Fox Paine & Co., LLC v Equity Risk Partners, Inc.
2020 NY Slip Op 33287(U)
September 21, 2020
Supreme Court, Westchester County
Docket Number: 52607/2014
Judge: Gretchen Walsh

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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FOX PAINE & COMPANY, LLC and SAUL A. FOX,

Plaintiffs,

-against–

EQUITY RISK PARTNERS, INC. and HUB INTERNATIONAL INSURANCE SERVICES, INC.,

Defendants.

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Index No. 52607/2014

Mot. Seq. No. 31
Return Date: 7/31/2020

DECISION AND ORDER

WALSH, J:

The following e-filed documents, listed in NYSCEF under document numbers 997-1000, 1142-1157, and 1246 were read on this motion by Defendants Equity Risk Partners, Inc. ("ERP") and HUB International Insurance Services, Inc. ("HUB") (together "Defendants") made pursuant to CPLR 3211(a)(10) and CPLR 1001 for an order dismissing the Fourth Amended Complaint ("FAC") of Plaintiffs Fox Paine & Company, LLC and Saul A. Fox ("Plaintiffs") for Plaintiffs' failure to join necessary parties, namely Plaintiffs' excess liability insurance carriers, Twin City Fire Insurance Company ("Twin City"), St. Paul Mercury Insurance Company ("St. Paul"), and Liberty Mutual Insurance ("Liberty") (collectively the "Excess Insurers"). Upon the foregoing papers, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

The Court incorporates by reference the factual and procedural summaries set forth in its prior Decisions and Orders dated April 6, 2018 (the "April 2018 Decision") and January 7, 2019 (the "January 2019 Decision") (NYSCEF Doc Nos. 875, 937). After six long years of litigation, this case was scheduled to begin trial on April 21, 2020. However, the trial was derailed by the COVID-19 pandemic. This Court is now permitted to begin to schedule its jury trials and is hopeful that the trial will commence in December.

DEFENDANTS' MOTION TO DISMISS

A. Defendants' Contentions in Support of its Motion

Defendants contend that their belated motion on what was the eve of trial[1] arose based on "recent fact discovery, depositions, and Plaintiffs' expert reports" (*id.* at 1). Defendants argue that, as a threshold matter, this Court must determine whether the policies of the Excess Insurers cover costs and expenses incurred by Plaintiffs in the Prior Actions before it can determine Plaintiffs' negligent procurement claim against ERP (*id.* at 3). Based on their reading of *Staten Is. Hosp. v Alliance Brokerage Corp.* (137 AD2d 674 [2d Dept 1988]), Defendants contend that the Excess Insurers are necessary parties at least until coverage is determined (*id.* at 7). According to Defendants, Plaintiffs conceded in prior motion papers that *Staten Is. Hosp.* stands for the proposition that an insurer may be an indispensable party in an action against a broker for negligent procurement because a noncoverage determination is a precondition to a finding of negligent procurement (*id.* at 8, *citing* Antonecchia Aff., Ex. 15 at 15 n18). It is Defendants' position that *Staten Is. Hosp.* is not limited to situations involving the primary insurer and that courts have also found excess insurers to be necessary parties as they would be bound by any declaration in the action (*id.* at 8-9). According to Defendants, the negligent procurement claim is not limited to amounts contained in the primary policy, but it also involves the amounts covered by the excess policies because Plaintiffs' damages are in amounts in excess of the primary policy, and any determination on coverage will have an effect on the Excess Insurers' liability (*id.* at 9-10). Defendants further contend that since there is a "duplicative parallel action in the California Court naming the Excess Insurers as defendants, there is a risk of multiple, inconsistent judgments as to the rights and obligations of the Excess Insurers" (*id.* at 10).

Defendants contend that Plaintiffs are seeking the same claim of damages (*i.e.,* the $24,462,188 allegedly expended in the Prior Actions) against the Excess Insurers in the California Action as they did against HCC previously in this action (*id.* at 11). Defendants state that in the California Action, Plaintiffs are seeking damages from ERP for expenses allegedly incurred in the Prior Actions to the extent the excess insurance policies do not provide coverage (*id.*). Therefore, Defendants maintain that a determination of coverage is "a necessary prerequisite before assessing ERP's potential liability" (*id.*). Defendants argue that Plaintiffs' expert, Gary Greenfield, issued an expert report before Plaintiffs settled with HCC confirming that this action is a coverage action (*id.*). Defendants argue that most of the damages sought by Plaintiffs are the costs and expenses incurred in the Prior Actions and that as to any other damages asserted, Plaintiffs have not sufficiently quantified the same (*id.* at 12). Defendants contend that Plaintiffs are seeking two categories of damages in this action: (1) approximately $23 million in fees and expenses allegedly incurred in the Prior Actions, subject to a $7 million offset due to the HCC settlement; and (2) approximately $10 million allegedly incurred in litigating against HCC (*id.* at 13). Defendants

