SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Charles Edward Ramos** PART 53

Index Number : 600674/2006

JPMORGAN CHASE

VS

TRAVELERS INDEMINITY

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

Dated: 3/15/07

HON. CHARLES E. RAMOS, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, and J.P. MORGAN SECURITIES INC.,

Plaintiffs,

-against- Index No. 600674/06

THE TRAVELERS INDEMNITY COMPANY, TWIN CITY FIRE INSURANCE COMPANY, and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Defendants.

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Charles Edward Ramos, J.S.C.:

In motion sequences 001 and 002, defendants Twin City Fire Insurance Company ("Twin") and American International Specialty Lines Insurance Company ("AISLIC") move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the amended complaint in its entirety.

The issue before this Court is whether plaintiffs' November 29, 2001 letter provides defendants with sufficient notice of a potential claim, in the manner required by Lloyds of London's ("LoL") Primary Policy, AISLIC and Twin's Excess Policies, to secure the insured's coverage. This Court holds that it does; defendants' motion to dismiss is denied.

Background

In 1997, plaintiffs' predecessor in interest, the Chase Manhattan Corporation, obtained an insurance program (the "JPMC 97-01") which provides various lines of coverage, including coverage for directors and officers liability, errors and omissions, and bankers' professional liability. LoL issued the

primary insurance policy under the JPMC 97-01 insurance program. Several other insurers, including Reliance Insurance Company ("Reliance"), participated as excess insurers.

On July 15, 2000, Twin issued a binder through which it replaced Reliance as a participant in the second excess layer of the JPCM 97-01. Pursuant to that binder, Twin agreed to provide insurance coverage of $10 million in excess of $30 million and a $12.5 million in excess of $70 million with a $10 million retention for the term of July 15, 2000 through November 30, 2001.

AISLIC's Excess Policies were also issued as part of the same insurance program, the JPMC 97-01. AISLIC insured plaintiffs under excess insurance policies ("AISLIC Excess Policies") for JPMC's bankers' professional liability, subject to their own terms and conditions, and for the terms and conditions of other liability policy issued to plaintiffs by certain underwriters at LoL as primary insurance coverage.

The JPMC 97-01 provided that plaintiffs could secure coverage in advance of the filing of an actual claim, during its terms, if plaintiffs provided notice of an "act, error, or omission" that may subsequently give rise to a claim. Specifically, the JPMC 97-01 provided that:

> If during the Policy Period [...] the Risk and Insurance Management Department shall become aware on any act, error or omission which may subsequently give rise to a claim being made against an Insured and shall during the Policy Period [...] give written notice of such act, error or omission, then any claim which is subsequently made against the Insured arising out of such act, error or omission shall for the purpose of this policy be treated as a claim made

during the Policy Period.

In addition, AISLIC's Excess Policies provide in Section 5(b) under the heading "Notice And Claims Reporting Provisions" as follows:

> If during the Policy Period [...], (i) written notice of a Claim has been given to the Insurer [in the same manner and to the extent permitted by the terms and conditions of the Lloyd's Primary Policy], or (ii) to the extent permitted by the terms and conditions of the Followed Policy [i.e., the Lloyd's Primary Policy], written notice of circumstances that might reasonably be expected to give rise to a claim has been given to the Insurer [AISLIC], then any Claim that is subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim or circumstances of which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim or circumstances of which such notice has been given, shall be considered made at the time such Claim or Circumstances has been given to the Insurer.

Further, plaintiffs sent AISLIC an addendum to LoL's Primary Policy. The addendum states that it effects a change in the section quoted above to require plaintiffs to provide written notice of "Wrongful Acts" instead of "acts, errors, or omissions" in order to avail themselves of the provisions of the Insured's Reporting Duties. The section provides:

> It is understood and agreed that, effective 30th November, 1998 at 12:01 a.m. Local Standard Time, Section B, Bankers Professional Liability is amended by deleting all reference to the words "acts, errors or omissions" and replacing them with the words "Wrongful Acts."

