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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NOVAPRO RISK SOLUTIONS, L.P.,

Cross-Complainant and Appellant,

v.

TIG INSURANCE COMPANY,

Cross-Defendant and Respondent.

D059066

(Super. Ct. No. 37-2008-00079448-
CU-IC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

This action involves a coverage dispute involving insurance companies that issued what is known as "claims made" professional liability insurance policies, and a lawsuit alleging negligent acts by the insured, NovaPro Risk Solutions, L.P., formerly known as Ward North America, Inc. (Ward). Ward handled claims as a third party administrator (TPA) for United States Fidelity and Guaranty Company (USF&G) and Discover Property & Casualty Insurance Company (DPCC) (together, sometimes USF&G),

administering claims arising out of USF&G's Red Hawk Insurance Services Program (the Red Hawk Program).

Respondent TIG Insurance Company (TIG) issued a policy to Ward that ran from December 31, 2000 to December 31, 2001. During that policy period Ward gave notice to TIG of a claim by USF&G that Ward mishandled a claim for an insured under the Red Hawk Program by allowing a default judgment to be entered against the insured. In 2005, after TIG's policy period, and during the policy period of another insurer, Liberty Surplus Insurance Company (Liberty), USF&G brought an action against Ward alleging a "program-wide" mishandling of claims under the Red Hawk Program (the USF&G Action).

During the pendency of the USF&G Action, Liberty brought this declaratory relief action against Ward, alleging it had no coverage obligations. Ward filed a cross-complaint against TIG, alleging the USF&G Action was covered by TIG's policy, because the claims made in 2005 arose out of the same error, omission or negligent act or series of errors, omissions or negligent acts as the claim made during TIG's policy period, making the 2005 claims, under the TIG policy, "deemed" to have been made at the same time as the 2001 claim.

TIG filed a motion for summary judgment, asserting (1) that it had no duty to defend or indemnify Ward because the 2005 and 2001 claims were not logically or causally related; and (2) it had no duty to defend the USF&G action because Ward did not tender a defense in a timely manner. The court granted TIG's motion.

On appeal, Ward asserts the court erred in granting summary judgment because (1) the USF&G Action arose out of the same series of errors or the same or related facts as the claim made during TIG's policy period; (2) the court improperly relied upon conduct occurring long after policy formation to determine the parties intentions; and (3) the court erred in finding there was no duty to defend based upon Ward's untimely request that TIG defend because TIG waived its right to assert that defense, and it suffered damages even though Liberty paid for its defense in the USF&G action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Red Hawk Program

In 1998 USF&G began writing insurance for a commercial auto liability and property program known as the Red Hawk Program. In November 1999 Ward entered into a claims servicing agreement with USF&G, wherein Ward agreed to act as a TPA, responsible for handling all claims pertaining to policies of insurance written by USF&G under the Red Hawk Program. In 2002, after the TIG Policy expired, DPCC began writing policies of insurance for the Red Hawk Program. Ward served as the TPA under the Red Hawk Program from November 1999 through 2004.

B. The TIG Policy

TIG issued a "Miscellaneous Professional Claims Made Liability Policy" to Ward for the policy period December 31, 2000 to December 31, 2001, subject to a retroactive date of December 31, 1995 (the TIG Policy). The TIG Policy provides in pertinent part, as follows regarding when claims are "deemed" to have been made:

"2. WHEN A CLAIM IS COVERED UNDER THIS POLICY [¶]
We will pay Damages and defend an Insured with respect to a Claim only when: [¶] . . . [¶] c. *The Claim is first made against any Insured and reported in writing to us in accordance with 3. below during the policy period or an Extended Reporting Period we provide in accordance with Section D.8. Extended Reporting Period. A Claim received by the Insured during the policy period and reported to us within 30 days after the end of the policy period will be considered to have been reported within the policy period. [¶] 3. WHEN A CLAIM IS DEEMED TO HAVE BEEN MADE [¶] a. A Claim shall be considered to be first made at the earliest of the following times: [¶] 1) When notice of such Wrongful Act is received by any Insured and reported to us in writing; [¶] 2) When a Claim is made directly to us in writing; or [¶] 3) When an Insured first becomes aware of a Wrongful Act that has occurred and is likely to result in a Claim; or [¶] b. All Claims made by the same person and arising out of the same error, omission or negligent act or series of errors, omissions or negligent acts will be deemed to have been made at the time the first of those Claims is made against any Insured.*" (Italics added, boldface omitted.)

The TIG Policy also includes the following relevant conditions:

"a. *Duties In Event of a Claim.* [¶] In the event a Claim is made against any Insured, or you have knowledge of a potential Claim, you must ensure that the following duties are performed: [¶] 1) Immediately record the details of the Claim or potential Claim, and the date the Claim was received by the Insured; [¶] 2) Notify us in writing as soon as practicable; [¶] 3) *Immediately* send us copies of any demands, notices, summonses or legal papers received in connection with the Claim; [¶] 4) Provide us with information at our request and cooperate with us in the handling of the Claim; [¶] 5) Assist us, at our request, in enforcing any right of recovery against any person or organization which may be liable to the Insured; and [¶] 6) Do nothing to prejudice any rights of recovery that may exist." (Second italics added, boldface omitted.)

The policy also states the following as to when a claim is "deemed" made:

"a. When we provide coverage on a 'Claims-Made' basis, we will consider a Claim to be made at the earlier of the following: [¶] 1) On the date you forward to us a Claim made against an Insured; or [¶] 2) On the date you first give us written notice: [¶] a) Of a Claim made

against an Insured; or [¶] b) That an error, omission or negligent act has happened that is likely to result in a Claim being made against an Insured. [¶] b. The written notice must be given to us as soon as you become aware of a potential Claim and must include all of the following: [¶] 1) The date, time, place of the circumstance relating to the potential Claim; [¶] 2) A detailed description of what happened; [¶] 3) The name and address of the injured party; [¶] 4) The names and addresses of all witnesses; and [¶] 5) The type of demand for Damages you expect. [¶] However, we will not consider any report made by you or on your behalf for the purpose of loss prevention, risk management or quality management to be a report of a Claim." (Boldface omitted.)

