SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

Index Number : 651047/2012
ASSOCIATED COMMUNITY
vs.
ST. PAUL MERCURY INSURANCE
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is by defendant to dismiss the complaint is GRANTED per the attached Decision and Order.

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

Dated: January 10, 2013

MELVIN L. SCHWEITZER, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

ASSOCIATED COMMUNITY BANCORP, INC., CONNECTICUT COMMUNITY BANK, N.A., AND WESTPORT NATIONAL BANK	:	Index No. 651047/2012
Plaintiffs,	:	DECISION AND ORDER
-against-	:	Motion Sequence No. 001
ST. PAUL MERCURY INSURANCE COMPANY,	:	
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

Memorandum Decision

Defendant St. Paul Mercury Insurance Company (Defendant) moves for an order, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), dismissing plaintiffs Associated Community Bancorp, Inc., Connecticut Community Bank, N.A., and Westport National Bank's (collectively, Plaintiffs) complaint, in its entirety.

Facts

In this action, Plaintiffs seek damages and declaratory relief in connection with two insurance policies (the Policies) issued by Defendant. Four separate lawsuits were commenced against Plaintiffs relating to the use of custodial accounts at Westport National Bank (Westport) for investment in the Ponzi scheme operated by Bernard L. Madoff. Plaintiffs' complaint asserts claims against Defendant for allegedly breaching its obligations to reimburse defense costs and to provide indemnification under the Policies in connection with three private civil lawsuits, and a separate action brought by state regulators (collectively, Investor Actions). Specifically, coverage is sought for the amended complaint filed in *Levinson v PSCC Serv Inc.,* Case No.

3:09-CV-269 [D Conn 2009] (the *Levinson* Action) on January 19, 2010, the amended complaint filed in *Davis v Connecticut Community Bank, N.A.,* (Case No. 3:10-cv-00261-SRU [D Conn 2011]) (the *Davis* Action) on May 9, 2011 and an action filed by the Connecticut Banking Commissioner, Howard Pitkin, on April 19, 2010, *Pitkin v Westport Natl. Bank,* (Case No. X07-CV-10-6010227-S [Conn Super 2010]) (the *Pitkin* Action). Plaintiffs also seek coverage for fourteen individual actions filed in April 2011, that were subsequently consolidated under the caption *Schacht v Connecticut Community Bank, N.A.,* (Case No. CV-11-6009429-S [Conn Super 2011]) (*Schacht* Actions).

Plaintiffs' present claims arise from the second of two waves of litigation that they have faced since the revelation of Bernard L. Madoff's Ponzi scheme. In the first wave of suits, brought between 2008 and 2009, customers who utilized Plaintiffs' services to facilitate investments with Bernard L. Madoff Investment Securities LLC (BLMIS) alleged that monies deposited with Westport were lost when they were transmitted to BLMIS and stolen by Madoff. Plaintiffs sought coverage for these claims under its insurance policies with Defendant, but the federal courts held that coverage was lacking due to the a policy exclusion for claims arising out of the insolvency of BLMIS.[1]

In 2010 and 2011, Plaintiffs' customers filed a new series of amended complaints. These complaints differed in that the customers now alleged that Westport did not transit their monies

[1] On July 27, 2009, Plaintiffs sued Defendant in the Connecticut Supreme Court in an action entitled *Associated Community Bancorp, Inc. v The Travelers Cos., Inc.*, Case No. CV-09-6002720-S [Conn Super 2009] (*Associated I*). The action was subsequently removed to the District Court, Case No. 3:09-cv-1357-JCH [D Conn 2010], as discussed *infra*.

to BLMIS at all. It is these new complaints, and a separate regulatory action brought by the State of Connecticut in April 2010, that are the subject of the present lawsuit.

The Policies

The two professional liability policies at issue are the SelectOne for Community Banks Policy No. EC05700118, issued for the claims-made period from June 1, 2008 to June 1, 2009 (08/09 Policy) and the SelectOne for Community Banks Policy No. EC05700193, issued for the claims made in the period from June 1, 2009 to June 1, 2010 (09/10 Policy). The Policies share nearly identical terms in all relevant aspects.