The Notice Letter

On November 29, 2001, plaintiffs' broker transmitted a document to the insurers, including AISLIC and Twin, which stated:

> On November 28th 2001, it was announced that various credit agencies had downgraded Enron, Inc. debt to junk status. In addition, it was announced that merger discussions with Dynergy, Inc. had been terminated. In light of this situation J.P. Morgan Chase & Co. released a statement disclosing that it has approximately $500 million of unsecured exposure to various Enron entities, including loans, letters of credit and derivatives. It was also confirmed that it has additional exposures of $400 million secured by the Transwestern and Northern natural pipelines. J.P. Morgan Chase & Co. and its subsidiaries and affiliates, and their directors and officers ("J.P. Morgan Chase") have an extensive relationship with Enron which includes, but is not necessarily limited to, lending, merger & acquisitions advisory services, various SWAPS transactions, purchaser of gas/energy and serving as indenture trustee for Enron's public debt. While we have not received notice of any claim or potential claim at this time it is anticipated that we may be named in the litigation expected to arise out of the financial difficulties of Enron as a result of the relationship described above.

A second letter to the insurers minutes later replaced the previous one and repeated the language aforementioned, but added that:

> Such litigation could include, among other things, allegations of breaches of fiduciary duty, errors and omissions, securities fraud, negligence (including gross negligence), fraudulent conveyance, equitable subordination and misrepresentation. While JP Morgan Chase would vigorously contest the validity of any such claims, and has no actual knowledge of such acts, we believe that all of the foregoing constitute Wrongful Acts that could give rise to a claim under the policy.

The day after plaintiffs sent out the aforementioned letters, counsel representing the underwriters wrote to plaintiffs' agent acknowledging receipt of the Notice and expressly "confirm[ing] the understanding that all of the Underwriters' rights, remedies and defenses under the policy, and at law, are fully reserved."

In late November, 2001, as the JPMC 97-01 insurance program

was close to expiring, plaintiffs renewed their insurance for the 2001-2002 policy period. Twin's binder for the JPMC 01-02 program stated that it was binding coverage under the terms and conditions of the underlying insurance contract, which included plaintiffs' submission of the Notice as a precondition to the new program.

Enron filed for bankruptcy shortly thereafter. According to plaintiffs, they anticipated that they would be brought into the fray of lawsuits against Enron. Indeed, in April 2002, plaintiffs were sued by Enron's investors. The actions were consolidated into a class action: *In Re Enron Corporation Securities Litigation* (the "Enron Investors Class Action"), Civil Action No. H-01-3624 (S.D Texas). Enron investors alleged that:

> JP Morgan [...] had an extensive and extremely close relationship with Enron. During the Class Period, JP Morgan provided commercial banking and investment banking services to Enron, helped structure or finance one or more of Enron's illicit partnerships or SPEs, and helped Enron falsify its financial statements and misrepresent its financial condition by hiding almost $4 billion in debt that should have been on Enron's balance sheet, while its security analysts were issuing extremely positive- and false misleading- reports on Enron, extolling its business success, the strength of its financial condition and its prospects for strong earnings and revenue growth. In return for JP Morgan's participation in the scheme, on top of the huge underwriting and consulting fees, interests payments, commitment fees and other payments, JP Morgan received from Enron and related entities, top executives of JP Morgan were permitted to personally invest at least $25 million in the lucrative LJM2 partnership as a reward to them for orchestrating JP Morgan's participation in this fraud.
>
> First Amended Consolidated Complaint for Violations of Securities Laws, *In Re Enron Corporation Securities Litigation*, Civil Action No. H-01-3624 (S.D Texas).

In June 2005[1], plaintiffs agreed to settle the Enron claims against them for $2.2 billion. In addition, plaintiffs allege they have incurred more than $200 million in reasonable defense costs.

Plaintiffs brought this action, seeking a declaratory judgment that their losses are covered by the JPMC 97-01 and damages for breach of contract.

Discussion

Under CPLR 3211(a)(7), facts pled in the complaint are presumed to be true and will be accorded every favorable inference if they fit within a legally cognizable claim. *Wilson v Hochberg*, 245 AD2d 116 (1st Dep't, 1997).

As a threshold matter, the parties dispute one element of plaintiffs' breach of contract claim: plaintiffs' adequate performance of the contract. In order to make a *prima facie* showing, and plead all the elements necessary to form a breach of contract claim, plaintiffs must show that they entered into a valid contract of insurance which the insurers allegedly breached when they refused to cover plaintiffs' losses in connection with the Enron actions. *Ross v FSG Privatair, Inc.*, No. 03 Civ 7292 (NRB), 2004 WL 1837366, at *3 (SDNY Aug 17, 2004). Defendants argue that plaintiffs' alleged failure to comply with a material term of the JPMC 91-01 Insurance Program Section IV(D)(2) i.e., to provide a valid notice of claim, prevents plaintiffs from

[1] Plaintiffs allege that the Agreement to settle the Enron Investors Class action was signed in January 27, 2006.

establishing their performance of the contract. Defendants argue that plaintiffs' notice was not specific enough.

