United States District Court
Southern District of Texas
ENTERED
March 30, 2021
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

NEW YORK MARINE AND GENERAL INSURANCE COMPANY,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:19-CV-260
	§	
HILLIARD MUNOZ GONZALES LLP, *et al.*	§	
	§	
Defendants.	§	

ORDER

Before the Court is a legal professional malpractice insurance policy dispute. For the past five years, the parties have been in disagreement about whether the standard legal professional liability policy at issue carries with it a contractual duty to defend a civil barratry[1] lawsuit, where the insured had no legal or professional relationship with the underlying plaintiffs. Defendants Robert C. Hilliard and Hilliard Muñoz Gonzales LLP's (collectively, "the Hilliard Parties") moved for partial summary judgment on New York Marine and General Insurance Company's ("New York Marine") alleged duty to defend the Hilliard Parties in the underlying Texas state court civil barratry lawsuit. (D.E. 33).[2] New York Marine opposed the Hilliard Parties' motion and filed a cross-motion for partial

[1] According to Texas statute, a private action for civil barratry under Subsection 82.0651(c) may be brought by a person who has been solicited by conduct violating Texas Penal Code Subsections 38.12(a) or (b) or Texas Disciplinary Rule of Professional Conduct 7.03. *See* TEX. GOV'T CODE § 82.0651(c).

[2] Defendant HMG, LLP did not join Hilliard and the Firm in filing the motion for partial summary judgment. (D.E. 33).

summary judgment on the same issue. (D.E. 38). For the following reasons, Defendant Hilliard Parties' motion is **DENIED,** and Plaintiff New York Marine's motion is **GRANTED.**

I. Background

On December 23, 2013, New York Marine issued Hilliard Muñoz Gonzales LLP ("the Firm") a Lawyer Professional Liability Insurance Policy No. PL201300000284 ("the Insurance Policy") that provided malpractice coverage through January 6, 2015. *See* (D.E. 1, ¶ 2; D.E. 1-1).[3]

The plaintiffs in the underlying barratry suit (the "*Nguyen* litigation") filed their claims against the Hilliard Parties and others in the 55th Judicial District Court of Harris County, Texas on March 3, 2016, alleging claims for misappropriation, fraud, and conspiracy against all defendants. (D.E. 33-2).[4] The Hilliard Parties subsequently requested that New York Marine provide for their defense pursuant to their Insurance Policy, but New York Marine declined. (D.E. 33-11, p. 2). In the immediate action now before this Court, the parties dispute whether, based on the allegations in the underlying pleadings and the language of the Insurance Policy, New York Marine had a contractual duty to defend the Hilliard Parties during the *Nguyen* litigation. (D.E. 33; D.E. 38).

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[3] The Insurance Policy disputed in this case was the second insurance policy issued by New York Marine to the Firm. Previously, New York Marine issued the Firm (or a predecessor in business) an insurance policy that incepted on December 23, 2011. (D.E. 1, p. 6 n.15).

[4] The *Nguyen* plaintiffs subsequently amended their petition eight times. *See* (D.E. 33-3; D.E. 33-4; D.E. 33-5; D.E. 33-6; D.E. 33-7; D.E. 33-8; D.E. 33-9; D.E. 33-10). The *Nguyen* plaintiffs' Eighth Amended Petition is the final petition in the underlying litigation. (D.E. 33-10). The *Nguyen* plaintiffs' allegations against the Hilliard Parties changed over time, but in their Eighth Amended Petition, the *Nguyen* plaintiffs brought only a cause of action for civil barratry and secondary claims against the Hilliard Parties. *See id.*

A. The Underlying *Nguyen* Litigation

i. The Deepwater Horizon Explosion

The genesis for the underlying litigation was the disastrous 2010 *Deepwater Horizon* oil rig explosion.[5] The rig, leased by British Petroleum ("BP") to drill the Macondo Well off the coast of Louisiana, experienced a well blowout on April 20, 2010. *In re Deepwater Horizon*, 739 F.3d 790, 796 (5th Cir. 2014). The resulting explosion caused millions of barrels of oil to spill into the Gulf of Mexico, "inflicting billions of dollars in property and environmental damage and spawning a litigation frenzy." *In re Deepwater Horizon*, 745 F.3d 157, 161 (5th Cir. 2014). During the underling litigation, Defendants Robert C. Hilliard ("Hilliard") and the Firm are alleged to have capitalized on the litigation frenzy by participating in a barratry scheme targeting Vietnamese American fishermen and seamen. *See* (D.E. 33-10).

ii. The Nguyen Plaintiffs' Allegations

The relevant facts as presented in the *Nguyen* plaintiffs' eighth and final amended petition are as follows: An attorney named Mikal C. Watts ("Watts") and his law firm, Watts Guerra, LLP ("WGC") allegedly "orchestrated a fraudulent barratry scheme and conspiracy to accumulate and file claims for thousands of purported clients [without their knowledge or consent]" against BP for property damage caused by the *Deepwater Horizon* oil spill. *See* (D.E. 1-5, p. 6). Watts' goal for the alleged barratry scheme was to collect