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[1] While the Court recognizes that back in April 2018, when this Court was first assigned to this case, ERP requested a Rule 24 conference to discuss a possible future motion to stay this action in favor of the California Action. That motion, however, was never made.

argue that the pleadings in the California Action demonstrate that the Plaintiffs are seeking from the Excess Insurers the same $23 million in litigation expenses (*id.* at 14). In addition, Defendants contend that the "damages" sought by Plaintiffs against ERP in the California Action "are alleged litigation expenses reimbursable in their entirety under the excess insurance policies providing $40 million in limits in excess of the $10 million in limits provided by the HCC primary policy" (*id.*). It is Defendants' position that if the primary and excess insurance policies cover the costs and expenses allegedly incurred, then Plaintiffs have no damages against Defendants and no claim of negligent procurement (*id.* at 15).

Defendants point out that in their FAC, Plaintiffs seek damages arising out of ERP's alleged negligent procurement of both the HCC primary policy and the excess policies that were follow form to the primary policy (all defined as "PE Policies") (*id.*, *citing* FAC ¶¶ 58, 80, 252). Defendants argue that any determination as to the negligent procurement of the PE Policies requires an adjudication of Plaintiffs' right to coverage under the excess policies, and if there is a finding that the excess policies cover the alleged costs and expenses of the Prior Actions, ERP's alleged negligence in procuring the PE Policies becomes moot (*id.* at 16).

According to Defendants, based on Plaintiffs' responses to ERP's interrogatory, Plaintiffs' calculation of damages for their negligent procurement claim includes "Plaintiffs' loss of the advance of defense costs in the entire Fox-Paine Litigation" (*i.e.*, $24,462,188.20) and this implicates the Excess Insurers because the HCC Policy covered only $10 million, which has been exhausted (*id.*). Defendants claim that Plaintiffs' expert, Ty Sagalow, opines that ERP violated the express terms of the PE Policies by "sending the 2007 FPC Complaint to HCC and the *excess carriers* without prior authorization from FPC thereby enabling HCC and the *excess carriers* to consider coverage for, and ultimately pay loss on behalf of Paine," and by failing to send HCC and the excess carriers the 2007 FPC Counterclaims against Fox thereby causing them to fail to consider the Counterclaims (*id.* at 17). Defendants assert that Plaintiffs' other insurance expert, Larry Goanos opines that ERP concealed that it provided notice to HCC and the Excess Insurers of the Fox-Paine Litigation and failed to inquire whether FPC would pursue coverage under the PE Policies and that ERP's acts or omissions "violated industry custom and practice" since ERP failed to notify FPC and Fox of: (1) "HCC and the *excess carrier's* acceptance for coverage of the 2006 FPC Complaint," and (2) "HCC and the *excess carriers'* transfer of the 2009 Arbitrations as Claims under FPC's HCC Policy" (*id.*). Defendants also point out that Plaintiffs' experts are contending that ERP breached its duties/committed professional malpractice by failing to support the denial by HCC and the Excess Insurers of coverage to the Paine Parties under the PE Policies. Defendants contend that the expert reports "focus on the decisions of the Excess Insurers to provide coverage to the Paine Parties and the duties of the Excess Insurers to communicate with FPC," which are the same claims Plaintiffs made in the California Action (*id.* at 18). Defendants assert that the "recent discovery and expert reports confirm that the purported acts and omissions, the policies at issues, the parties, and the asserted damages are intertwined in such a way that make the Excess Insurers" necessary parties (*id.*).