Pursuant to the Policies, "all Claims arising out of the same Wrongful Act and all Interrelated Wrongful Acts . . . shall be deemed one Claim . . . first made . . . on the date the earliest of such Claims is first made" (Def. Br. Ex. A, General Terms, Conditions & Limitations, at 10). The Policies contain a series of coverage sections, including a Bankers Professional Liability Insuring Agreement, which provides coverage for losses the Plaintiffs would be legally obligated to pay on account of any claim first made against them for a professional services act taking place before or during the policy period. The Professional Services Liability Coverage contains exclusions that bar coverage

> "for Loss on account of any Claim made against the Insureds" (1) based upon, arising out of or attributable to the insolvency, conservatorship, receivership, bankruptcy, or liquidation of, or financial inability to pay . . . by . . . any . . . investment company, investment bank, or any broker or dealer in securities or commodities . . . (herein the "Insolvency Exclusion"); (2) based upon, arising out of or attributable to any dispute involving fees or charges for the Insured's services . . . ; (3) based upon, arising out of or attributable to any of the Insured's actual or written representations, promises or guarantees regarding the past performance . . . of any investment product . . . ; (4) for the actual

> loss of money, securities, property or other items of value in the custody or control of the Company . . . ; (5) based upon, arising out of or attributable to (a) the underwriting, syndication, or promotion of equity or debt securities; (b) the investment banking activities, including the sale and distribution of a new offering of securities; (c) any disclosure requirements in connection with subparts (a) and (b).

(Def. Br. Ex. A, Bankers Professional Liability Insuring Agreement, at 2-4).

Further, Professional Services Liability Coverage is subject to an exclusion that bars coverage for "any Claim made against any Insured . . . based upon, arising out of, or attributable to such Insured gaining in fact any personal profit, remuneration or financial advantage to which such Insured was not legally entitled (Def. Br. Ex. A, General Terms, Conditions & Limitations, at 8).

Under the Policies, the insureds are to retain the duty to defend, but Defendant is to advance defense costs to the insureds incurred in response to covered claims. The Policies provide that Defendant "shall advance on behalf of the Insureds, defense costs which the Insureds have incurred in connection with Claims made against them, before disposition of such claims . . . " (Def. Br. Ex. A, General Terms, Conditions & Limitations, at 12).

Defendant moves to dismiss based on the following premises: (1) res judicata precludes the claims asserted in the complaint; (2) the terms, limitations and exclusions set forth in the Policies bar coverage for Plaintiffs' claims; and (3) the unqualified declaration sought by Plaintiffs for future judgments is not ripe for adjudication.

Associated I

On July 27, 2009, Plaintiffs sued Defendant in the Connecticut Supreme Court in an action entitled *Associated Community Bancorp, Inc. v The Travelers Cos., Inc.* (Case No. CV-09-6002720-S [Conn Super 2009]) (*Associated I*). The action was subsequently removed to the District Court (Case No. 3:09-cv-1357-JCH [D Conn 2010]). In October 2009, Plaintiffs filed their second amended complaint, alleging claims for breach of contract, and seeking a declaration that Defendant had a duty to pay their defense costs and to indemnify them in connection with the underlying Investor Actions brought against them by investors in funds operated by Madoff.

The Investor Actions were brought by or on behalf of individuals for whom Westport allegedly established and managed custodial accounts to facilitate their investments with Madoff. The investors alleged various causes of action including, but not limited to, negligence, breach of contract, breach of fiduciary duty, theft, fraud, violations of the Racketeer Influenced and Corrupt Organizations Act, violations of the Connecticut Unfair Trade Practices Act, and violations of 15 USC 78 and Rule 10b-5 promulgated under the Securities and Exchange Act.