The TIG Policy includes the following definition of "wrongful act":

"10. Wrongful Act means any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the conduct of your professional services that you provide for a fee as stated in Item 7. on the Declarations Page. Any actual or alleged breach of duty, neglect, error or misstatement, misleading statement or omission arising out of, based on, related to, or in consequence of *the same related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events shall be deemed as arising from the same Wrongful Act.*" (Italics added, boldface omitted.)

C. The White Knight Claim

In November 2001 a default judgment was entered in the amount of \$403,694 against USF&G's insured, White Knight Limousine Service (the White Knight Action). The default judgment was entered in the White Knight Action as a result of Ward's failure to timely retain counsel and file a responsive pleading due to the fact that Ward's file clerk placed the complaint in a closed file.

In December 2001 Ward provided notice to TIG of a potential claim that USF&G might bring against Ward as a result of the default judgment. By letter dated March 12,

2002, USF&G made an actual claim against Ward, demanding that Ward pay for the amount of the default judgment and/or any appeal or settlement thereof (the White Knight Claim). On March 22, 2002, Ward formally tendered the defense of the White Knight Claim to TIG.

In March 2004 Ward and TIG entered into a settlement agreement with USF&G and its reinsurers, wherein USF&G released Ward for any and all claims which USF&G and its affiliates "had or now have or may claim to have as such claim relates to [Ward's] handling of the [White Knight Action]." (Boldface omitted.) Under the terms of the settlement, Ward contributed its \$50,000 deductible under the TIG Policy, and TIG paid an additional \$422,000 to fully resolve the White Knight Claim.

D. The JWP Claim

In January 2002 USF&G asserted another claim against Ward arising out of its alleged mishandling of a separate matter involving another USF&G insured, JWP Lenders Corp. (the JWP Claim). USF&G alleged that Ward failed to properly recognize coverage defenses that should have been raised in connection with the JWP Claim. Ward tendered the JWP Claim to Kemper Insurance, which had issued the claims made and reported policy in effect during the time of the JWP Claim. Ward never tendered the defense or indemnity of the JWP Claim to TIG.

E. Audit of Red Hawk Program in 2004

In June 2004 USF&G and DPCC conducted an audit of the claims files which Ward was administering under the Red Hawk Program. Based upon the 2004 audit, USF&G and DPCC concluded that Ward had afforded coverage, provided a defense and

paid settlements on a number of claims which were not covered under the insurance policies at issue. USF&G and DPCC also determined that Ward took unreasonable and unnecessary positions in handling numerous claims in the Red Hawk Program which resulted in excessive attorney fees and litigation costs.

F. The 2004 Claims

By letter dated November 1, 2004, Ward reported to Liberty six claims made in August 2004 against Ward by USF&G and DPCC arising out of Ward's alleged mishandling of claims made under Red Hawk Program (the 2004 Claims). Ward never tendered the defense or indemnity of the 2004 Claims to TIG and Ward never contended that the 2004 Claims were related to the White Knight Claim.

G. The 2005 Claims and the USF&G Action

On November 3, 2005, USF&G and DPCC filed an action against Ward, (the USF&G Action), asserting causes of action for negligence, breach of contract, breach of fiduciary duty and negligent misrepresentation as a result of Ward's alleged mishandling of numerous claims under the Red Hawk Program (the 2005 Claims). On February 22, 2006, Ward tendered the defense and indemnity of the 2005 Claims to Liberty. Liberty agreed to defend Ward in connection with the 2005 Claims under a reservation of rights. Ward retained its own counsel to defend the 2005 Claims, but Liberty paid all of Ward's defense fees and costs in connection with the 2005 Claims. Ward did not pay any defense fees and costs incurred in connection with the 2005 Claims.

When Ward tendered the 2005 Claims to Liberty, Ward sought credit against its deductible under the Liberty policy for amounts Ward paid in connection with the 2004

Claims on the basis that those claims were related to the 2005 Claims. Ward did not seek credit against the Liberty deductible for the \$50,000 Ward paid to resolve the White Knight Claim. Ward also did not tender the 2005 Claims to TIG.

In the underlying USF&G Action, USF&G asserted that Ward consistently failed to identify and properly address coverage issues, failed to identify and properly address liability issues, failed to adequately and properly evaluate damages, failed to properly pursue recoveries (such as subrogation and deductibles), and improperly assigned tasks to others that should have been performed by in-house adjusters and/or failed to adequately monitor the work and expenses of outside adjusters, attorneys, and vendors. USF&G also asserted that Ward's failure to properly manage the Red Hawk Program resulted in damages in excess of \$5,000,000.

In 2005 USF&G retained an expert, Michael Hale, to review approximately 5,500 claim files handled by Ward under the Red Hawk Program. After he completed his review, Hale prepared a schedule of Red Hawk Program files which he asserted were not properly handled by Ward (the Red Hawk Issues Files Schedule). The Red Hawk Issue Files Schedule sets forth over 900 separate examples of alleged improper claims handling by 20 different claims adjusters on policies issued by both USF&G and DPCC. The White Knight Claim was included on the Red Hawk Issues Files Schedule because at the time Hale prepared the schedule, he did not know that USF&G and Ward had entered into a general release of any and all claims that USF&G possessed against Ward arising out of the White Knight Action. . The White Knight Claim is the only claim identified on the Red Hawk Issue Files Schedule which involves a default judgment. Prior to entry of

judgment in the USF&G Action, Ward never advised TIG that the White Knight Claim was on a list of problem claims files prepared by USF&G's expert or that the claim was part of the USF&G Action. The operative complaint in the USF&G Action provided by Ward to TIG did not mention or otherwise refer to the White Knight Claim. .

H. Ward's Motion in Limine To Exclude Evidence of the White Knight Claim

Before trial in the USF&G Action concerning the 2005 Claims, Ward filed a motion in limine to exclude any reference to alleged negligent acts of Ward in connection with the White Knight Claim and to preclude USF&G from seeking any damages relating to the White Knight Claim based upon the prior general release entered into between USF&G and Ward. USF&G represented to the court that they were not seeking to recover damages based upon Ward's handling of the White Knight Action, but only sought to use it as evidence of Ward's negligence.