Defendants contend that if the Excess Insurers cannot be joined as necessary parties, the Court should dismiss the action pursuant to CPLR 1001 (*id.* at 19). It is Defendants' contention

that the factors listed in CPLR 1001(b) (whether an action should proceed in the absence of a necessary party) weigh against this action proceeding without the joinder of the Excess Insurers. Regarding the first factor, Defendants argue that since the Plaintiffs are pursuing their claims against ERP and the Excess Insurers in a duplicative parallel action in California for the same amount of damages, there is a chance of multiple inconsistent judgments as to the rights and obligations of the Excess Insurers (*id.* at 19-20). As to the second and third factors, Defendants contend that they and the Excess Insurers will be "highly prejudiced" if this action is allowed to proceed because Defendants' defense with respect to the negligent procurement claim is predicated on resolving coverage and if this Court finds in favor of coverage, Plaintiffs will rely on this finding in the California Action as precedent for a similar finding against ERP there and because the policies are follow form, it is likely that Plaintiffs will argue that the Excess Insurers are similarly bound by this finding of coverage (*id.* at 20). Defendants further contend that without a coverage determination, "Defendants would be deprived of essential defenses in this action based on Plaintiffs' failure to present claims to the Excess Insurers in a timely fashion and in compliance with the policy terms and conditions"[2] (*id.*). Regarding the fourth factor, Defendants point out that despite this Court's encouragement of a stipulation entered between the parties staying any enforcement of a judgment in favor of Plaintiffs pending the conclusion of the California Action, Plaintiffs have refused to enter into any such stipulation. Finally, as to the fifth factor, Defendants argue that there cannot be an effective judgment here because "New York case law holds that the negligence claims against ERP should be dismissed as premature until coverage issues are determined" (*id.* at 21; *citing Staten Is. Hosp.*, 137 AD2d at 677).

B. Plaintiffs' Contentions in Opposition

Plaintiffs state they commenced this action in February of 2014 against their former insurance broker, ERP, and former insurance carrier, HCC, alleging that Defendants conspired with the Paine Parties to "secretly extract $10 million dollars in insurance proceeds from Plaintiffs' policy, which the Paine Parties used to fund years of litigation against Plaintiffs" (Plfs' Opp. Mem. at 1). Plaintiffs claim they sued HCC and ERP in New York because the HCC Policy provided for jurisdiction here and the parties' unlawful conduct was directed at or took place here (*id.*). According to Plaintiffs, two and a half years into this action, they discovered that ERP "materially facilitated a separate successful scheme to tap Plaintiffs' excess insurance policies, leading to additional millions paid to the Paine Parties" (*id.* at 2). Plaintiffs' claim this is what led to the separate action in California against ERP and the Excess Insurers in February 2017 (*id.*).[3] Plaintiffs contend that "the claims asserted against ERP and the Excess Insurers in California are separate and distinct from the claims asserted against ERP and HCC in New York" (*id.*). Plaintiffs argue that ERP moved to stay the California Action until the New York Action is resolved as the New

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[2] This argument misses a critical component of Plaintiffs' negligence claim, which is that ERP's failure to properly advise and assist Plaintiffs in pursuing coverage under the primary and excess policies may have allowed the insurers to assert viable defenses to coverage.

[3] In addition, Plaintiffs contend that this is allegedly where the Excess Insurers are subject to jurisdiction and where the majority of the unlawful conduct took place (*id.*).

York Action would fully resolve Plaintiffs' claims and California Court granted ERP's motion (*id.*). According to Plaintiffs, Defendants are incorrect in their argument that the adjudication of Plaintiffs' claims necessarily requires a coverage determination under the primary and excess policies, and that such a determination would inequitably bind the Excess Insurers in their absence (*id.*).

Plaintiffs contend that Defendants' motion should be denied because: (1) the Excess Insurers are not necessary parties; (2) even if they were, the claims against Defendants must proceed to trial; (3) Defendants are estopped from making the motion; and (4) it is law of the case that joinder of the Excess Insurers is unnecessary (*id.* at 3-5).

In support of their first argument, Plaintiffs argue that the Excess Insurers are not necessary parties because an insurance broker can be liable for negligent procurement "*regardless* of whether the plaintiff first establishes a right to coverage and, therefore, the mere assertion of a negligent procurement claim does not render an insurer a necessary party" (*id.* at 6). In addition, Plaintiffs argue the availability of coverage under the excess policies has no bearing on their ability to recover damages in this action (*id.*). Plaintiffs allege this Court has recognized the following: "(1) Plaintiffs are never forced to sue all joint tortfeasors, or all parties against whom they have claims; (2) Defendants cannot force Plaintiffs to sue the Excess Insurers; (3) Plaintiffs are free to exercise their right to recover all amounts attributable to Defendants' breaches *here* in the first instance, and nothing compels Plaintiffs to engage in further litigation; and (4) if Defendants wish to pursue the Excess Insurers (or anyone else) for contribution, they are free to do so" (*id.* at 6-7).