The investors' claims fell into three categories: (1) although Westport was paid significant annual fees to act as the custodian for the investment accounts, Westport never had possession of any securities purportedly purchased by Madoff/BLMIS. If Westport had properly performed its custodial duties and taken possession of the securities purportedly purchased, Madoff's Ponzi scheme would have been exposed and the funds never would have been misappropriated; (2) in providing periodic statements to the investors showing acceptable investment performance, Westport lulled the investors into believing that their funds were

actually invested in performing securities; (3) Westport improperly received excessive custodial fees, particularly since it did not actually have possession of any securities. The excessive fees allegedly created a conflict of interest that deterred Westport from diligently protecting the investors' interests. Some investors also contend that Westport made misrepresentations in its reports to them as a deceptive basis for charging unjustified fees. The investors sought return of their lost investments and return of the fees paid to Westport.

In October 2009, Defendant moved, in *Associated I*, to dismiss Plaintiffs' second amended complaint on the grounds that it had no duty to advance defense costs or to indemnify Plaintiffs in response to the *Associated I* Investor Actions, in part, because coverage under the 08/09 Policies was precluded. The District Court granted Defendant's motion, holding that the Insolvency Exclusion precluded coverage for the Investor Actions. The District Court granted Plaintiffs leave to reopen the case, provided that they attached a proposed third amended complaint that "states a claim within the standards set forth in this Ruling" (*Associated Community Bancorp, Inc. v The Travelers Cos., Inc.*, 2010 WL 1416842, *13, 2010 US Dist LEXIS 34799, *36 [D Conn 2010].) On May 28, 2010, the District Court denied Plaintiffs' motion to reopen, holding that there was no coverage under the 08/09 Policy for any of the Investor Actions, in part, because the Insolvency Exclusion barred coverage for those suits (*Associated Community Bancorp, Inc. v The Travelers Cos., Inc.*, [D Conn 2010] [unpublished; Def. Br. Ex. H]). On June 3, 2010, Plaintiffs appealed to the Second Circuit. The Second Circuit affirmed the District Court's decision (*see Associated Community Bancorp, Inc. v The Travelers Cos., Inc.*, 421 Fed Appx 125 [2d Cir 2011]).

Plaintiffs commenced the present action seeking coverage for certain of the Investor Actions, as well as an action filed by the Connecticut Banking Commissioner, Howard Pitkin. The operative complaints in the Investor Actions continue to allege that (1) Westport was paid significant fees to act as the custodian for the investment accounts, but never possessed any securities purportedly purchased, (2) Westport's periodic statements lulled the investors into believing that their funds were actually invested in performing securities, and (3) the excessive fees Westport collected created a conflict of interest deterring Westport from diligently protecting the investors' interests. In addition, the Investor Actions assert that funds were never transferred to BLMIS (Failure to Transfer allegations). Specifically, Westport allegedly did not transfer customer funds as required by the custodial agreement.

Discussion

Standard for Motion to Dismiss

On a motion to dismiss made pursuant to CPLR 3211, the court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint, liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Leon,* 84 NY2d at 87-88; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Salles v Chase Manhattan Bank,* 300 AD2d 226, 228 [1st Dept 2002]).

Res Judicata

Defendant moves, pursuant to CPLR 3211 (a) (5), to dismiss the action based upon res judicata. New York courts apply the law of the rendering jurisdiction to determine the preclusive effect of the decisions of sister states (*see e.g. Schultz v Boy Scouts of Am.*, 65 NY2d 189, 204 [1985]). As all of the underlying actions were decided in Connecticut, Connecticut law applies.

In Connecticut, "[u]nder the doctrine of *res judicata* . . . a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim . . ." (*State of Conn. v Aillon*, 189 Conn 416, 423, 456 A2d 279, 283 [1983], *cert denied* 464 US 837 [1983]).

The purposes of res judicata "must inform the decision to foreclose future litigation" (*State of Conn v Ellis*, 197 Conn 436, 466, 497 A2d 974, 990 [1985]).

> "[A] decision whether to apply the doctrine of res judicata to claims that have not actually been litigated should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close and the competing interest of the plaintiff in the vindication of a just claim"

(*Isaac v Truck Serv.*, 253 Conn 416, 422, 752 A2d 509, 513 [2000] [internal quotation marks and citation omitted]).