Ward asserted that the release of the White Knight Claim was "a release of all claims, known, unknown" and that TIG and Ward paid \$472,000 "to get rid of that case entirely, not to have it show back up." The court adopted this position and granted Ward's motion in limine, precluding USF&G and DPCC from making any reference to the White Knight Claim during trial in the USF&G Action.

I. Ward Does Not Provide Notice to TIG Concerning the 2005 Claims Until 2008

The first time that TIG was notified of the existence of the 2005 Claims was on January 4, 2008 (more than two years after the 2005 Claims were first made), when in-house counsel for Ward sent an e-mail to TIG, providing TIG with a copy of the complaint in the USF&G Action and a copy of Liberty's supplemental reservation of

rights letter, dated June 28, 2007. That e-mail stated that Ward was sending TIG a copy of the complaint in the USF&G Action and Liberty's supplemental reservation of rights letter to provide notice to TIG that, if the 2005 Claims constitute a single claim, then such claim should be deemed part of the White Knight Claim. The January 2008 e-mail did not request that TIG defend, indemnify or otherwise assist Ward in connection with the 2005 Claims. The January 2008 e-mail also did not advise TIG that the White Knight Claim was part of the USF&G Action.

On October 13, 2008, Ward's in-house counsel sent a second e-mail to TIG advising that jury selection was starting in the USF&G Action and that Liberty was still defending Ward in connection with the 2005 Claims. The October 2008 e-mail also provided TIG with a copy of a Liberty's complaint for declaratory relief in the instant matter, filed on March 7, 2008. The October 2008 e-mail did not request that TIG defend, indemnify or otherwise assist Ward in connection with the 2005 Claims. Liberty's position in the coverage action was that each of the 900 claims was a separate claim subject to a separate deductible.

On November 21, 2008, Ward's in-house counsel sent a third e-mail to TIG, attaching a copy of the verdict form and judgment from the USF&G Action, reflecting that a \$6.6 million verdict had been entered against Ward. The November 2008 e-mail states that, if it is determined that all of the various loss allegations arising out of the Red Hawk Program constitute a single claim, then the matter was covered as part of the White Knight Claim. The November 2008 e-mail requested that TIG advise Ward as to its

position regarding the matter. The November 2008 e-mail did not request that TIG defend, indemnify or otherwise assist Ward in connection with the 2005 Claims.

In response to Ward's November 21, 2008 e-mail, TIG's coverage counsel advised Ward that the 2005 Claims could not be covered under the TIG Policy since the 2005 Claims were not first made and reported to TIG during the TIG policy period, which is a condition precedent to coverage under the TIG Policy. TIG further advised Ward that TIG had obtained a general release from USF&G in favor of Ward, which released Ward from any and all claims relating to Ward's handling of the White Knight Action, and that such release precluded USF&G from seeking any damages arising out of the White Knight Action in connection with the 2005 Claims.

In response to TIG's letter dated January 12, 2009, Ward stated that it disagreed with Liberty's position regarding "relation back and inter-related claims" and that Ward would use the very same arguments raised by TIG "as one of the arrows in [Ward's] quiver against Liberty."

J. Ward Enters into Covenant Not To Execute Agreement with USF&G and DPCC

In September 2009 Ward entered into a covenant not to execute agreement with USF&G and DPCC to resolve the 2005 Claims, whereby Ward dismissed its appeal from the judgment in the USF&G lawsuit. Ward, USF&G and DPCC stipulated that, at the time of Ward's negligent conduct which was the subject of the 2005 Claims, Ward was insured under a professional liability policy issued by Liberty in effect during the policy period from May 1, 2004 to May 1, 2005.

The parties to the covenant not to execute agreement also stipulated that as a result of Liberty's refusal to settle within policy limits, the parties proceeded to trial, wherein a verdict was rendered and judgment entered against Ward for \$6.6 million. The covenant not to execute agreement required Ward to testify in this action that at the time of the negligent conduct which was the subject of the 2005 Claims, Ward was insured under the Liberty policy in effect for the period May 1, 2004 to May 1, 2005, and that Liberty's refusal to settle within policy limits caused the excess verdict.

The covenant not to execute agreement modified Ward's legal obligation to pay the judgment. Specifically, Ward became contractually obligated to pay only \$1 million of the \$6.6 million judgment and agreed to prosecute a claim against Liberty and TIG for breach of contract and bad faith. USF&G and DPCC were contractually obligated to file a notice of satisfaction of judgment once Ward's action against Liberty and TIG was completed. Ward did not assign any purported rights that it may have had against Liberty or TIG to USF&G and DPCC.

K. The CSU Workers' Compensation Program

On August 6, 1999, The trustees of the California State University (CSU) retained Ward to serve as its TPA to administer all workers' compensation claims made against CSU. In February 2002 CSU made a claim against Ward for improperly assigning routine workers' compensation claims to nurse case managers (the 2002 CSU Claim). In January 2004 CSU sued Ward for alleged program-wide misconduct (the CSU Action).

AIG, which insured Ward under a professional liability policy for the period April 22, 2003 through April 22, 2004 (the AIG Policy), denied coverage for the CSU Action

on the basis that the first claim made by CSU against Ward arising out of its workers' compensation program was first made in February 2002, before the AIG Policy began and that all claims asserted by CSU arising out of its workers' compensation program should be considered a single claim first made when the 2002 CSU Claim was made.

Both Ward's coverage counsel and general counsel for Ward's majority shareholder, U.S. Risk Insurance Group, argued that the 2002 CSU Claim with respect to overutilization of nurse case managers arose out of a different and unrelated wrongful act than the 2004 lawsuit by CSU alleging a general mishandling of the entire workers' compensation program.

III. PROCEDURAL BACKGROUND

A. Liberty's Complaint for Declaratory Relief

On March 7, 2008, during the pendency of the underlying USF&G Action, Liberty filed a complaint seeking declaratory relief that it owed no duty to defend or indemnify Ward in connection with the 2005 Claims under the Liberty Policy.

B. Ward's Cross-Complaint against TIG

On October 16, 2009, Ward filed a first amended cross-complaint naming TIG as a cross-defendant. In its first amended cross-complaint, Ward alleged that the wrongful conduct which was the subject of the 2005 Claims was covered under the claims made and reported policies issued by Liberty. Ward admits in its first amended cross-complaint that the first time that USF&G asserted that Ward had generally mishandled the Red Hawk Program was when USF&G filed the USF&G Action concerning the 2005 Claims in November 2005.

