

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 16-0295-DOC-AJWx

Date: July 12, 2017

Title: PHILADELPHIA INDEMNITY INSURANCE COMPANY V. IEC
CORPORATION

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Goltz
Courtroom Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT FOR
PLAINTIFF:
None Present

ATTORNEYS PRESENT FOR
DEFENDANT:
None Present

**PROCEEDINGS (IN CHAMBERS): ORDER DENYING PLAINTIFF’S
MOTION TO COMPEL
ARBITRATION [79]**

Before the Court is Plaintiff Philadelphia Indemnity Insurance Company’s (“Plaintiff”) Motion to Compel Arbitration (“Motion”) (Dkt. 79). The Court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the parties’ arguments and the moving papers, the Court DENIES Plaintiff’s Motion.

I. Background

In providing background, the Court will use the facts as set out in the operative complaint, Plaintiff’s Second Amended Complaint (“SAC”) (Dkt. 33).

Plaintiff issued Defendant IEC Corporation (“Defendant”) various insurance policies with policy periods spanning 2009 and 2013 (collectively, the “Policies”). SAC ¶¶ 5–24.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 16-0295-DOC (AJWx)

Date: July 12, 2017
Page 2

On October 15, 2012, Rachel Cordova, Martha Yates, and Rosalinda Mendoza (collectively, the “*Cordova* Plaintiffs”) filed a lawsuit against Defendant in California Superior Court (the “*Cordova* Litigation”). *Id.* ¶ 25.

On October 23, 2012, Defendant’s insurance broker tendered the *Cordova* Litigation to Plaintiff for coverage under the Policies. *Id.* ¶ 82. On March 18, 2013, Plaintiff wrote to Defendant about coverage for the *Cordova* Litigation, addressing each of the Plaintiff’s Policies. *Id.* ¶ 83. Plaintiff agreed to defend the *Cordova* Litigation subject to a reservation of rights under one of the Policies (the “Occurrence Policy”). *Id.* However, Plaintiff disclaimed coverage under the other Policies (the “Claims Made and Excess Policies”). *Id.* ¶¶ 86–87.

Plaintiff brought suit in this Court seeking a declaratory judgment that it owes no duty to defend or to indemnify Defendant in the *Cordova* Litigation under any of the Policies. *Id.* ¶¶ 99–107. Plaintiff also seeks restitution and reimbursement from Defendant for the amount spent in defense, settlement, or indemnity (including payment of attorneys’ fees) in connection with the *Cordova* Litigation. *Id.* ¶¶ 108–14.

II. Procedural History

On August 23, 2016, Plaintiff filed its SAC. Defendant answered on September 12, 2016 (“Answer”) (Dkt. 37 pp. 1–24). Defendant also asserted counterclaims against Plaintiff for breach of contract and breach of the duty of good faith and fair dealing (“Counterclaim”) (Dkt. 37 pp. 25–39). Additionally, Defendant seeks a declaratory judgment that Plaintiff owes a duty to defend Defendant in the *Cordova* Litigation. Counterclaim ¶¶ 44–48. Plaintiff answered the counterclaims on November 17, 2016 (Dkt. 40).

Plaintiff filed the instant Motion to Compel Arbitration on June 19, 2017. Defendant opposed on June 26, 2017 (Dkt. 87). Plaintiff replied on July 3, 2017 (Dkt. 92).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 16-0295-DOC (AJWx)

Date: July 12, 2017
Page 3**III. Discussion**

Plaintiff argues that California Civil Code § 2860 entitles Plaintiff to compel arbitration of the parties' dispute over the defense expenses.¹ Plaintiff claims that arbitration must begin immediately and be completed before the trial date for the instant action. Mot. at 4, 16.

“An insurance carrier [under California law] owes a duty to defend its insured whenever a suit against the insured ‘*potentially* seeks damages within the coverage of the policy.’” *Truck Ins. Exch. v. Superior Court*, 51 Cal. App. 4th 985, 993 (1996) (emphasis in original) (quoting *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 275 (1966)). After notice of litigation, the insurer can either “accept defense of the lawsuit without raising any objection to coverage,” “refuse to furnish a defense,” or “defend the action under a reservation of rights.” *Id.* at 993–94. “If [a] reservation of rights creates a conflict of interest between the insurer and the insured, the insured has the right to demand independent counsel”—that is, counsel of their own choosing. *Id.* at 994 (citing *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal. App. 3d 358, 364 (1984)).

California Civil Code § 2860 provides that disputes concerning independent counsel's fees not addressed by policy provisions “shall be resolved by final and binding arbitration.” However, California courts are divided over whether arbitration of the attorney's fee dispute should take place before resolution of other coverage issues. *See Steelcase Inc. v. Nationwide Indem. Co.*, No. 2:14-CV-6291-SVW-RZ, 2015 WL 12828056, at *2 (C.D. Cal. Feb. 10, 2015). *Compare Intergulf Development v. Superior Court*, 183 Cal. App. 4th 16, 22 (2010) (holding that insurers may compel arbitration of the attorney's fees dispute only after the adjudication of the duty to defend issue) *with Truck Ins. Exch.*, 51 Cal. App. 4th at 989 (arbitration of the attorney's fees dispute prior to the determination of other claims was allowed, and did not bar the other claims on *res judicata* grounds).