Claims Made Policy Versus Occurrence Policy

The issue of the sufficiency of plaintiffs' letter or notice of claim to Twin and AISLIC intended to invoke coverage under a policy after its expiration turns on whether the JPMC 97-01 is a claims-made policy or an occurrence policy thereby effecting the standard by which this Court must evaluate the November 29th letters.

The difference between the two policies lies in the timing of three events: (1) the occurrence; (2) the notice of a potential claim; and (3) the actual notice of claim or claims. An occurrence policy covers injury which takes place during the policy period regardless of whether the loss is reported during that period. *St. Paul Fire & Marine Ins. Co. v Barry*, 438 US 531, 535 n.3 (1978). In other words, only the timing of the injury matters and it must have occurred within the life of the policy to allow the insured to be covered. An occurrence policy provides greater liability coverage to the injured. Ins Dept Reg 121, 11 NYCRR Part 73.0(c). A claims made policy covers liability only when the notice and claim occur during the policy period thus, providing less protection to the insured. *Mount Vernon Fire Ins. Co. v East Side Renaissance Associates*, 893 F Supp. 242 (SDNY 1995)(citing Ostrager & Newman, Handbook on Insurance Coverage Disputes § 4.02(b)(4) (7th ed 1994)). In a claims-made policy, the first factor, the occurrence, generally

described in the policy as an act, omission, or wrongdoing, can occur during or sometime before the life of the policy.

The terms of the LoL primary policy, section IV D(2) do not fit neatly into either category, claims made or occurrence in that it allows plaintiffs to report errors, acts or omissions that the insured believes may give rise to a claim in the future. Contrary to the usual terms of a claims-made policy, if plaintiffs provide written notice and the notice is received by Twin and AISLIC within the policy period, a claim which arises out of the circumstances reported will be covered and deemed to have been made during the policy even if it is made after. See LoL Primary Policy, Section IV D(2). This coverage clause extends the limits of insurance coverage in a claims-made policy and provides protection for a claim that may be brought years after the policy has expired, provided adequate notice has been given to the insurer. *See National Union Fire Ins. Co. v Ambassador Group, Inc. (In re Ambassador Group, Inc. Litig.)*, 830 F Supp 147, 154, 156-157 (EDNY 1993).[2] The JPMC 97-01 is an extended claims-made policy.

Sufficiency of the Notice Under the Extended Claims-Made Policy

Through a typical claims-made policy, the insured has no coverage beyond the policy's final effective date, and thus the insured must strictly comply with the policy's notice of claim

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[2] The California Court of Appeals, First Appellate District defines this type of extended claims-made clause as an "awareness provision." See *KPFF, Inc v California Union Ins. Co.*, 56 Cal App 4th 963, 971-973, 66 Cal Rptr 2d 36, 41-42 (1st Dist 1997), review denied (Cal Oct 22, 1997).

provisions. See *FDIC v Saint Paul Fire & Marine Ins. Co.*, 993 F2d 155, 160 (8th Cir, 1993) (notice that would cause one to investigate a renewal for insurance is less specific than notice to investigate potential claims under a "claims made" policy); *FDIC v Interdonato*, 988 F Supp 1, 6 (DDC, 1997) ("an important factor in considering the sufficiency of an insured's notice is specificity.")

An extended claims-made provision still requires adequate notice as notice essentially defines coverage. However, an inherent advantage of this policy is that it enables policyholders with pending, yet unfiled claims to maintain coverage. The insured has a "reciprocal responsibility [...] to report all acts and occurrences that could become future claims. Thus, the notice provision requirement sets the parameters of the coverage under the policy [...]." *FDIC* at 158.[3]

On the one hand the insured must provide the insurer with a specific notice detailing the circumstances which could lead to an action. This notice will necessarily be limited since the claim has not yet been filed and thus the insured cannot be thorough without speculating as to substance of the potential complaint against it. On the other hand, the insured cannot (and most likely will not) detail facts which could potentially be

[3] The parties cite many cases which do not involve "claims-made" policies but rather "occurrence policies." As explained, these two types of insurance policies have different notice requirements and thus necessarily are evaluated by different standards. This Court only cites relevant cases involving "claims-made" policies with awareness provisions.

admitted at trial as an admission of wrongdoing before any claims is actually made against them.[4] While courts have held that a notice provision in an extended claims made policy should be construed strictly because notice of a potential claim defines coverage in this type of policy, the sufficiency of a notice is evaluated on a case by case basis according to the language of the policy's notice provision. (See *FDIC v Barham*, 995 F2 600, 604 n.9 (5th Cir, 1995); *Medical Inter Ins. Exch. Of NJ v Health Care Ins Exch.*, 278 NJ Super 513, 518-519 (App Div), cert denied, 140 NJ 329 (1995)).