Fundamentally, under Connecticut law,

> "[t]he judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest"

(*In re Juvenile Appeal [83–DE]*, 190 Conn 310, 318, 460 A2d 1277, 1282 [1983] [internal citation omitted]).

Mindful of these competing interests, Connecticut's highest court has repeatedly held that "[t]he doctrines of preclusion . . . should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies " (*id.*; *see also Isaac*, 253 Conn at 423, 752 A2d at 513; *Ellis*, 197 Conn at 466, 497 A2d at 990). Moreover, "the scope of matters precluded necessarily depends on what has occurred in the former adjudication" (*Ellis*, 197 Conn at 467, 497 A2d at 990). Thus, it appears that, in determining whether Connecticut would have applied claim preclusion, we must look to the factual circumstances of the dismissal of the first proceeding, while also considering the competing concerns of finality of judgments and other social policies.

(i) ***Transactional Test***

In deciding whether the doctrine of res judicata is applicable, the question of whether the second action stems from the same transaction as the first must be addressed. Connecticut has adopted the transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata (*Powell v Infinity Ins. Co.*, 282 Conn 594, 922 A2d 1073 [2007]; *Orselet v DeMatteo*, 206 Conn 542, 545–46, 539 A2d 95, 97 [1988]). The prior action's disposition must include all rights of the plaintiff to remedies against the defendant with respect "to all or any part of the transaction, or series of connected transactions, out of which the action arose" (*Powell*, 282 Conn at 604, 922 A2d at 1080 [internal quotation marks and citations omitted]). To determine what series of facts constitutes a transaction should be determined pragmatically, considering the facts in relation to time, space, origin, and the parties' motivation and expectations (*id.*).

It cannot be disputed that the present case arises from the same transaction or series of transactions as *Associated I*. Both actions involve the same parties and the same Policies. In both matters, Plaintiffs alleged that Defendant breached the Policies by denying coverage for the underlying Investor Actions. However, the underlying allegations in the Investor Actions vary from the claims litigated in the prior action. Specifically, the Investor Actions now include Failure to Transfer claims that were never asserted in the prior litigation. As such, the transactional test does not support res judicata barring the present action.

(ii) *One Claim*

Defendant further argues that the Investor Actions constitute one claim, deemed to have been first made during the 08/09 policy period. Defendant contends that, as the claims arise out of interrelated wrongful acts, as defined by the Policies, the claims constitute one claim, made when the earliest of them was made during the 08/09 policy period.

However, the *Davis* amended complaint and the *Schacht* Actions were not filed until after April 2010, when the *Associated I* motion to dismiss was decided. Additionally, the *Levinson* amended complaint was filed after *Associated I* was commenced and Defendant entirely fails to name or address the *Pitkin* action in its res judicata argument. Defendant's one claim argument is not persuasive, as the chronological order of the filings, as well as the actual allegations contained within the complaint, bar a determination that all the Investor Actions are one claim under the 08/09 Policy.

Nonetheless, this action is inextricably intertwined with *Associated I* (*see Powell*, 282 Conn at 604, 922 A2d at 1080; *Orselet*, 206 Conn at 545–46, 539 A2d at 97; *Duhaime v American Reserve Life Ins. Co.*, 200 Conn 360, 364–65, 511 A2d 333, 335 [1986]). However,

the underlying Investor Actions, though intertwined, were not addressed under *Associated I.* The burden is on the party seeking to invoke res judicata to prove that the doctrine bars the second action (*Computer Assoc. Intl., Inc. v Altai, Inc.*, 126 F3d 365, 369 [2d Cir 1997], *cert denied* 523 US 1106 [1998]). Defendant contends that once an insured litigates an action against its insurer, it is barred from bringing a second related claim against the same insurer, relying upon *Walsh Constr. Co. of Illinois v National Union Fire Ins. Co. of Pittsburgh, PA.* (153 F3d 830 [7th Cir 1998]). In *Walsh*, the trial court in the first coverage case issued a broad declaratory judgment barring coverage for not merely the version of the underlying lawsuit that was before the court, but also any amended versions of that same suit that were filed in the future (*id.* at 832-834). In opposition, Plaintiffs aver that the fact that the *Walsh* court issued a broad declaratory judgment in the first action distinguishes *Walsh* from the present case.

