period. See *Nat'l Union Fire Ins. Co. of Pittsburgh v. Willis*, 296 F.3d 336, 339 (5th Cir. 2002); see also *Hirsch v. Tex. Lawyers' Ins. Exch.*, 808 S.W.2d 561, 563 (Tex.App.– El Paso 1991, writ denied).

However, assuming *arguendo* that the Laytons' claim was first made when they filed their May 30, 2014 amended petition, the Court concludes that, for the following reasons, any available coverage under the Policy would otherwise be precluded by the fortuity doctrine.

B. Fortuity Doctrine

The fortuity doctrine relieves insurers from covering certain behaviors that the insured undertook prior to purchasing the policy. *RLI Ins. Co., v. Maxxon Southwest Inc.*, 108 F.App'x 194, 198 (5th Cir. 2004). The doctrine holds that "[i]nsurance coverage is precluded where the insured is or should be aware of an ongoing progressive or known loss at the time the policy is purchased." *Id*. (quoting *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72, 75

(Tex.App.– Houston [14th Dist.] 1995, no writ)(citation omitted)). If an insured knows, or should have known, at the time it purchased the insurance policy, that its current behavior is wrongful and could result in liability, it effectively removes the risk element inherent in insurance, and therefore a Texas court will not require the insurer to pay. *Id*. Under the fortuity doctrine, "[t]he relevant inquiry is whether [the insureds] knew at the time they entered the insurance policy that they were engaging in activities for which they could possibly be found liable." *Id*. at 199 (quoting *Franklin v. Furgo-McClelland (Southwest) Inc.*, 16 F.Supp.2d 732, 737 (S.D. Tex. 1997)).

Application of the fortuity doctrine in the duty-to-defend context is resolved by the eight-corners rule. *Colony Nat. Ins. Co. v. Unique Indus. Product Co.*, 487 F.App'x 888, 893 (5th Cir. 2012)(citing *Warrantech Corp. v. Steadfast Ins. Co.*, 210 S.W.3d 760, 766 (Tex. App.--Fort Worth 2006, pet. denied)).

In the Laytons' original and amended petitions, they allege that White, an insured under the Policy, engaged in fraudulent and otherwise wrongful conduct from April 1997 to January 2013. In particular, both petitions allege that White made fraudulent representations and failed to disclose certain information to the Laytons in order to induce them to enter into transactions which White had no intention of performing. The Laytons allege that White had "actual awareness" that his representations were false at the time he made them.

It is undisputed that Wesco issued the instant Policy on March 17, 2014. According to the Laytons' petitions, the alleged wrongful conduct of White occurred from April 1997 to January 2013,

at the very latest, approximately ten months before he purchased the Policy on behalf of his firm.

Based on the foregoing, the Court concludes that the allegations in the Laytons' original and amended petitions[7] reflect that, at the time the Policy was purchased, White, an insured under the Policy, knowingly engaged in conduct that he knew or should have known could reasonably be expected to expose him and his firm to liability. In other words, the Court concludes that the acts allegedly committed by White constitute a "loss in progress," which precludes Wesco's duty to defend White or Ledford E. White, P.C., for the Laytons' claims.[7] Moreover, the jury found, among other things, that White and Ledford White, P.C., knowingly committed common law and statutory fraud against Gwendolyn Layton and committed theft of the Laytons' property. (ECF No. 73, Br. in Supp. Pl.'s Mot. Summ. J., App. 1554-1583.) Based on the jury's findings, the Court likewise concludes that any duty on the part of Wesco to indemnify White or Ledford E. White, P.C. is likewise precluded by the fortuity doctrine. See *ACE American Inc. Co.*, 699 F.3d 832, 844 (5th Cir. 2012)(citing *Zurich Am. Ins. v. Nokia, Inc.,* 268 S.W.3d 487, 490-91 (Tex. 2008)(The duty to defend is controlled by the facts that establish liability in the underlying suit)).

Because the Court concludes that there is no coverage on these

[7] In addition, assuming *arguendo* that the Laytons' May 20, 2014 amended petition governs, the Laytons' previously filed August 16, 2013 original petition provides additional evidence that shows White was aware of an ongoing progressive or known loss when he purchased the policy on behalf of the firm.

bases, it need not address the remaining grounds raised by the parties in their respective motions for denying coverage or finding that coverage is not precluded under the Policy. Moreover, in light of the Court's conclusion that there is no coverage for the Laytons' claims, the Laytons cannot establish that Wesco breached its contractual obligations under the policy. As such, the Laytons' counterclaim for breach of contract and related counterclaim for attorney's fees are without basis.

III. Conclusion

For the reasons explained above, Wesco's motion for summary judgment that there is no duty to defend or indemnify White or Ledford E. White, P.C., for the Laytons' claims is GRANTED,[8] and the Laytons' opposing motion for partial summary judgment is DENIED.

The Laytons' counterclaims for breach of contract and attorney's fees are DISMISSED with prejudice.

The Laytons' motion to strike Wesco's expert designation and motion in limine are DENIED as moot (docs. 74, 96). Wesco's motion in limine is likewise DENIED as moot (doc. 97).

SIGNED March 10, 2017.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[8] On April 19, 2016, White and Ledford E. White, P.C., were served with a summons and Wesco's second amended complaint. They have not filed a responsive pleading as required by Federal Rule of Civil Procedure 12(a) and are therefore in default. However, the Court emphasizes that the instant order granting Wesco's motion for summary judgment and concluding that there is no coverage for the Laytons' claims is not being entered against White and Ledford E. White, P.C., based on their default. Rather, the Court, for the same reasons explained herein, concludes that Wesco's motion for summary judgment should likewise be granted against White and Ledford E. White, P.C.