[5] A more detailed, factual background of the *Deepwater Horizon* explosion is set forth in the U.S. Court of Appeals for the Fifth Circuit's opinion, *In re Deepwater Horizon*, 732 F.3d 326 (5th Cir. 2013).

millions of dollars in attorneys' fees from BP. *Id.* To accomplish this, Watts engaged Hilliard "of Robert C. Hilliard, LLP"[6] and the Firm[7] together with other attorneys and firms to aid, assist, and finance[8] "[the] barratry and misappropriation operation and to serve as 'of counsel' to the purported clients" in the BP oil spill litigation. *Id.* at 7.

As alleged in the petition, Watts, Hilliard, and other attorneys, individually and through their firms, allegedly "paid runners several million dollars for tens of thousands of cases." *Id.* at 9. In exchange for the funds, the runners solicited clients for the BP litigation by gathering the identities, social security numbers, and dates of birth of approximately 44,510 Vietnamese Americans. *Id.* at 9. The runners provided this information to Watts' brother, who then provided the information to the attorneys and others. *See id.* However, none of the purported clients provided their information or were even aware that their information would be used to file claims against BP. *Id.* at 8.

Due to the runners' efforts, by June 10, 2010, Watts, attorney John Cracken ("Cracken"),[9] and Hilliard had obtained "tens of thousands of cases." *Id.* at 9. That same day, Watts allegedly "entered into a joint venture agreement with the Hilliard Firm,"[10] in

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[6] Robert C. Hilliard, LLP is not a party to this action.

[7] The Eighth Amended *Nguyen* Petition confusingly refers to both Robert C. Hilliard, LLP and Hilliard Munoz Gonzales LLP (the Firm) collectively as "the Hilliard Firms." (D.E. 33-10, p. 7).

[8] Hilliard's involvement in the barratry scheme was in turn partially funded by non-lawyer, William "Max" Duncan ("Duncan"). (D.E. 33-10, p. 7). Duncan later initiated an arbitration proceeding against Hilliard and the Firm, for which New York Marine also declined to provide defense costs and indemnification coverage. (D.E. 9, p. 10–15). Although also disputed in this case, the Duncan arbitration costs and indemnification ("Duncan claims") are the subject of the parties' separately filed cross-motions for summary judgment (D.E. 54; D.E. 56) and will be addressed in a separate, forthcoming order.

[9] Cracken and his firm were listed as Defendants in the underlying *Nguyen* litigation, but are not parties to this case. (D.E. 1-5, p. 1).

[10] The Eighth Amended *Nguyen* Petition does not specify which of the Hilliard Firms (Robert C.

which both WGC and Hilliard acknowledged that they "had contributed over $3,000,000 each to 'facilitate the **procurement** . . . for . . . fisherman, shrimpers, and oyster growers claiming economic damages arising from the Deepwater Horizon oil spill . . . .'" *Id.* at 7–8.

On November 6, 2010, Cracken sent an email to Watts and Hilliard with an article appearing to show that one of the runners they had hired to procure the client list had pled guilty to manufacturing clients in a separate litigation matter, and on December 29, 2010, Cracken admitted to his alleged co-conspirators that the runners had not signed up actual clients, but had instead procured a list of names that the parties could convert into "clients" over time. *Id.* at 9–10. Despite knowing the clients were illegitimate, in April 2011, Watts and WGC filed over 40,000 direct short form claims[11] in the BP *Deepwater Horizon* multi-district litigation ("MDL") and later stated under penalty of perjury that the clients had completed written and signed engagement agreements. *Id.* at 11, 13.

Subsequently, on September 30, 2011, Watts, WGC, Hilliard, and others entered into a Master Project Agreement to reimburse Watts and WGC for the costs associated with the solicitation of those purported clients, thereby "forming a general partnership and/or joint venture." *Id.* at 12.

After recognizing that the purported clients for whom the short forms had been filed were not actual clients who had agreed to representation, Watts, Hilliard, and others

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Hilliard, LLP or Hilliard Muñoz Gonzales LLP (the Firm)) entered into the joint venture agreement.

[11] The *Nguyen* petition does not explain what the process for filing the MDL short form claims entailed. *See* (D.E. 1-1).

subsequently sent runners to solicit the "clients" and have them complete affidavits inaccurately attesting they had previously hired WGC to file claims on their behalf. *Id.* at 13–14. Throughout 2012 and 2013, Defendants (presumably including the Hilliard Parties) paid runners to solicit the clients by knocking on their doors and sending out mailings. *Id.* at 14. However, when these mailings and door solicitations yielded few responses, Defendants (presumably including the Hilliard Parties) funded a telephone solicitation campaign from October 2012 through January 2013, during which the runners contacted the purported clients in order to allegedly "coerce them into signing the registration forms." *Id.* at 15.