In sum, the insured must adhere as closely as possible to the terms of the policy by providing a timely notice of the circumstances which the insured believes could lead to an action against them. Plaintiffs provided TWIN and AISLIC with a notice which first and foremost set forth that the letter's purpose was to comply with the policy terms and conditions, informing the excess insurers that the letter was specifically written about the "circumstances which may give raise to a claim(s)." Second, the notice informed the insurers that plaintiffs, among other activities, engaged in "lending," "various SWAP transactions," purchased gas/energy from Enron and, that Enron's credit rating was downgraded. Plaintiffs sent a second notice which added the

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[4] Defendants argue that "plaintiffs' purported notice fails because they expressly disclaimed any knowledge of wrongdoing. To support their argument, defendant cites *FDIC v Mijalis*, 15 F3d 1314 (5th Cir. 1994). However, this case concerns an "occurrence policy" which is specifically differentiated from a "claims-made policy" or, in this case, an "extended claims-made policy".

types of claims which could be asserted in future litigation; e.g., breaches of fiduciary duty, errors and omissions, securities fraud, negligence (including gross negligence), fraudulent conveyance, equitable subordination and misrepresentation which are precisely the claims that were made against them.

In *FDIC v Barham*, 995 F2d 600 (5th Cir, 1993), the contract required that notice of "facts and circumstances [relating to specific wrongful acts] having the potential to give rise to a claim" be sent to the insurer. The insured gave no written notice of wrongful acts but rather the insurer received constructive notice through a third party investigation. The court held that a sufficient notice was one stating specific acts which have claim potential. Id at 605.

The JPMC 97-01 requires notice of an "act, error or omission". Plaintiffs have identified such acts which, while they do not admit them to be wrongful, could lead to claims within the meaning of the policy. The notice lists the types of services which plaintiffs provided to Enron i.e., acts such as "lending", engaging in "various SWAP transactions," and purchasing gas/energy from Enron and thus, listed the circumstances which could render plaintiffs liable and ultimately led to the allegations in the Class Action complaint. Indeed, the Enron shareholders' action alleges breach of fiduciary duty...precisely the claims plaintiffs predicted. Owing to the fact that plaintiffs did not admit that they had committed any

wrongdoing nor could detail specific facts giving rise to a possible action as explained above, plaintiffs could only notify their insurer of an act, not an error or omission which inherently imply wrongdoing.

AISLIC

AISLIC argues that plaintiffs could have stated in their notice that they structured and financed Enron's special purposes entities, giving particulars such as dates, persons involved, and potential claimants, and explaining the allegations of wrongdoing which might be based on these transactions, all while categorically denying any wrongdoing. However, as explained above, this would defeat the purpose of an extended claims-made policy provision since such specific knowledge and foresight implies actual wrongdoing and does not allow a party to notify its insurer prior to the actual filing of the claim. The fact that plaintiffs explicitly disavowed any actual knowledge of such wrongful acts in the revised notice does not conflict with the terms of the policy. The detail that AISLIC suggests, would render it impossible for an insured to even satisfy an awareness provision. Therefore, plaintiffs' notice suffices to fulfill the JPMC 97-01's notice requirement in order to be covered by the insurers.

AISLIC also argues that because its policy requires more specificity than the norm, plaintiffs did not comply with the notice requirement because its notice is a merely general description of plaintiffs' relationships with Enron and not a

notice of any "acts, errors, omissions."[5] AISLIC states that as its own policy makes it clear, a valid notice of circumstances are only claims (1) arising out of "facts" alleged in the notice of circumstances or (2) alleging "any Wrongful Act"[6] which is alleged in the notice of circumstances.

Section 5(b) of AISLIC's contract regarding notices and claim reporting is also an extended claims-made policy. Similar to the language in the primary policy, it extends the limits of insurance coverage in a claims-made policy and provides protection for a claim that may be brought years after the policy has expired. AISLIC argues that its policy requires more specificity in terms of the insured's duty to report than the LoL primary policy. This Court disagrees.