Though the two actions involve the same parties, have overlapping facts and share similar legal issues, it does not follow that the judgment in the first action will bar the second action.

> "A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is, where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first"

(*Computer Assoc. Intl.*, 126 F3d at 369, quoting *Interoceanica Corp. v Sound Pilots, Inc.*, 107 F3d 86, 91 [2d Cir 1997]). Defendant has not met its burden to prove that the underlying Investor Actions at issue here - *Davis*, *Levinson*, *Schacht* and *Pitkin* - are barred by the determination in *Associated I.* Therefore, the present action is not barred by res judicata.

Policy Exclusions

Because all of the Policies were written and entered into in Connecticut, Connecticut law applies to their interpretation (*see e.g. Matter of Allstate Ins. Co. (Stolarz-New Jersey Mfrs. Ins. Co.)*, 81 NY2d 219 [1993]). Further, the parties do not dispute that Connecticut Law applies, nor do they present a choice of law argument. To determine the scope of coverage afforded by the Policies, their terms are to be construed based on the standard rules of contract construction (*see e.g. Goldberg v Hartford Fire Ins. Co.*, 269 Conn 550, 558-559, 849 A2d 368, 373 [2004]). An insurance policy must be interpreted to effectuate the parties' intent, determined from a fair and reasonable construction of the written words, arrived at by according the words their ordinary meaning (*id.*). Where a contract is clear and unambiguous, the contract must be given effect according to its terms (*id.* at 373).

Defendant argues that the Investor Actions do not fall within the Policies' coverage because they fall under several exclusions. The Insolvency Exclusion states that claims for loss "based upon, arising out of or attributable to the insolvency, conservatorship, receivership, bankruptcy, or liquidation of, or financial inability to pay . . . by . . . any . . . investment company, investment bank, or any broker or dealer in securities or commodities . . ." are excluded from coverage (Def. Br. Ex. A, Bankers Professional Liability Insuring Agreement, at 3). Connecticut courts have interpreted the term "arising out of" broadly in the context of insurance contracts (*see Board of Educ. of City of Bridgeport v St. Paul Fire & Marine Ins. Co.*, 261 Conn 37, 48, 801 A2d 752, 758 [2002], quoting *Hogle v Hogle*, 167 Conn 572, 356 A2d 172 [1975]).

Under Connecticut's rules of contract construction, any reading of the plain language of the Insolvency Exclusion would bar coverage of the investors' claims as alleged in *Associated I.*

Those claims are certainly connected with, incident to, or flow out of BLMIS/Madoff's insolvency. The language of the exclusion covers "any claim" arising out of the insolvency of "any investment firm," specifically excluding coverage for these types of claims. Accordingly, the exclusion does bar coverage for claims relating to the investors' funds being lost after being transferred to BLMIS.

Defendant further avers that the Bankers Professional Liability Insuring Agreement precludes coverage under the exclusion: "for the actual loss of money . . . in the custody or control of the Company" (Def. Br. Ex. A, Bankers Professional Liability Insuring Agreement, at 3). Defendant relies upon case law arguing that the exclusion for loss of money in the insured's custody or control precludes coverage, because it is undisputed that the investors placed money in Plaintiffs' custody, and that those funds were lost (*see K. Bell & Assoc., Inc. v Lloyd's Underwriters*, 97 F3d 632, 634-35 [2d Cir 1996]; *Shriver Ins. Agency v Utica Mut. Ins. Co.*, 323 Ill App 3d 243, 249, 750 NE2d 1253, 1257-1258 [Ill App 2001]). Defendant also contends that public policy prohibits insurance coverage for claims seeking the return of ill-gotten gains (*see Vigilant Ins. Co. v Credit Suisse First Boston Corp.*, 10 AD3d 528, 529 [1st Dept 2004]).