Sometime around or after November 2011, Watts and WGC allegedly discussed with Hilliard and Cracken the option to pre-purchase future fees that WGC would potentially recover due to its role in the *Deepwater Horizon* MDL—a role that WGC had secured by paying runners to solicit and accumulate potential clients. *Id.* WGC allegedly agreed (or offered to agree) to accept payment from Hilliard and/or Cracken for pre-purchase of WGC's potential fees. *Id.*

Despite their alleged efforts to legitimize the clients listed in the 2011 short forms, on January 7, 2013, Watts and Hilliard "acknowledged"[12] that neither the clients nor the purported damages were real. *Id.* at 16. However, despite this knowledge, Watts and Hilliard, together with other alleged co-conspirators and Cracken as co-counsel, submitted 44,004 presentment forms to BP on January 16, 2013, seeking approximately $2 billion on

[12] The *Nguyen* petition does not specify how or to whom Watts and Hilliard allegedly "acknowledged" that the clients and damages were not real. *See* (D.E. 1-1).

behalf of the purported clients. *Id.* The Defendants (presumably including the Hilliard Parties) continued to present claims on behalf of the *Nguyen* plaintiffs without their knowledge or consent until at least May 2, 2016, when Defendant's short-form joinders were dismissed. *Id.* at 17.

iii. Nguyen Trial Court Summary Judgment Motions and Appeal

The *Nguyen* plaintiffs, a group of 439 Vietnamese Americans who were solicited by the runners as "clients" for the BP oil spill litigation, subsequently brought claims for civil barratry under Texas Government Code section 82.0651(c) and secondary claims for civil conspiracy, and aiding and abetting against Hilliard, the Firm, Robert C. Hilliard, LLP, Watts, WGC, and others. *Id.* at 19. In the trial court for the underlying *Nguyen* litigation, Watts, WGC, the Hilliard Parties, and Robert C. Hilliard, LLP filed motions for summary judgment challenging the *Nguyen* plaintiffs' barratry claims on the grounds that the conduct alleged in the petition did not support a civil barratry claim under Texas Government Code section 82.0651(c) and that any barratry claims were barred by a two-year statute of limitations. (D.E. 33, p. 7–8); *Nguyen v. Watts*, 605 S.W.3d 761, 771–72 (Tex. App.—Houston [1st Dist.] 2020), *reh'g denied* (July 28, 2020) (discussing rulings by the trial courts). The trial court granted the summary judgment motions on the barratry claims after finding that civil barratry claims under section 82.0651(c) require "each individual plaintiff to show solicitation" or "actual communication with the client" and that filing an unauthorized claim was insufficient to constitute "solicitation" as required by the Texas statute. *Nguyen*, 605 S.W.3d at 772 (discussing trial court rulings). The trial court also granted summary judgment on the barratry claims for which the applicable statute of

limitations is two years, because the most recent solicitations alleged were the January 2013 phone calls and no tolling had occurred. *Id.* The *Nguyen* plaintiffs appealed, but on May 28, 2020, the Texas First Court of Appeals affirmed the trial court's summary judgment for Hilliard and the Firm. *Id.* at 795.[13]

B. Dispute in this Court over the Duty to Defend

In the case before this Court, the Hilliard Parties allege that New York Marine failed to honor its contractual obligation to defend the Hilliard Parties during the underlying *Nguyen* litigation. (D.E. 33, p. 3). The Hilliard Parties sent notice of the *Nguyen* suit to New York Marine and requested coverage for its defense. *Id.* at 10. However, New York Marine informed the Hilliard Parties in a March 10, 2016 letter of its position that the Insurance Policy did not extend coverage for the *Nguyen* litigation. (D.E. 33-11, p. 2). For the next two years and over the course of the *Nguyen* litigation, the parties continued to dispute the coverage denial with the Hilliard Parties sending New York Marine each of the amended *Nguyen* petitions with requests that it reconsider. (D.E. 33, p. 11). New York Marine refused, remaining firm in its position that the Policy did not provide the Hilliard Parties with defense coverage. (D.E. 33, p. 11); (D.E. 1). New York Marine subsequently filed this action seeking a declaration that it had no obligation to defend the Hilliard Parties or HMG, LLP in connection with a third-party claim that arose during the *Nguyen* litigation and a subsequent arbitration initiated by Duncan and Duncan Litigation

[13] The First Court of Appeals reversed and remanded portions of the trial court's summary judgment as they related to Watts and WGC but affirmed the remainder of the trial court's judgment as to the Hilliard Parties. *Id.*

Investments, LLC. (D.E. 1).[14]

i. Cross-Motions for Summary Judgment

In this immediate malpractice insurance dispute, the parties filed their cross-motions for partial summary judgment regarding New York Marine's alleged duty to defend the Hilliard Parties during the *Nguyen* litigation. (D.E. 33; D.E. 38). New York Marine contends that the Insurance Policy did not extend to and therefore did not obligate New York Marine to defend the Hilliard Parties in connection with the underlying *Nguyen* litigation. (D.E. 38). The Hilliard Parties disagree and argue that New York Marine breached its Insurance Policy contract by refusing to provide for the Hilliard Parties' defense costs in the underlying barratry case. (D.E. 33).