Plaintiff argues that *Compulink Mgmt. Ctr., Inc. v. St. Paul Fire & Marine Ins. Co.*, 169 Cal. App. 4th 289, 293 (2008), governs the instant dispute. However, the decision in *Compulink* stands only for the proposition that § 2860 requires arbitration of a dispute over independent counsels' fees even in cases where non-arbitrable claims, such as breach of the covenant of good faith claim, exist. *Id.* at 292. The *Compulink* court did

¹ Defendant argues that Plaintiff cannot invoke § 2860 because Plaintiff breached its duty to defend. Opp'n at 13. Because the Court will not order the dispute over the attorneys' fees to arbitration until after the adjudication of the duty to defend issue, the Court will assume that § 2860 applies to the instant action for the purposes of this Order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 16-0295-DOC (AJWx)

Date: July 12, 2017
Page 4

not directly address the issue of the timing of arbitration in cases where the policy's coverage is also in dispute, *see id.* at 292–93, and thus does not resolve the key issue here.

In *Intergulf*, the California Court of Appeal found the lower court erred in granting the insurer's motion to compel arbitration when it had not determined whether or not the insurer had a duty to defend. *Intergulf*, 183 Cal. App. 4th at 21–22. The court distinguished *Intergulf* from *Compulink* on the grounds that *Compulink* was a dispute “over the *amount* to be paid independent counsel” which “did not involve the preliminary question of duty to defend.”² *Id.* (emphasis in original). The *Intergulf* court found this to be a “distinction *with a difference.*” *Id.* at 22 (emphasis in original). The court held that it would be premature to decide whether the insurer was entitled to binding arbitration under § 2860 when there had not yet been a determination that the insurer had a duty to defend. *Id.* (finding that a premature determination on the arbitration issue may prejudice the insured's breach of contract and bad faith claims).

Plaintiff cites *Truck Insurance Exchange*, 51 Cal. App. 4th at 998, to support its argument that the Court does not need to decide the coverage and duty to defend issues in order to grant the instant Motion. Reply at 11. However, the *Truck Ins. Exch.* court addressed the timing of arbitration where the insurer was attempting to use an arbitration award of attorney's fees to assert a *res judicata* defense against the insured's cross-claims. *Truck Insurance Exchange*, 51 Cal. App. 4th at 991. Moreover, the insured in *Truck Insurance Exchange* was “agreeable to arbitration of its ‘attorney's fees’ dispute.” *Id.* at 990. That is not the case here.

Further, the California Court of Appeal has subsequently found that a trial court erred when it prematurely stayed a case and ordered the parties to arbitrate their fee dispute because the duty to defend issues, as well as the breach of contract and bad faith claims, had not been resolved. *Janopaul + Block Companies, LLC v. Superior Court*, 200 Cal. App. 4th 1239, 1249 (2011). The *Janopaul* court required a preliminary determination on the duty to defend and breach issues before the insurer could move to arbitrate under § 2860. *Id.* at 1249–50. The court specifically noted that its decision did not preclude § 2860 arbitration of independent counsel's fees. *Id.* Rather, it merely

² Plaintiff also cites *Pepsi-Cola Metro. Bottling Co. v. Ins. Co. of N. Am.*, No. CV 10-2696 SVW MANX, 2010 WL 10875087, at *12 (C.D. Cal. Dec. 28, 2010) to support its argument. Mot. at 12. In reconciling *Intergulf* and *Compulink*, the district court in *Pepsi-Cola* held that § 2860 must apply to the attorney's fee dispute as long as an insurer timely acknowledges its duty to pay. *See id.* at *12. However, this holding does not directly address the issue of the timing of the required arbitration.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 16-0295-DOC (AJWx)

Date: July 12, 2017
Page 5

required “postponing” the determination of arbitration “until the threshold questions of duty to defend, breach and bad faith are resolved.” *Id.*

Here, the parties disagree as to whether Plaintiff owes Defendant a duty to defend the *Cordova* Litigation under the Policies. SAC ¶¶ 99–107; Counterclaim ¶¶ 44–48. In fact, the Court denied Plaintiff’s Motion for Judgment on the Pleadings regarding the duty to defend issue, on the grounds that there is a plausible interpretation of the Claims Made Policy that would result in a potential for coverage (Dkt. 51).

Accordingly, the Court finds it premature to determine Plaintiff’s right to arbitrate the independent counsel’s fee dispute under § 2860 at this time. *See Janopaul*, 200 Cal. App. 4th at 1249. Plaintiff may move to compel arbitration of the independent counsel’s fees upon a favorable ruling on the coverage and duty to defend issues.

IV. Disposition

For the foregoing reasons, the Court DENIES Plaintiff’s Motion.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11
CIVIL-GEN

Initials of Deputy Clerk: djg