Plaintiffs contend that adjudicating their negligent procurement claim does not require a coverage determination that would bind the Excess Insurers (*id.* at 7). Plaintiffs argue that as a matter of law "[d]etermining ERP's liability for negligence *does not* requires an adjudication of Plaintiffs' right to coverage" (*id.*).[4] In support, Plaintiffs rely on *Third Eye Blind, Inc. v Near N. Entertainment Ins. Serv., LLC* (127 Cal App 4th 1311, 1316, 26 Cal Rptr 3d 452, 456 [Cal Ct App 2005]) which they contend held that the question of whether a broker failed to give competent advice "'is an independent question and does not depend on whether [the insurer] was justified in denying coverage under the [plaintiffs'] policy'" (*id.* at 2, *quoting Third Eye Blind, Inc.*, 127 Cal App 4th at 1318-1319). Plaintiffs also rely on *Jordache Enter., Inc. v Brobeck, Phleger & Harrison* (18 Cal 4th 739, 743, 958 P2d 1062 [1998]), which they contend held that "the plaintiff's ability to sue defendants for negligence was not contingent on the resolution of the coverage question" and "[n]o matter the outcome, the coverage litigation 'would not preclude [the defendant's] potential liability for not advising a more direct, certain, and timely method of obtaining an insurer-funded defense of the [underlying] action" (*id.* at 8-9). Plaintiffs contend these cases are controlling because its negligent procurement claim is based on ERP's failure to give competent advice (*id.* at 9). Plaintiffs' contend that "ERP is liable for its negligence whether the

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[4] According to Plaintiffs, New York and California law are not in conflict on the issues of whether a definitive coverage determination is a prerequisite to a finding of liability for negligent procurement. But if there were such a conflict, Defendants have acknowledged that California law would control (Plfs' Opp. Mem. at 9, n5, *citing* NYSCEF Doc. No. 1010 at 7, 14-16).

PE Policies afford coverage or not;" therefore, an adjudication of the coverage determination is not required to try Plaintiffs' negligent procurement claim (*id.*).

Plaintiffs distinguish the cases on which Defendants rely because they are cases in which a declaratory judgment was sought to determine whether the policy at issue provided for coverage (*id.* at 10-11). Plaintiffs argue that even if it were necessary to interpret provisions of the HCC Policy, any such determination would not necessarily bind the Excess Insurers in the California Action (*id.* at 11). It is Plaintiffs' contention that: (1) excess insurers are not necessary parties in lawsuits involving determinations over coverage under primary policies; and (2) excess insurers are not bound to follow a third party's interpretation of primary policy provisions unless there is an express contractual provision requiring the excess insurer to accept such a third party's interpretation (*id.* at 11-12).

Plaintiffs contend that Defendants are "[r]epackaging a failed argument from a prior briefing" in which they argued that Plaintiffs had to seek reimbursement from the Excess Insurers first since the Excess Insurers payout to Plaintiffs would result in Plaintiffs having no damages against Defendants. Plaintiffs point out that this Court rejected this argument holding that it "misses the crux of Plaintiffs' claim that is not dependent upon whether or not Plaintiffs' claims would have been covered under the FPC Policies [and instead was predicated on whether ERP's actions] constituted a substantial factor in causing Plaintiffs to have to incur millions of dollars defending against the Paine Parties' frivolous litigation … Since HCC and the Excess Carriers paid out on the FPC Policies as a settlement (while they were still contesting coverage), whether or not there was actual coverage is irrelevant" (*id.* at 12-13, *quoting* April 2018 Decision at 70). Plaintiffs contend that the "key principle here is that joint tortfeasors are not necessary parties" (*id.* at 13). Plaintiffs point out that ERP admitted that Defendants and Excess Insurers are "alleged joint tortfeasors" and that Plaintiffs are entitled to pursue whichever Defendants they wish for the full amount of their damages (*id.*). Plaintiffs contend that ERP continues to make attempts at escaping responsibility for its wrongdoing by pointing the finger at the potential availability of coverage from the Excess Insurers (*id.* at 14).