II. Legal Standard

A. Summary Judgment Standard

A court shall grant summary judgment when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "[A] fact is genuinely in dispute only if a reasonable jury could return a verdict for the non-moving party." *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the party meets its burden, the burden shifts to

[14] The pending declaratory judgment action will be addressed in the Court's separate, forthcoming order on the separately filed cross-motions for summary judgment (D.E. 54; D.E. 56) in connection with the Duncan arbitration claims.

the non-moving party to set forth specific facts showing a genuine issue for trial. FED. R. CIV. P. 56(e). The court must view the evidence in the light most favorable to the non-movant and draw all justifiable inferences in favor of the non-movant. *Envtl. Conservation Org. v. City of Dall., Tex.*, 529 F.3d 519, 524 (5th Cir. 2008).

On cross-motions for summary judgment, [the court] review[s] each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.'" *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010) (quoting *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001)). Cross-motions for summary judgment will not, in and of themselves, warrant the granting of summary judgment unless one of the parties is entitled to judgment as a matter of law. *Joplin v. Bias*, 631 F.2d 1235, 1237 (5th Cir. 1980); *Bricklayers, Masons & Plasterers Int'l Union of Am. v. Stuart Plastering Co.*, 512 F.2d 1017, 1023 (5th Cir. 1975); *accord Flecha v. Medicredit, Inc.*, No. 1:16-CV-792-LY, 2018 WL 3014422, at *3 (W.D. Tex. May 15, 2018).

B. Duty to Defend

Whether an insurer has a duty to defend its insured in an underlying lawsuit is a question of law. *Lyda Swinerton Builders, Inc v Oklahoma Surety Co*, 903 F3d 435, 445 (5th Cir 2018). Under Texas law, courts follow the "eight corners" rule to determine whether an insurer has a duty to defend. *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720, 723 (5th Cir. 1999). "Under this rule, courts compare the words of the insurance policy with the allegations of the plaintiff's complaint to determine whether *any* claim asserted in the pleading is potentially within the policy's coverage." *Id.* The court

must consider "the latest, and only the latest, amended pleadings." *Rhodes v. Chi. Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983); *see Century Sur. Co. v. Seidel*, 893 F.3d 328, 333 (5th Cir. 2018) ("Texas courts follow the 'eight-corners' rule, which 'looks only to the four corners of the most recent complaint in the underlying action as well as the four corners of the insurance policy.'" (quoting *City of College Station, Tex. v. Star Ins. Co.*, 735 F.3d 332, 336 (5th Cir. 2013))).

"In reviewing the underlying pleadings, the court must focus on the factual allegations that show the origin of the damages rather than on the legal theories advanced." *VRV Dev. L.P. v. Mid-Continent Cas. Co.*, 630 F.3d 451, 457 (5th Cir. 2011) (quoting *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). The court must ascertain whether the facts, as alleged, fall within the policy's coverage. *Ewing Constr. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014); *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). "If the petition pleads facts sufficient to create the potential of covered liability, then the insurer has a duty to defend the entire case, even if some of the alleged injuries are not covered." *Lyda Swinerton Builders, Inc.*, 903 F3d at 447.

"The duty to defend analysis is not influenced by facts ascertained before the suit, developed in the process of litigation, or by the ultimate outcome of the suit." *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 552 (5th Cir. 2004). Rather, it is determined by examining the eight corners of the pleadings and the policy. *Zurich Am. Ins. Co.*, 268 S.W.3d 487 at 491. Under very rare, narrow exceptions, Courts may consider evidence outside the most recent petition and insurance policy, but this exception only

applies "[1] when it is initially impossible to discern whether coverage is potentially implicated and [2] when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." *Ooida Risk Retention Grp., Inc. v. Williams*, 579 F.3d 469, 476 (5th Cir. 2009) (quoting *Northfield Insurance Company v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004)).