Defendant takes the language in the AISLIC excess policy out of context. Section 5(b) applies a claims-made policy to

> facts alleged in the Claim [which is later filed] or circumstances of which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim or circumstances of which such notice has been given. [Emphasis added].

The insured is limited in reporting facts in a Claim which has not yet been filed without speculating as to the as yet unfiled complaint and suspected allegations of wrongdoing. Further, plaintiffs cannot assert wrongdoing which could later be

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[5] None of the JPMC 97-01 insurers, except AISLIC, have raised this objection.

[6] AISLIC states that it did not agree to the addendum which was sent after the issuance of the original contract. This argument is not inconsistent as here, AISLIC relies on its original contract, Section 5(b), not plaintiffs' addendum.

used against them. The insured can, on the other hand, report circumstances which Section 5(b) defines broadly as "reasonably expected to give rise to a claim." Plaintiffs have described such circumstances by listing all services rendered to Enron as well as all legal claims which may later be asserted against them which ultimately led to the allegations in the complaint.

TWIN

Twin contends that a letter by underwriters' counsel "confirm[ing] the understanding that all of the Underwriters' rights, remedies and defenses under the policy, and at law, are fully reserved" informed plaintiffs that their notice was being rejected.

Boilerplate language does not inform a reasonable insured that there is a defect in his or her purported notice. *FDIC v Interdonato*, 988 F Supp 1, 10 (US Dist DC, 1997). An insured's rejection letter must indicate the notice's deficiencies. Id. If the notice provided to an insurer is considered to be defective, good faith requires the insurer to notify the insured of its objections within reasonable time. Id at 10-11. Otherwise, the insurer waives any right to assert notice as a defense at a later time. Id.

Twin itself asserts that its letter reserving rights is standard practice. Twin's reservation of rights is simply boilerplate and does not constitute a rejection for purposes of preserving its lack of adequate notice defense. Twin failed to contest plaintiffs' notice when it received it and continued to

remain silent until an actual claim against plaintiffs was asserted. In fact, in late November 2001, when renewal for the 2001-2002 insurance program called for a notice of plaintiffs' involvement with the Enron matter to the old insurers as a precondition to new coverage, Twin accepted the terms of the 01-02 insurance program thereby accepting plaintiffs' submission of the Notice.[7]

Additionally, plaintiffs argue that defendants had ample constructive notice of their extensive involvement with Enron as the companies' relationship and subsequent liabilities were publicized prior to Enron's collapse.[8] While public awareness is not sufficient notice, *Travelers Ins. Co. v Volmar Constr. Co.* 300 AD2d 40, 43 (1st Dep't, 2002)[9], it should have at least awakened Twin's interest to object to the sufficiency of

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[7] As the Enron situation rapidly deteriorated in the last few days prior to the expiring policy period, the insurers on the 2001-2002 period, which included Twin City, refused to provide coverage for Enron claims under the subsequent program. The insurers questioned the plaintiffs on their relationship with Enron and insisted that the plaintiffs provide notice to the JPMC 97-01 Insurers as a condition of their binding coverage under the new program.

[8] "The ties are notably tight between Enron and JP Morgan Chase [...] Not only does JP Morgan provide innumerable separate credit arrangements for Enron; it also has the largest derivative operation of any bank, as well as a large business trading commodities. There is no 'doubt' that Enron is on the other side of many JP Morgan trades [...]." *The Economist*, November 3, 2001.

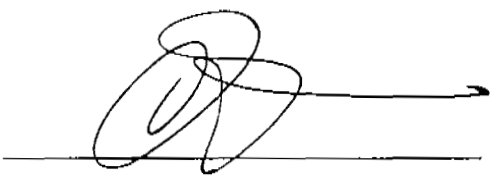
[9] In *Travelers Ins. Co.*, the First Department held that notice of the underlying occurrence from an independent source does not excuse the insured's obligation to provide a notice which must be sufficient on its own.

plaintiffs' notice. Once LoL, the primary insurer, accepted plaintiffs' Notice, it was incumbent upon any excess insurer who was dissatisfied with the notice to inform plaintiffs within a reasonable time of their objection.

Accordingly, it is

ORDERED that defendants, Twin and AISLIC's motions to dismiss are denied.

Dated: March 19, 2007



J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.