In opposition, Plaintiffs contend that the underlying allegations illustrate that the Westport's customers are claiming a number of forms of loss, including the loss of investment earnings opportunity and the opportunity for investment appreciation on the principal in their accounts, which do not constitute actual losses, and are therefore covered under the Policies. Plaintiffs claim that the underlying suits also allege that the investors' deposits have not been actually lost, but rather unfairly retained by Plaintiffs. Additionally, Plaintiffs argue that the exclusion is ambiguous.

As previously discussed in this decision, under Connecticut's rules of contract construction, the plain language of the exclusion is clear and unambiguous. Further, restitution of ill-gotten funds does not constitute "damages" or a "loss" as those terms are used in insurance policies. The risk of being directed to return improperly acquired funds is not insurable (*see generally Vigilant*, 10 AD3d 528; *Reliance Group Holdings, Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 188 AD2d 47, 55 [1st Dept 1993]; *Level 3 Communications, Inc. v Federal Ins. Co.*, 272 F3d 908, 911 [7th Cir 2001]). Plaintiffs' argument that the loss of the Investor funds does not constitute actual loss is unpersuasive. As such, the underlying claims are properly excluded under this provision.

Additionally, Defendant states that the Policies exclude coverage for losses "based upon, arising out of, or attributable to any dispute involving fees or charges for an Insured's services" (Def. Br. Ex. A, Bankers Professional Liability Insuring Agreement, at 3). To the extent that the Investor Actions do contain allegations of purported fee overcharges, these claims are clearly not covered under the Policies.

In opposition, Plaintiffs allege that the new causes of action, mainly that funds were never transferred to BLMIS, the Failure to Transfer allegations, bring the claims outside those precluded in *Associated I*. The Policies exclude coverage for allegations "based upon, arising out of, or attributable to [the] Insured gaining in fact any personal profit, remuneration or financial advantage to which such Insured was not legally entitled" (Def. Br. Ex. A, General Terms, Conditions & Limitations, at 8). As discussed previously, the plain language of this exclusion would bar the Failure to Transfer allegations.

As the District Court found in the prior litigation commenced by Plaintiffs, the court refuses to torture the language of the Policies to find ambiguity where none exists (*see Associated Community Bancorp, Inc. v The Travelers Cos., Inc.*, 2010 WL 1416842, 2010 US Dist LEXIS 34799 [D Conn 2010], *affd* 421 Fed Appx 125 [2d Cir 2011]). Accordingly, the clear language of the Policies' exclusions bars the underlying Investor Actions' allegations and Defendant's motion to dismiss these allegations is granted.

The Pitkin Action

Regardless of when the claims of the *Pitkin* Action are deemed first made, the Policies contain a "Sale of Securities" exclusion that bars the allegations made in the action. The *Pitkin* Action alleges that Plaintiffs sold unregistered securities and failed to provide required disclosures in connection with the sale of those securities. The Policies expressly exclude from coverage any claim, "based upon, arising out of, or attributable to" Plaintiffs' "underwriting, syndication, or promotion of securities" or "investment banking activities, including the sale and distribution of a new offering of securities" (Def. Br. Ex. A, Bankers Professional Liability Insuring Agreement, at 3). As such, under the Policies, these allegations are excluded from coverage.

Declaratory Judgment

Plaintiffs seek an unqualified declaration that Defendant has a duty to defend and indemnify Plaintiffs for any future judgment or settlement that might be entered or reached in resolution of the Investor Actions. Defendant contends that this request for a determination is improper unless and until there is a resolution of the claims by underlying judgment or settlement. When a declaratory judgment action is brought, the court analyzes the contract

language to determine if both duties exist (*see e.g. Mitchell v Medical Interinsurance Exch.*, 101 Conn App 721, 923 A2d 790 [Conn App 2007]). Indeed, in *DaCruz v State Farm Fire & Cas. Co.* (268 Conn 675, 846 A2d 849 [2004]), the Court determined that a decision in a declaratory judgment action that there was no duty to defend necessarily was a decision on the duty to indemnify as well, whether or not the indemnification issue had become fully ripe (*id.* 268 Conn at 688, 846 A2d at 858; *Allstate Ins. Co. v Limone*, 2008 WL 4780043, 2008 Conn Super LEXIS 2626 [Conn Super 2008]).