When determining whether each side has satisfied its burden, the Supreme Court of Texas has instructed the Fifth Circuit—when applying Texas law—to "resolve all doubts regarding the duty to defend in favor of the duty . . . and . . . construe the pleadings liberally." *Zurich Am. Ins. Co.*, 268 S.W.3d 487 at 491. Courts applying the eight corners rule "give the allegations in the petition a liberal interpretation." *Nat'l Union Fire Ins. Co.*, 939 S.W.2d at 141. Courts must not, however, "read facts into the pleadings, . . . look outside the pleadings, or imagine factual scenarios which might trigger coverage." *Id.* at 142.

i. Construing Insurance Policies

As with other contracts, a federal court, sitting in diversity in Texas, applies Texas law in the interpretation of insurance policies. *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367, 371 (5th Cir. 2011) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)); *see Lowe v. Hearst Commc'ns, Inc.*, 487 F.3d 246, 252 n.4 (5th Cir. 2007). Courts applying Texas law construe insurance contracts in the same manner as other contracts. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). Courts must "strive to give effect to the written expression of the parties' intent," which requires

reading "all parts of a contract together." *Id.* "[C]ourts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract." *Id.*

Courts construe terms in contracts to have their plain, ordinary meaning unless something in the contract itself indicates that the parties intended for them to have particular definitions. *Tanner v. Nationwide Mutual Fire Ins. Co.*, 289 S.W.3d 828, 831 (Tex. 2009). When a contract as worded can be given "a definite or certain legal meaning," it is unambiguous as a matter of law, and the court enforces it as written. *WBCMT 2007 C33 Office 9720, LLC v. NNN Realty Advisors, Inc.*, 844 F.3d 473, 478 (5th Cir. 2016) (applying Texas law). The court will not find an insurance contract ambiguous because it lacks clarity or because the parties disagree on its meaning. *Id.*; *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010). "Instead, a contract is ambiguous only if it is subject to two or more reasonable interpretations after applying the pertinent canons of construction." *WBCMT 2007 C33 Office 9720, L.L.C.*, 844 F.3d at 478 (quoting *McLane Foodservice, Inc. v. Table Rock Restaurants, L.L.C.*, 736 F.3d 375, 378 (5th Cir. 2013)) (internal quotations omitted). If, after applying the canons of interpretation an insurance policy remains ambiguous, its language must be construed "against the insurer in a manner that favors coverage." *Beaston*, 907 S.W.2d at 433.

The insured has the burden of showing that a claim is potentially within the coverage of the policy. *Federated Mut. Ins. Co.*, 197 F.3d at 723. "After the insured meets his burden to show that the alleged facts in the petition state a potential claim against him, to defeat the duty to defend, the insurer bears the burden of showing that the plain language of a

policy exclusion or limitation allows the insurer to avoid coverage of all claims, also within the confines of the eight corners rule." *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 528 (5th Cir. 2004).

It is the insurer's burden to prove the applicability of an exclusion permitting it to deny coverage. TEX. INS. CODE § 554.002; *see Trinity Universal Ins. Co. v. Emp'rs Mut. Cas. Co.*, 592 F.3d 687, 691–92 (5th Cir. 2010) ("Although the burden is typically 'on the insured to show that a claim against him is potentially within the scope of coverage under the policies,' when 'the insurer relies on the policy's exclusions, it bears the burden of proving that one or more of those exclusions apply.'" (citation omitted)). Once the insurer proves that an exclusion applies, the burden shifts back to the insured to show that the claim falls within an exception to the exclusion." *Id.*

When determining whether an exclusion applies, courts "must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987).

III. Analysis

A. Cross-Motions for Summary Judgment

The sole issue in both parties' pending motions for partial summary judgment is whether New York Marine had a duty to defend the Hilliard Parties in the underlying *Nguyen* litigation. *See* (D.E. 33; D.E. 38). Hilliard and the Firm argue that New York Marine owed the Hilliard Parties a duty to defend the *Nguyen* Litigation for three reasons:

(1) the text of the Insurance Policy clearly provides coverage in that the claims alleged in the *Nguyen* Litigation arise from an "act, error, omission or Personal Injury in the rendering of or failure to render Professional Services for others"—the *Nguyen* plaintiffs; (2) insurance coverage is not barred by the "no prior knowledge" rule; and (3) "Exclusion (A)"—the "other business enterprise" exclusion—of the Policy does not apply to the Hilliard Parties' conduct alleged in the *Nguyen* pleadings.

New York Marine disagrees and argues that it had no duty to defend the Hilliard Parties in connection with the *Nguyen* litigation because: (1) the *Nguyen* plaintiffs' claims did not arise out of any act, error, or omission in the rendering of or failure to render "Professional Services" for others by the Hilliard Parties; (2) the allegations in the *Nguyen* petition sufficiently demonstrate that, prior to December 23, 2011, the Hilliard Parties had "knowledge" and reason to anticipate that a potential claim would be brought against them; and (3) the *Nguyen* barratry claims against the Hilliard Party arose out of acts on behalf of an uninsured business venture, thus making Exclusion A applicable to bar coverage. (D.E. 38, p. 5). The Court will address each issue, as needed.

i. Relevant Contract Language

The Insurance Policy provides, under the heading titled, "COVERAGE":

> The [Insurance] Company will pay on behalf of the **Insured** all sums which the Insured shall become legally obligated to pay as **Damages** for **Claims** first made against the **Insured** and reported to the Company during the **Policy Period**, subsequent renewal thereof, or any applicable Extended Reporting Period arising out of any act, error, omission or **Personal Injury** in the rendering or of failure to render ***Professional Services*** *for others* by an **Insured** covered under this policy. . . .