C. Ward's Admissions in the Instant Matter

In response to requests for admissions propounded upon Ward by Liberty in this matter, Ward conceded that the White Knight Claim is not related to the 2005 Claims. Ward denied Liberty's request for admission requesting Ward to admit that the White Knight Claim arose from the same interrelated wrongful acts as the 2005 Claims. In its response to Form Interrogatory 17.1, Ward asserted that the White Knight Claim involved Ward's alleged failure to timely answer a summons and complaint against an insured, in a single lawsuit, leading to a default judgment. By contrast, Ward explained the 2005 Claims involved Ward's alleged breach of duty in failing to properly handle claims under the Red Hawk Program on a program-wide basis.

D. TIG and Ward's Cross-Motions for Summary Judgment/Summary Adjudication

On July 9, 2010, TIG filed a motion for summary judgment or, in the alternative, summary adjudication, seeking a determination that TIG did not owe any duty to defend or indemnify Ward in connection with the USF&G Action and the 2005 Claims asserted therein. Ward also filed a cross-motion for summary adjudication.

The court granted TIG's motion for summary judgment. The trial court also denied Ward's cross-motion for summary adjudication and overruled all of Ward's evidentiary objections.

In granting TIG's motion for summary judgment, the court found as follows:

"The Court does not believe that the 2005 claims arise out of 'the same error, omission or negligent act or series of errors, omissions or negligent acts' as the White Knight claim involving Ward's failure to secure counsel for a USF&G insured. The Court similarly does not believe that the 2005 claims are 'similar or related Wrongful Acts,

incidents, errors, omissions, or negligent acts' [Citation.] Nor does the Court believe the 2005 claims and the White Knight claim are based on related facts, circumstances, situations, transactions or events. [Citation.] [¶] Not only does the Court conclude the White Knight claim and the 2005 claims are not logically or causally related so as to allow the two to collapse into one claim, the Court believes Ward's conduct demonstrates there was no intent on the part of the parties that these matters formed a single claim. [Citation.] In this regard, the Court notes that Ward (1) failed to ever tender to TIG other Red Hawk claims (the JWP claim and the 2004 claims); (2) failed to even inform TIG of the 2005 claims for two years; (3) admitted in its First Amended Cross-Complaint that the first time USF&G had asserted that Ward had generally mishandled the Red Hawk Program was when USF&G filed the underlying action [citation]; and (4) denied that the White Knight claim arose from the same wrongful act as the Red Hawk claims [citation]."

The court also rejected Ward's argument that TIG breached its duty to defend:

"The Court rejects this argument for at least two reasons. First, Ward failed to comply with its duties under the policy to notify TIG as soon as practicable of the claim. [Citation.] Second, in light of the fact Liberty paid all of Ward's defense costs in connection with the 2005 claims, the Court concludes Ward has sustained no damage due to any purported failure to defend. [Citation.] There is no evidence Ward has had - or is obligated - to reimburse Liberty for these costs."

DISCUSSION

I. *STANDARDS GOVERNING SUMMARY JUDGMENT MOTIONS*

In appeals from summary judgments, we review the court's ruling on the motion *de novo*. (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.)

In doing so, we "apply the same rules and standards that govern a trial court's determination of a motion for summary judgment." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258.) Summary judgment should be granted if "all the papers

submitted show that there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

To satisfy its burden, a moving defendant is not required to "conclusively negate an element of the plaintiff's cause of action. . . . All that the defendant need do is to 'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. omitted (*Aguilar*)). Once this defendant's burden is met, the "burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists" (Code Civ. Proc., § 437c, subd. (p)(2).)

On de novo review, we view the evidence in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions and strictly scrutinizing the defendant's showing, and resolve any evidentiary doubts or ambiguities in plaintiff's favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 274, fn. 2.) "Summary judgment will be upheld when, viewed in such a light, the evidentiary submissions conclusively negate a necessary element of plaintiff's cause of action, or show that under no hypothesis is there a material issue of fact requiring the process of a trial, thus defendant is entitled to judgment as a matter of law." (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1360-1361.)

II. GENERAL PRINCIPLES OF INSURANCE POLICY INTERPRETATION

The interpretation of the meaning of an insurance policy and the scope of coverage are questions of law. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th

1474, 1481.) Because the relevant facts appear undisputed, and the only issue is the legal question involving construction of the policy and the application of its provisions to the claims asserted by Ward, we review the trial court's ruling de novo. (*Maxconn Inc. v. Truck Ins. Exchange* (1999) 74 Cal.App.4th 1267, 1272.)

"An insurance policy, like all contracts, is to be interpreted to effectuate the mutual intent of the parties. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821.) Where possible, we must look solely to the terms of the policy, and the clear and explicit meaning of the policy terms (understood in their ordinary and popular sense) will govern our interpretation. (*Id.* at p. 822.) If a policy is ambiguous (i.e. susceptible of more than one reasonable interpretation), the ambiguity is construed in favor of coverage. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912.) ¶¶

However, the predicate to interpreting ambiguities in favor of coverage is that the policy be reasonably susceptible of more than one interpretation. [If] a policy clearly excludes coverage, we will not indulge in [fanciful] constructions to divine some theoretical ambiguity to find coverage. (*City of Laguna Beach v. Mead Reinsurance Corp.* (1990) 226 Cal.App.3d 822, 830-831, italics omitted.) An insurer is entitled to limit its coverage to defined risks, and if it does so in clear language, we will not impose coverage where none was intended." (*Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 469.)

III. "CLAIMS MADE" POLICIES

"All professional liability policies were at one time 'occurrence' policies. [Citation.] Underwriters soon realized, however, that 'occurrence' policies were

unrealistic in the context of professional malpractice because the injury and the negligence that caused it were often not discoverable until years after the delictual act or omission. In an effort to reduce their exposure to an unpredictable and lengthy 'tail' of lawsuits filed years after the occurrence they agreed to protect against, underwriters shifted to the 'claims made' policy. [Citation.] This type of policy differed materially from an 'occurrence' policy in several aspects. Most notably, it was transmittal of notice of the claim to the insurer which was the event that invoked coverage." (*Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1358 (*Pacific Employers*)).)