Alternatively, Plaintiffs argue that the case must proceed to trial even if the Excess Insurers were found to be necessary parties under CPLR 1001(a) (*id.* at 15). Plaintiffs allege that dismissal would be extremely prejudicial to them because: (1) they have spent six years to get to this point; (2) the California Action is not an effective remedy due to the stay; (3) it would force Plaintiffs to redo nearly every stage in the litigation process; (4) it would allow Defendants to "nullify and relitigate" six years of rulings in this action; (5) it would delay relief; and (6) it would "potentially destroy the financial viability of Plaintiffs' claims in light of the extraordinary resources" already expanded (*id.* at 16). Plaintiffs also contend that going to trial will not prejudice Defendants or the Excess Insurers because in the event Defendants are found liable, they may seek contribution from the Excess Insurers and an adjudication of the negligent procurement claim does not operate as a coverage determination which would bind the Excess Insurers (*id.* at 16). In addition, there will be no *res judicata* or collateral estoppel effect because ERP does not claim to be a party to the Excess Policies or to be in privity with the Excess Insurers (*id.* at 16-17).

Plaintiffs argue that "[b]ecause Plaintiffs' claims against the Excess Insurers do not arise out of any activities of the Excess Insurers in New York, the only basis for jurisdiction in New York would be general (as opposed to specific). The U.S. Supreme Court, however, has all but limited a corporation's 'presence' for general jurisdiction to its state of incorporation and principal place of business, and New York is neither for the Excess Insurers" (*id.* at 15, n11). As such, Plaintiffs contend they would not be able to obtain jurisdiction over the Excess Insurers in New York (*id.* at 17). Plaintiffs also contend that they did not know about the Excess Insurers' allegedly wrongful activities until they discovered, two and a half years into this action, that the Excess Insurers made a $9 million settlement payment to the Paine Parties (*id.*). Plaintiffs allege that it was then that they initiated the California Action because that is where the Excess Insurers are subject to jurisdiction (*id.*). Plaintiffs also argue that the Excess Insurers have known and participated in this litigation by producing documents and witness for depositions, yet the Excess Insurers "never once objected to this case proceeding without them" (*id.*). Plaintiffs contend that if the Excess Insurers believe they could be prejudiced by the upcoming trial they had more than six years to consent to jurisdiction and intervene. Instead, the Excess Insurers joined ERP's motion to stay the California Action until this action is resolved, which by that time included the issue over coverage (*id.*). Lastly, Plaintiffs contend that an effective judgment can be rendered without the joinder of the Excess Insurers because New York and California law allows claims against an insurance broker to be resolved in the absence of an insurer (*id.* at 17-18).

Plaintiffs claim that Defendants are equitably estopped from claiming the Excess Insurers are necessary parties (*id.* at 18). Plaintiffs contend that in its first motion to dismiss in April 2014, ERP argued Plaintiffs failed to plead damages because they had "insurance coverage remaining in the FPC insurance tower," and, therefore, ERP knew that Plaintiffs' claimed damages could exceed $10 million and were potentially subject to reimbursement from the Excess Insurers yet ERP did not choose to move to dismiss based on the Excess Insurers being necessary parties nor did they seek to implead the Excess Insurers (*id.*). Plaintiffs argue that by waiting for six years to make this motion, Defendants are equitably estopped from bringing this motion (*id.* at 19). Plaintiffs further contend that Defendants are judicially estopped because of the position ERP advanced in its motion to stay the California Action (*i.e.*, "'Plaintiffs placed the excess coverage at issue in the first-filed New York Action. It is at issue here. To avoid duplicative litigation and inconsistent rulings, this [California] Court, should stay the matter as to all issues raised herein, and hence, as to all parties'") (*id.*). According to Plaintiffs, ERP argued in the California Action "that ***this Court can and should resolve any necessary coverage issues in New York*** -- the jurisdiction without the Excess Insurers -- ***and ERP prevailed***" (*id.* at 20). Plaintiffs further point out that the California Court, in granting the motion to stay (which has now stayed the California Action for three years), stated that to the extent a resolution to the coverage question was necessary, it should be decided in New York despite the absence of the Excess Insurers (*id.*).

Finally, it is Plaintiffs' position that it is the law of the case that joinder of the Excess Insurers is unnecessary (*id.* at 21). Plaintiffs contend that when they moved to discontinue their claims against HCC in June 2017, ERP argued that primary and excess insurers are necessary parties until the coverage issue was determined and that based on the Appellate Division's holding in *Staten Island*, Plaintiffs had to first join the Excess Insurers in the case (*id.*). According to

Plaintiffs, Justice Scheinkman disagreed and authorized the discontinuance of the action against HCC without the joinder of the Excess Insurers (*id.* at 21-22). Plaintiffs argue that since Justice Scheinkman did not order the joinder of the Excess Insurers, and since ERP did not appeal or seek to implead the Excess Insurers, Defendants are barred from re-raising the issue (*id.* at 22).[5]