(D.E. 1-1, p. 6) (emphasis added).

"Claim" is defined to

> mean[] a demand for money or services, or the filing of suit or institution of arbitration proceedings or Alternative Dispute Resolution naming an Insured and alleging an act, error, omission or Personal Injury resulting from the rendering of or failure to render *Professional Services*.

Id. at 10 (emphasis added).

The relevant portion of the Policy's definition for "Professional Services" provides coverage for

> (a) services performed, or advice given by the Insured in the Named Insured's practice as a law firm or legal professional.

Id. at 11.[15]

ii. Whether "Professional Services" were rendered for others such that there is a "Claim" under the Policy for which a duty to defend would attach.

Setting aside for the moment who is an "Insured" under the policy,[16] the Court views the finding as dispositive of this matter: whether any allegation within the four corners of

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[15] The Insurance Policy's definition of "Professional Services" also includes: "(b) services as a notary public, title agent, title insurance agent, arbitrator or mediator; (c) services as a trustee, administrator, conservator, executor, guardian, receiver or similar fiduciary capacity; (d) activities of the Insured as a member of a formal accreditation, ethics, peer review, licensing board, standards review or similar professional board or committee; (e) the publication or presentation of research papers or similar materials, but only if direct pecuniary compensation per publication or presentation is less than $3,000; (f) services performed by the Insured in a lawyer-client relationship on behalf of one or more clients shall be deemed for the purpose of this section to be the performance of Professional Services for others in the Insured's capacity as a lawyer, although such services could be performed wholly or in part by non-lawyers." (D.E. 1-1, p. 11).

[16] The parties do not dispute that the Hilliard Parties—Hilliard and the Firm—qualify as "Insureds" under the Insurance Policy. Instead, New York Marine contends that the joint venture that Robert C. Hilliard of Robert C. Hilliard, LLP allegedly entered into with Watts was not an insured party under the Policy. (D.E. 38, p. 23). The Court finds that *Nguyen* litigation did not constitute a "Claim" under the Policy because no "professional services," as that term is defined by the Policy, were rendered for the underlying *Nguyen* litigants by the Hillard Parties, the Court need not delve into the issue of who or what qualifies as an "Insured" under the Policy.

the live pleading in the underlying *Nguyen* suit constitutes a "Claim" within the meaning of the Insurance Policy, such that coverage would be implicated and a duty to defend would attach. The Court finds no allegations that can be considered a "claim" under the Policy because no "professional services" were rendered from the Hilliard Parties on behalf of the *Nguyen* litigants in the underlying litigation as alleged within the four corners of the live pleading in that case. *See generally* (D.E. 1-5).

To begin, the Policy's definition of "Claim," as stated above, provides that a "'Claim' means a demand for money or services, or the filing of suit or institution of arbitration proceedings or Alternative Dispute Resolution naming an Insured and alleging an act, error, omission or Personal Injury resulting from the rendering of or failure to render *Professional Services*." (D.E. 1-1, p. 10) (emphasis added). The parties agree that the relevant portion of the Policy's definition for "Professional Services" provides coverage for "(a) services performed, or advice given by the Insured in the Named Insured's practice as a law firm or legal professional." *Id.* at 11. As such, the critical issue is whether the *Nguyen* plaintiffs' claims, as presented within the four corners of the live pleading, arose from any act, error, omission or Personal Injury in the rendering of or failure to render Professional Services—that is, "services performed, or advice given by the [Hilliard Parties] in the Named Insured's practice as a law firm or legal professional"—for others. *Id.* at 6, 11.

Turning to the four corners of the live *Nguyen* petition, the parties in their respective briefing argue two possible allegations that could be construed as falling under the Policy's definition of "professional services" for others: (1) the solicitation of purported "clients"

and (2) the filing of presentment forms on behalf of the purported clients. Regarding solicitation, the *Nguyen* petition alleges that "between July 30, 2012 and January 7, 2013, Defendants caused eight separate solicitation mailings to be sent to the 44,000 purported clients requesting the individuals to sign registration forms agreeing to the representation and giving WGC authority to act on their behalf in the BP litigation." *Id.* at 13. Regarding presentment, the *Nguyen* petition alleges that on January 6, 2013, "Watts and Hilliard, in association with other conspirators and Cracken as co-counsel, submitted to BP approximately 44,004 Presentment Forms, including those of Plaintiffs, seeking $2,010,538,000 on behalf of these [purported] clients [the *Nguyen* plaintiffs]" and that until May 2, 2016, the Defendants "knowingly instituted and filed over 44,000 claims that they had not been authorized to pursue, including claims brought on behalf of [the *Nguyen*] Plaintiffs." *Id.* at 16, 19. The *Nguyen* petition alleges that Defendants pursued the unauthorized claims "in order to obtain the economic benefit of attorney's fees from the two billion dollars being sought from BP." *Id.* at 20.