The social utility of claims made policies is explained by the fact that underwriters, secure in the knowledge "claims will not arise under the subject policy after its expiration or termination can underwrite a risk and compute premiums with greater certainty. An insurance company can establish its reserves without having to consider the possibilities of inflation beyond the policy period, upward-spiraling jury awards, or later changes in the definition and application of negligence. [Citation.] There are benefits to the insured as well. Among other things, 'claims made' policies aid in making insurance more available and less expensive than 'occurrence' policies." (*Pacific Employers, supra*, 221 Cal.App.3d at pp. 1359-1360, fn. omitted; *KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 972.)

IV. ANALYSIS

A. *The Homestead Case*

Homestead Ins. Co. v. American Empire Surplus Lines Ins. Co. (1996) 44

Cal.App.4th 1297 (*Homestead*) involved a cross-complaint between two insurers, each of which had issued a "claims made" policy to the same insured, an escrow company, in consecutive years. (*Id.* at p. 1301.) The plaintiffs filed a complaint against the insured and others during the term of a policy issued by American Empire Surplus Lines Insurance Company (American Empire). The action arose from a commercial real property sales transaction. Other plaintiffs later filed a complaint against the insureds and others during the term of a policy issued by Homestead Insurance Company (Homestead Insurance), alleging that the defendants had defrauded investors in a series of transactions. (*Id.* at pp. 1301–1302.) The insured and Homestead Insurance alleged that the second action was a claim made during the prior policy period because both actions arose from " 'a series of interrelated acts' " and therefore were "treated 'as a single claim' " under the terms of a provision in the American Empire policy. (*Id.* at pp. 1302, 1304–1305.)

In *Homestead*, the Court of Appeal noted that the purpose of a "claims made" policy, as distinguished from an "occurrence" policy, is to limit the insurer's risk to claims made during the policy period regardless of when the injury or its cause occurred. This reduces the insurer's potential liability on a policy and results in a lower premium for the insured. (*Homestead, supra*, 44 Cal.App.4th at p. 1304.) The Court of Appeal concluded that the second action was a claim made after the American Empire policy

period elapsed and that coverage under the American Empire policy did not extend to claims made after the policy period. (*Id.* at p. 1305.) In doing so, the Court of Appeal stated that the "single claim" provision did not cause claims made during different policy periods to merge into a single claim and did not shift liability from one insurer to another. (*Ibid.*) The *Homestead* court stated further that a claim, or multiple claims treated as a single claim, must be made during the policy period to trigger coverage. (*Ibid.*)

The court, noting that the position of the insured and Homestead would "stretch the tail" of the first insurer's policy to include a claim made against the insured during the second policy period, rejected the argument because "[l]engthening the policy tail . . . is the very thing 'claims made' coverage exists to prevent." (*Homestead, supra*, 44 Cal.App.4th at p. 1305.) The court held the definition of "claim" in the first policy ("[c]laims arising out of the same act or out of a series of interrelated acts shall be . . . treated as a single claim' ") (*id.* at p. 1303) remained subordinate to, and did not vary, the requirement in the policy that the first insurer agreed to pay for loss from claims made against the insured "during the policy period," and to be covered by the policy, a claim—or a group or series of claims "treated as a single claim"—still had to have been made during the policy period. (*Id.* at pp. 1303-1306.)

Under the clear language of TIG's policy, it only provides coverage for claims that are first made against Ward during the policy period. The policy further requires that the claim be first reported during the policy period, or within 30 days after the end of the policy period. As in *Homestead*, Ward cannot use the "related claims" language to bring

over 900 claims made 46 months after expiration of the TIG policy back into the policy period.

Ward relies upon *Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co.* (2004) 120 Cal.App.4th 17 (*Friedman*), for the proposition that "related claims" that are made after the policy period has expired may be deemed to have been made at the time of a claim made during the policy period. However, *Friedman* is distinguishable. In fact, the Court of Appeal in *Friedman* itself expressly distinguished itself from *Homestead*, stating: "Because the [*Homestead*] case involved a dispute between two insurers on successive years of risk, the court expressly found it unnecessary to analyze whether the first lawsuit and the second lawsuit arose from 'interrelated' acts." (*Friedman*, at p. 33.) Likewise in this case we have a dispute between two insurers on successive years of risk, and, as in *Homestead*, we need not analyze whether the White Knight and Red Hawk claims arose from interrelated acts because even if they did so "the insured must still receive notice of those claims during the policy period. If it does not, the policy does not cover such claims." (*Homestead, supra*, 44 Cal.App.4th at p. 1306.)

In dicta, the Court of Appeal in *Friedman, supra*, 120 Cal.App.4th at page 33 stated: "To the degree that *Homestead* can be read for the blanket proposition that no claim made after the expiration of a claims made policy can ever be ascribed to that policy because the definition of claim is 'subordinate' to the insuring clause promising to pay any claim made during the policy period [citation] we must respectfully part company with it."

However, the *Homestead* decision expressly acknowledged that the potential claim period is an exception to the general rule that claims must be first made and reported during the policy to be covered. As long as a notice of such a potential claim is made during the policy period, an actual claim made after expiration of a policy period is covered. (*Homestead, supra*, 44 Cal.App.4th at p. 1306.) Thus *Homestead* is not inconsistent with *Friedman*.

Ward also relies on *Westrec Marina Management, Inc. v. Arrowood Indemnity Co.* (2008) 163 Cal.App.4th 1387 (*Westrec*). However, *Westrec* does not support Ward's position.

There, the issue was whether a demand letter in an employment dispute and a subsequent civil action based upon the same dispute was the same claim. (*Westrec, supra*, 163 Cal.App.4th at pp. 1394-1395.) The policy required that the claim be "first made" during the policy period and reported within 30 days after expiration of the policy period. (*Id.* at p. 1389.) As the demand letter was received during the initial policy period, but was not reported within 30 days after the policy expired, there was no coverage for the complaint, which was filed and served during a renewal policy period, because the claim was first made during the earlier policy period. The Court of Appeal distinguished *Homestead* factually because *Homestead*, unlike *Westrec*, did not address the effect of a "single claim" provision limiting coverage to claims "first made" during the policy period. (*Westrec*, at p. 1396.) The effect of application of the "single claim" provision in *Westrec* was that it did not "extend coverage to a claim made after the policy

period, contrary to the purpose of a 'claims made' policy, or to shift liability from one insurer to another." (*Ibid.*)

The Court of Appeal in *Westrec* did not overrule or otherwise question the *Homestead* opinion. Indeed, it affirmed the holding in *Homestead* that extending coverage to claims made after a claims made and reported policy expires is contrary to the purpose of a claims made policy. (*Westrec, supra*, 163 Cal.App.4th at p. 1396.)