Further, a declaratory judgment should not be granted where it effectively would be nothing more than an advisory opinion (*State Farm Fire & Cas. Co. v LiMauro*, 103 AD2d 514, 517 [2d Dept 1984], *affd* 65 NY2d 369 [1985]). Such relief is deemed premature in cases where a final determination on the underlying theories of liability has not been made (*Prashker v United States Guar. Co.*, 1 NY2d 584, 591 [1956]). The instant case falls within the ambit of *Prashker* and its progeny (*see e.g. New York Pub. Interest Research Group v Carey*, 42 NY2d 527 [1977]; *State Farm Fire & Cas. Co. v Joslyn*, 99 AD2d 631, 632 [3d Dept 1984]). As such, the court finds that it is premature to address Defendant's duties, if any, to defend and indemnify Plaintiffs for any future judgment or settlement not presently at issue here. As such, Plaintiffs' claim for declaratory judgment is dismissed without prejudice.

Duty to Defend

Under Connecticut law, it is well settled that an insurer's duty to advance defense costs is independent of, and broader than, its duty to indemnify (*see Imperial Cas. & Indem. Co. v State of Conn.*, 246 Conn 313, 324, 714 A2d 1230, 1236 [1998]). Whether Defendant had a duty to defend under the policy depends on whether, in light of the policy language, the complaints in the

underlying actions alleged conduct for which coverage was provided. "[A]n insurer's duty to defend . . . is determined by reference to the allegations contained in the [injured party's] complaint" (*see Flint v Universal Mach. Co.*, 238 Conn 637, 646, 679 A2d 929, 934 [1996]).

The "duty to defend an insured arises if the complaint states a cause of action which appears on its face to be within the terms of the policy coverage" (*Hogle v Hogle*, 167 Conn 572, 576, 356 A2d 172, 174 [1975] [internal quotation marks and citations omitted]). If there is no potential for coverage under the policy, there is no duty to advance defense costs (*see DaCruz*, 268 Conn at 687-688, 846 A2d at 858). A finding that there is no duty to advance defense costs necessarily means that there is no duty to indemnify (*id.*). The court has found that there is no coverage for the underlying Investor Actions under the Policies, and as such, Defendant does not have a duty to defend or indemnify Plaintiffs for these actions.

Conclusion

The court has determined that there is no coverage for the underlying Investor Actions under the Policies. Additionally, the court finds that it is premature to declare the extent of Defendant's duties, if any, to defend and indemnify Plaintiffs as to any future Investor Actions not presently at issue. Defendant's motion to dismiss is granted, and Plaintiffs' complaint is dismissed.

Accordingly, it is

ORDERED that St. Paul Mercury Insurance Company's motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that and the Clerk is directed to enter judgment accordingly.

Dated: January 10, 2013

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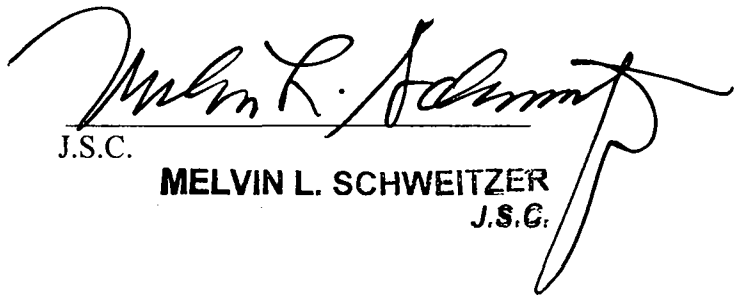

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.