As previously mentioned, the "coverage" provision in the Policy states explicitly that the insurer is "obligated to pay as Damages for Claims . . . *arising out of* any act, error, omission or Personal Injury in the rendering or of failure to render Professional Services for others by an Insured . . . ." (D.E. 1-1, p. 6) (emphasis added). Under Texas law, the phrase "arising out of" means "that there is simply a causal connection or relation, which is interpreted to mean that there is but-for causation, though not necessarily direct or proximate causation." *Utica Nat'l Ins. Co. of Tex. v. Am.*, 141 S.W.3d, 198, 203 (Tex. 2004) (internal quotation marks omitted). Accordingly, in this case, if the *Nguyen*

plaintiffs' claims against the Hilliard Parties—specifically the solicitation or unauthorized filing of presentment forms—had a "causal connection or relation" to the rendering or failure to render professional services, then New York Marine possessed a duty to defend. *Id.*

First, regarding solicitation, Texas state courts and federal courts applying Texas law have concluded that professional services include only "those services for which professional training is a prerequisite to performance." *Guaranty Nat'l. Ins. Co. v. North River Ins. Co.*, 909 F.2d 133, 136 (5th Cir.1990) (quoting *Duke Uni. v. St. Paul and Marine Ins. Co.*, 96 N.C. App 635, 386 S.E.2d 762, 766, *review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990)). In other words, "[p]rofessional services are considered those acts which use the inherent skills typified by that profession, not all acts associated with the profession." *Atlantic Lloyd's Ins. Co. of Tex. v. Susman Godfrey, LLP*, 982 S.W.2d 472, 477 (Tex. App.—Dallas 1998, pet. denied) (emphasis in original) (citing *Bank of Ca. v. Opie*, 663 F.2d 977, 981 (9th Cir. 1981)). Thus, practices such as billing and fee setting are generally not characterized as professional services. *Gregg & Valby, LLP v. Great Am. Ins. Co.*, 316 F.Supp.2d 505, 513 (S.D. Tex. 2004) (noting that "the court has little trouble concluding that Plaintiff's billing and fee-setting practices are not 'professional services'"). But most importantly, Texas courts have clearly held that client solicitation does not constitute professional services. *Atl. Lloyd's Ins. Co. of Tex.*, 982 S.W.2d at 478 (holding that a solicitation letter informing a doctor's former patient of a medical negligence lawsuit did not qualify as professional services because "[s]oliciting clients does not require a lawyer to use the specialized education and knowledge inherent to lawyers").

Here, similar to the letter mailed by the attorneys in *Atlantic Lloyd's*, the Hilliard Parties' alleged solicitation mailings did not require the Hilliard Parties to use their specialized education or knowledge as a law firm or legal professionals. *Atl. Lloyd's Ins. Co. of Tex.*, 982 S.W.2d at 478. As such, the alleged solicitations do not constitute "Professional Services" as defined in the Insurance Policy or under Texas common law and did not fall within the Insurance Policy's coverage.

Next, regarding the filing of unauthorized presentment forms, the Policy covers claims "arising out of any act, error, omission or Personal Injury in the rendering or failure to render Professional Services *for others*". (D.E. 1-1, p. 6). The Court cannot reasonably conclude that filing unauthorized forms or claims for third parties without their knowledge or any pre-existing relationship constitutes "Professional Services *for others*" or that such acts could be considered "services performed or advice given. . . as a law firm or a legal professional." *See id.* at 6, 11. The *Nguyen* plaintiffs' live petition makes no complaint about the rendition (or omission) of any service to them by the Hilliard Parties (or any defendant), let alone professional services. To the contrary, as stated above, the express allegations in the *Nguyen* Petition turn on the complete absence of authority to act for the Plaintiffs (or anyone else) and alleges that Defendants (which included the Hilliard Parties) knowingly pursued the unauthorized claims "in order to obtain the economic benefit of attorney's fees from the two billion dollars being sought from BP." *Id.* at 20.