Ward also relies on a case involving a policy covering sexual abuse. This case also inapplicable. *TIG Insurance Co. v. Smart School* (S.D. Fla. 2005) 401 F.Supp.2d 1334 involved an occurrence based policy, not a claims made policy. (*Id.* at p. 1347.) The issue there did not involve the question of when a claim was *made*, but rather when a claim *occurred*. (*Ibid.*) Accordingly, it has no relevance to our analysis.

Here, it is undisputed that the 2005 Claims were not made against Ward until 2005, when the USF&G Action was filed. It is also undisputed that the 2005 claims were not reported to TIG until January 2008, when Ward's in-house counsel sent an e-mail to TIG, providing TIG with a copy of the complaint in the USF&G Action. "If a court were to allow 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." (*Pacific Employers, supra*, 221 Cal.App.3d at pp. 1358-1359.)

B. *Notice of Potential Claim As to the White Knight Action*

As discussed, *ante*, in December 2001, during the TIG policy period, Ward gave TIG notice of a potential claim as a result of the default judgment entered against USF&G's insured in the White Knight Action. Also, as discussed above, the TIG policy

contains a potential claim provision that requires Ward to give notice to TIG of a wrongful act that is likely to result in a potential claim. That report must give a detailed description of the potential claim.

Under this provision, if Ward reports a potential claim with specifics and details during the policy period the actual claim will be deemed first made and reported during the policy period. "This is the only exception to 'claims made' coverage." (*Homestead, supra*, 44 Cal.App.4th at p. 1306.) To invoke coverage under this clause, the notice must be sufficiently specific to enable the insurer to gauge its potential liabilities for that year. (*KPFF, Inc. v. California Union Ins. Co., supra*, 56 Cal.App.4th at p. 975.)

At no time during the TIG policy period did Ward ever provide TIG written notice of any facts, circumstances or other information that could be considered notice of a potential claim by USF&G against Ward concerning the alleged program-wide problems with the Red Hawk Program. No one was aware in 2001 that USF&G years later would allege that Ward had generally mishandled the entire Red Hawk Program and seek \$6 million in damages. Thus, the notice of potential claims clause has no application here.

C. *The "Related Acts" Provision*

As discussed *ante*, the Court of Appeal in *Homestead* considered and rejected the argument that a related acts provision in a professional liability policy could be used by an insured to "stretch the tail" of a professional liability claims made policy to cover claims first made and first reported after the policy had expired. (*Homestead, supra*, 44 Cal.App.4th at p. 1305.) The Court of Appeal there found that the policy definition of "claim" remains subordinate to the requirement that the claim be first made during the

policy period. (*Ibid.*) In this case, the TIG policy also requires that the claim be reported during the policy period, so that the definition of "wrongful act" and the limitations on the number of deductibles or limits of liability that may apply to related acts is still subordinate to the condition of coverage that the claim be reported during the TIG policy period.

However, even if the "related acts" provision of the TIG policy could be construed to create coverage for claims first reported after the TIG policy expired to the extent such claims are related to claims first made during the TIG policy period, the White Knight Claim and the 2005 Claims do not arise out of the same wrongful conduct nor do they arise out of a series of negligent acts. In *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854 (*Bay Cities*), the California Supreme Court concluded that the term "related" encompasses acts that are either logically or causally related. (*Id.* at 872-873.) The high court in *Bay Cities* explained, however, that the term "related" does not encompass every conceivable logical relationship and that at some point, a relationship between two claims, though perhaps logical, might be so attenuated that an objectively reasonable insured could not have expected they would be treated as a single claim. (*Id.* at 873.) In *Bay Cities*, the court held that multiple errors by a *single* attorney in connection with a *single* case resulted in a *single* injury. (*Id.* at p. 869.)

Bay Cities does not support Ward's position that over 900 program-wide claims can be deemed related to a \$472,000 default claim, where the actionable conduct by the insured is distinct in time, character and impact, and is only related to the same insurance program. In this case, the *only* factual nexus between the White Knight Claim and 2005

Claims is that USF&G was the claimant in the White Knight Claim and was one of the plaintiffs in the litigation that arose out of the 2005 Claims. The 2005 Claims were based upon negligent practices in more than 900 claims files handled by 20 different claims adjusters. The actionable misfeasance by Ward cannot be characterized as a series of related acts, but instead involves conduct linked exclusively by the fact that Ward maintained a multi-year relationship with USF&G and DPCC under the Red Hawk Program.

In asserting that 2005 claims were related to the White Knight claim, Ward argues that the "real meat" of USF&G's claims against Ward was Ward's understaffing and inadequate training. However, understaffing and inadequate training was not the wrongful act that caused a default to be entered against USF&G's insured in the White Knight Action. Rather, the default judgment was entered as a result of a file clerk's mistake.

In *Eureka Federal Sav. & Loan Assn. v. American Casualty Co.* (9th Cir. 1989) 873 F.2d 229, the Ninth Circuit considered "disparate acts and omissions made by five directors in connection with issuance of loans to over 200 unrelated borrowers" and held that the claims could not be aggregated into a single loss. (*Id.* at p. 235.)

Likewise in *Fin. Mgmt. Advisors, LLC v. American Intl. Specialty Lines Ins. Co.* (9th Cir. 2007) 506 F.3d 922, the Ninth Circuit reversed summary judgment in favor of an insurer on the grounds that the acts were not "related" within the meaning of the policy's provision for "related wrongful acts." In that case a professional financial advisor and portfolio manager advised two unrelated investors to invest in a specific type

of security known as a collateral bond obligation. Based upon that advice, both investors invested in the same bond fund. (*Id.* at pp. 924-925.) When the value of the bond funds declined, both investors filed actions in different policy years. Despite the fact that there was significant overlap in the allegations of wrongdoing asserted by the two investors and the fact that both investors alleged that FMA's conduct was part of a common scheme or pattern and practice of behavior, the Ninth Circuit found that their claims did not arise out of the same or related facts. (*Id.* at p. 926.)