Furthermore, based on a four-corners review of the Nguyen petition and taking the allegations at face-value, the Hilliard Parties' unauthorized filing of the Nguyen presentment forms and claims for an economic benefit qualifies as a potential violation of

the Texas Penal Code or the Texas Disciplinary Rules of Professional Conduct. *See id.* at 19–20; TEX. PENAL CODE ANN. § 38.12(a)(1) (West) (stating that a "person commits an offense if, with intent to obtain an economic benefit the person: (1) knowingly institutes a suit or claim that the person has not been authorized to pursue"); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.03 (stating that a "lawyer shall not by in-person contact, or by regulated telephone or other electronic contact . . . seek professional employment concerning a matter arising out of a particular occurrence or event . . . from a prospective client or nonclient who has not sought the lawyer's advice regarding the employment"). During oral argument, the Hilliard Parties maintained that they were never subject to any criminal charges and that because the Texas First Court of Appeals ultimately determined that no civil barratry occurred as a matter of law, New York Marine was obligated to defend the Hilliard Parties during the *Nguyen* litigation. However, the duty-to-defend is determined by looking only to the eight corners of the underlying petition and insurance policy. *Federated Mut. Ins. Co.*, 197 F.3d 723. As such, whether an actual violation of the Texas Penal Code or civil barratry statute occurred is immaterial to this suit. *Primrose Operating Co.*, 382 F.3d at 552.

While the Court acknowledges that it must interpret the Policy in favor of the duty to defend and construe terms according to their ordinary meaning, the Court cannot favor such a construction when it would result in an absurdity. Interpreting an attorney's "Professional Services for others" to include unauthorized claims that are filed without the others' knowledge or consent is exactly such "a construction [that] is unreasonable, inequitable, and oppressive." *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex.

1987); *see also Pavecon, Inc. v. R-Com, Inc.*, 159 S.W.3d 219, 222 (Tex. App.—Fort Worth 2005, no pet.) (stating that when interpreting a contract, a court should avoid, if possible, "a construction that is unreasonable, inequitable, or oppressive, or would lead to an absurd result").

Moreover, although the Hilliard Parties correctly note that the Insurance Policy's definition of "Professional Services" include some acts or services that may be performed without an attorney-client relationship, the sub-definitions of "Professional Services" all concern activities or services that require some level of authority or relationship between the "Insured" and the third-party or parties for whom an "Insured" would provide the particular, defined professional services or activities. *See* (D.E. 1-1, p. 11).

Noscitur a sociis,[17] a canon of contract and statutory interpretation, directs that similar terms in a contract should be interpreted in a similar manner and instructs that the meaning of a word or phrase can be revealed by its association and commonality with other nearby words or phrases. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441–42 (Tex. 2011) (citing *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750 n.29 (Tex. 2006)). By applying the canon, the Court construes "Professional Services" to include only services or activities for which an Insured has some level of express or implied authority to provide to and on behalf "of others"—something that the Hilliard Parties admitted did not exist between the *Nguyen* plaintiffs and the Hilliard Parties at the time that the presentment forms and claims were filed. At the time of the filing of the presentment forms and claims,

[17] Translation: "It is known by its associates." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441–42 (Tex. 2011) (citations omitted).

the Hilliard Parties not only lacked the *Nguyen* parties' consent but had no relationship or dealings whatsoever with the *Nguyen* plaintiffs from which the Hilliard Parties could reasonably infer some minimal degree of implied authority.

For those reasons, the Court finds that the Hilliard Parties' filing of the presentment forms and claims done without the knowledge or consent of the *Nguyen* plaintiffs did not qualify as rendering "Professional Services for others" as required by the Insurance Policy.[18] As such, pursuant to the eight-corners rule, the conduct alleged in the *Nguyen* petition as compared with the Insurance Policy's terms did not obligate New York Marine to defend the Hilliard Parties during the underlying *Nguyen* litigation.

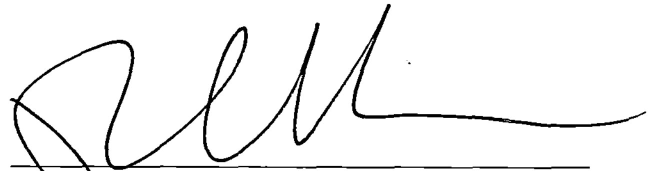
Because the Court's conclusions entitle New York Marine to judgment as a matter of law—namely that no duty to defend existed in the underlying *Nguyen* litigation—it need not address the parties' remaining arguments regarding the Policy's coverage or exceptions or exemptions thereof.

[18] The Court reminds the Hilliard Parties that before filing any claims or providing "professional services for others", the Hilliard Parties are to aspire to meet the goals set forth in the *Texas Lawyers' Creed*, which states that "professionalism requires more than merely avoiding the violation of laws and rules . . . [a] lawyer owes to a client allegiance, learning, skill, and industry" and "[a] lawyer shall not be . . .influenced by mere self-interest." *Tex. Lawyers' Creed—A Mandate for Professionalism*, available at https://txbf.org/about-us/texas-lawyers-creed (last viewed March 28, 2021).

IV. Conclusion

For the reasons set out above, the Hilliard Parties' motion for partial summary judgment is **DENIED** (D.E. 33) and New York Marine's cross-motion for partial summary judgment is **GRANTED.** (D.E. 38).

SO ORDERED.



DAVID S. MORALES
UNITED STATES DISTRICT JUDGE

Dated: Corpus Christi, Texas
March 30, 2021