For a claim to be deemed related under the TIG Policy, it must not only be made by the same person, but it must also arise out of the same negligent act or a series of negligent acts. The White Knight claim and the subsequent 2005 claims involve separate underlying claims files, separate claims adjusters, separate injuries and separate allegations of wrongdoing that occurred at different times and were attributable to different acts, errors or omissions.

Indeed, Ward has admitted as much in its discovery responses in this action. Liberty served a first set of requests for admission on Ward. Request for Admission No. 47 provides, as follows: "Admit that the WHITE KNIGHT LIMO CLAIM arose from the same INTERRELATED WRONGFUL ACTS as the RED HAWK CLAIMS." Liberty's first set of requests for admission defines the "WHITE KNIGHT LIMO CLAIM" as "USF&G's claim made against [Ward] in or about 2001, regarding [Ward's] alleged mishandling of an underlying claim filed against White Knight Limousine Service, which [Ward] reported to TIG and the TIG identified as claim number B01139795."

"RED HAWK CLAIMS" is defined as "the claims submitted under the RED HAWK PROGRAM that USF&G contends [Ward] mishandled and that were the subject of the UNDERLYING LAWSUIT." "INTERRELATED WRONGFUL ACTS" is defined as "WRONGFUL ACTS 'that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transactions or causes.' "

In response to Liberty's request for Admission No. 47, Ward denied the request.

Liberty also served a first set of form interrogatories on Ward, which included Form Interrogatory 17.1. Form Interrogatory 17.1 provides in part: "Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission: (a) state the number of the request; (b) state all facts upon which you base your response

In response to Form Interrogatory 17.1, explaining the denial of request for Admission No. 47, Ward provided the following verified answer: "The White Knight Limo claim involved Ward's alleged failure to timely answer a summons and complaint against an insured, in a single lawsuit, leading to a default judgment. *By contrast*, as the request defines 'Red Hawk Claims' as claims that were the subject of the Underlying Lawsuit, *the 'Wrongful Act' alleged against Ward in the Underlying Lawsuit involved its alleged breach of duty in failing to properly handle claims under the Red Hawk Program on a program-wide basis.*" (Italics added.)

Thus, Ward admitted that the White Knight Claim is unrelated to the 2005 Claims as they involved different, unrelated wrongful acts. Ward could not contradict this

judicial admission to defeat TIG's motion for summary judgment. Code of Civil Procedure section 2033.410 states that "[a]ny matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action." "[A] judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues." (*Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120.) Thus, a party opposing a motion for summary judgment cannot offer evidence which contradicts its own judicial admissions. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 ["Admissions or concessions made during the course of discovery govern and control over contrary declaration lodged at a hearing on a motion for summary judgment"].)

Accordingly, Ward's admission conclusively establishes that there was no basis for coverage under the TIG Policy, as the White Knight Claim did not arise out of the same wrongful act or series of related wrongful acts as the 2005 Claims.

D. Ward's Objectively Reasonable Expectations Pertaining to Coverage

Ward asserts that the court erred in considering the reasonable expectations of the parties because the policy language at issue is unambiguous. However, consideration of the insured's objectively reasonable expectations is relevant to "whether the disputed policy language, in context, is free from ambiguity and has a plain and clear meaning to a layperson." (*Nissel v. Certain Underwriters at Lloyds of London* (1998) 62 Cal.App.4th 1103, 1112, italics omitted; see also *Cooper Companies v. Transcontinental Ins. Co.*, (1995) 31 Cal.App.4th 1094, 1106. Indeed, in *Bay Cities* the California Supreme Court specifically acknowledged that the reasonable expectations of an insured are relevant in

evaluating whether two or more claims should be treated as a single claim under a professional liability policy. (*Bay Cities, supra*, 5 Cal. 4th at p. 873.)¹

Here, Ward did not have an objectively reasonable expectation that, by providing notice of a potential claim regarding the White Knight Action during the TIG policy period, it could obtain "tail coverage" for every claim ever made by USF&G that related to the Red Hawk Program. Ward's conduct with respect to subsequent claims pertaining to the Red Hawk Program demonstrates this point.

In January 2002, after Ward had already provided TIG with notice of a potential claim in connection with the White Knight action, USF&G asserted another claim against Ward arising out of its alleged mishandling of the Red Hawk Program—the JWP Claim. Ward did not tender the defense or indemnity of the JWP Claim to TIG.

Similarly, in August 2004, when USF&G and DPCC asserted the 2004 Claims, Ward never tendered the defense or indemnity of these claims to TIG and Ward never contended that the 2004 Claims were related to the White Knight Claim. Ward tendered the defense and indemnity of the 2004 Claims to Liberty under the Liberty policy. Accordingly, the failure of Ward to ever tender to TIG any of the numerous other claims made by USF&G against Ward which arose out of the Red Hawk Program after the

¹ In a footnote, without citation to any authority, Ward also asserts the court erred in overruling its objection to evidence offered by TIG on this issue. By failing to cite any authority, Ward has waived this argument. (*Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 695, fn. 9 ["An issue merely raised by a party without any argument or authority is deemed to be without foundation and requires no discussion."].)

White Knight claim establishes that Ward did not reasonably expect the TIG policy to apply to the 2005 claims.

This is further evidenced by the position taken by Ward with respect to the 2002 CSU Claim against Ward for improperly assigning routine workers' compensation claims to nurse case managers. In January 2004 CSU sued Ward for alleged program-wide misconduct.

AIG denied coverage for the CSU Action on the basis that the first claim made by CSU against Ward arising out of its workers' compensation program was first made in February 2002, before the AIG Policy began and that all claims asserted by CSU arising out of its workers' compensation program should be considered a single claim first made when the 2002 CSU Claim was made.

Ward maintained that the 2002 CSU Claim with respect to overutilization of nurse case managers arose out of a different and unrelated wrongful act than the 2004 lawsuit by CSU alleging a general mishandling of the entire workers' compensation program.

The facts presented in the CSU Action are virtually identical to facts presented with respect to the 2005 Claims asserted by USF&G and DPCC. In each case, the client made a specific claim against Ward regarding specific wrongful conduct on a discrete program matter and then, several years later, made a claim against Ward for program-wide problems. The fact that the claims are asserted by the same client does not create coverage under the TIG Policy, when the 2005 Claims were not first made and reported during the TIG Policy period and when Ward failed to provide notice during the TIG

policy period of any circumstances regarding a potential claim that USF&G might bring based upon program-wide problems with the Red Hawk Program.

F. Duty To Defend Ward in Connection with the 2005 Claims

1. No request for a defense

Mere knowledge that an insured is sued does not constitute tender of a claim.

What is required is knowledge that the suit is potentially within the policy's coverage coupled with knowledge that the insurer's assistance is desired. (*Cravens, Dargan & Co. v. Pacific Indem. Co.* (1972) 29 Cal.App.3d 594, 602 [knowledge of action does not trigger duty to defend where defense not requested by insured].)

Ward never requested that TIG defend the 2005 Claims and never provided notice to TIG during the litigation of any settlement offer which had been made by USF&G, which is further evidence that Ward was not seeking the assistance of TIG. Ward also never provided any documents or other information to TIG which would have suggested that the White Knight Claim was part of the USF&G Action. Ward cannot rely upon the Red Hawk Issues Files Schedule to create a duty to defend when Ward never advised TIG during the pendency of the USF&G Action that the White Knight Claim was at issue in the case. Failure by an insured to provide an insurer with extrinsic evidence beyond the allegations set forth in the complaint, precludes the insured from relying upon such evidence for purposes of triggering a defense obligation. (*Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376, 1388.)

2. *No damages*

Ward also cannot state any claim against TIG for failure to defend because Ward was fully and completely defended by Liberty, and Ward paid no money in connection with its defense of the 2005 Claims. Under California law, "an insured is entitled to only a single full defense." (*San Gabriel Valley Water Co. v. Hartford Accident & Indem. Co.* (2000) 82 Cal.App.4th 1230, 1241.) Thus, where one insurer has paid for the insured's defense in an underlying litigation, a second insurer's alleged failure to do so is "of no consequence" to the insured. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1090.) Here, Ward has admitted in response to requests for admissions that it was fully defended by Liberty and that Ward did not pay any sums toward its defense of the 2005 Claims. (AE 41, at 3:15-25; 4:1-10).

Ward's reliance upon *Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992 does not support its contention there was a duty to defend. There, the Court of Appeal held that "where the insurer that accepts the defense has a policy limit far below the amount claimed, and far lower than that of the insurer that declines the defense" (*id.* at p. 1005), a defense by the one insurer does not excuse the failure of the other insurer to provide a defense. (*Ibid.*) However, we do not have that situation here.²

² Ward has filed a "Notice of Erratum to Appellants Reply Brief" asserting that it inadvertently omitted the citation to *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498 in its reply brief, as additional authority following its citation to *Safeco Ins. Co. of America v. Parks, supra*, 170 Cal.App.4th 992. TIG objected to the "Notice of Erratum" as improper supplemental briefing filed without leave from this court. TIG is correct. (See Cal. Rules of Court, rule 8.200(a)(4).) Accordingly we have not considered this new, unauthorized citation in rendering this opinion.

The limits of the Liberty Policy were adequate to resolve the USF&G Action, as evidenced by the fact that several policy limits demands were made to Liberty which it refused to accept. In addition, Ward has stipulated that it was Liberty's failure to accept USF&G's policy limits demand that resulted in the \$6.6 million judgment. Accordingly, TIG was entitled to summary adjudication that it did not breach any duty to defend Ward against the 2005 Claims.

3. *No timely demand*

The TIG Policy, under Section D, entitled CONDITIONS, requires that Ward "[i]mmediately send [TIG] copies of any demands, notices, summonses or legal papers received in connection with the Claim." (Boldface omitted.) Ward first provided TIG with notice of the underlying USF&G Action in January of 2008, almost two years after Ward had notified Liberty of the complaint. Time is of the essence in connection with a claims made and reported policy. Accordingly, failure to comply with a reporting requirement precludes coverage for the claim, without any obligation by the insurer to prove prejudice. (*Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 760-762; *Pacific Employers, supra*, 221 Cal.App.3d at pp. 1358-1361.)

Ward asserts that TIG waived the right to assert the timeliness of Ward's notice of the 2005 Claims as a basis for denying coverage because TIG did not cite that defense in stating its coverage position. In support of this position, Ward cites Insurance Code section 554, which provides, "Delay in the presentation to an insurer of notice of proof of loss is waived . . . if he omits to make objection promptly and specifically on that ground." However, the California Supreme Court has rejected such a waiver rule,

holding that "an insurer does not impliedly waive coverage defenses it fails to mention when it denies the claim." (*Waller v. Truck Ins. Exchange* (1995) 11 Cal.4th 1, 31.) Relying upon *Waller*, the District Court for the Northern District of California rejected an insured's argument that Insurance Code section 554 provided a basis upon which an insurer could waive a late notice coverage defense by not timely asserting it. *Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co.* (N.D. Cal. 2007) 480 F.Supp.2d 1182, 1191-1192.) Rather, the insured must still show some misconduct by the insurer or detrimental reliance by the insured. (*Id.* at p. 1191.) Under California law, "waiver requires the insurer to intentionally relinquish its right to deny coverage, and . . . a denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial." (*Waller, supra*, 11 Cal.4th at p. 31.)

Claims made and reported policies differ from occurrence policies in that timely notice is a condition precedent to coverage so that insurers can properly establish reserves and can charge a lower premium based upon the knowledge that their policies do not provide long tail coverage. (*Pacific Employers, supra*, 221 Cal.App.3d at pp. 1359-1360.) Here, Ward waited over two years to provide notice of the 2005 Claims, despite the fact a condition to coverage under the TIG Policy was that Ward immediately provide TIG with copies of any demands, notices, summonses or legal papers received in connection with a claim. Ward's two-year delay in providing TIG with a copy of the USF&G complaint relieved TIG of any duty to defend.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P.J.

HUFFMAN, J.