C. Defendants' Contentions in Further Support of their Motion

Defendants assert that Plaintiffs are prejudicing Defendants as they are failing to live up to their representation to this Court that they would limit their damages in this action to "*the losses incurred as a result of the non-payment of primary insurance dollars*" (Defs' Reply at 1). Defendants point out that instead, the damages Plaintiffs seek are "*only available if there is no coverage under the Excess Policies*" (*id.* at 2). Defendants argue that the authority on which Plaintiffs rely is not controlling since those cases involved general claims of negligence, not claims of negligent procurement (*id.* at 3). Defendants state that Plaintiffs are "no longer hid[ing] that they are attempting to claim all damages they may have against the Excess Insurers *in this action* based on a theory of joint and several liability" (*id.* at 6). In this regard, it is Defendants' contention that Plaintiffs' citation to cases recognizing "that liability under New York law is said to be 'joint and several' is misplaced because none of the cases deal with the issue of joinder of necessary parties," or joinder of an insurer in a negligent procurement claim (*id.*)

Defendants maintain that the factors enumerated in CPLR 1001(b) do not weigh in favor of proceeding to trial without the Excess Insurers (*id.* at 7). Defendants disagree with Plaintiffs' assertion that they do not have another effective remedy to pursue their claims against the Excess Insurers and Defendants without suffering prejudice due to the amount of time and money spent on discovery and motion practice (*id.*). According to Defendants, the California Action, which is duplicative of this action, is an effective remedy to pursue their claims (*id.*). Defendants argue that motion practice and discovery will be relatively quick since most of the documents produced in this action would be the same as the ones that would be produced in the California Action and the Excess Insurers have produced documents in this action which would be used in the California Action. Furthermore, Defendants point out that to the extent identical issues are litigated in New York, the doctrine of collateral estoppel or issue preclusion may apply (*id.*). Defendants argue that the dismissal, or a stay, of this case in favor of pursuing the California Action, would result in a speedy resolution of all issues against all parties and avoid the risk of multiple, inconsistent judgments (*id.* at 8). Defendants dismiss Plaintiffs' argument that Defendants should have sought joinder of the Excess Insurers by claiming the burden to join necessary parties lies solely with the Plaintiffs, and it was not until the FAC was filed on January 31, 2019, which alleged, for first time, a claim of damages for negligent procurement, did the Excess Insurers become necessary parties (*id.*). Defendants further maintain that this motion became necessary based on recent fact discovery, depositions, and Plaintiffs' expert reports, which confirmed that the damages Plaintiffs

[5] The Court does not agree with Plaintiffs' law of the case argument since it is undisputed that this is the first time Defendants moved to dismiss based on Plaintiffs' failure to join a necessary party.

are seeking are the same damages Plaintiffs are seeking in the California Action against the Excess Insurers and ERP (*id.* at 8-9).

Defendants dispute Plaintiffs' arguments that it would be inequitable to grant their motion on the eve of trial or that Defendants are equitably estopped from pursuing dismissal based on the lack of necessary parties (*id.* at 9). Defendants claim the Court "need look no further than the representation made by Plaintiffs' [former] lead counsel in open court," in which counselor stated "[w]e [are] proposing to modify to make it very clear by stipulation that the damage recoveries here are for [ERP's] *wrongful conduct with respect to HCC and the primary policy payments*" (*id.*). Defendants argue that "[a]s evidenced by Plaintiffs' acknowledgment that they have sued Defendants as joint and several tortfeasors with the Excess Insurers, this representation is blatantly false" (*id.*). Defendants contend that the assertion that Defendants waited six years to make this motion is a "false narrative" because the negligent procurement claim was not added until January 2019 in Plaintiffs' FAC (*id.*). Defendants also take issue with the idea that they took "prior inconsistent positions" in the California Action, stating they sought the stay in June 2017, about two years before the Plaintiffs added their negligent procurement claim in New York (*id.*).

Defendants argue the law of the case doctrine does not apply to this motion (*id.* at 10). According to Defendants, the only issue before Justice Scheinkman was whether HCC should be dismissed as a party in light of its settlement with Plaintiffs, and that his ruling was narrowly tailored (*id.*). Defendants argue this is the first instance the parties are addressing the issue of necessary joinder of the Excess Insurers and Plaintiffs have been given notice and an opportunity to respond (*id.* at 11). In addition, Defendants argue that even if Justice Scheinkman's ruling with respect to HCC was deemed law of the case, the negligent procurement claim was not interposed until January 2019, and a substantial amount of new discovery has occurred which would require discounting the law of the case "in favor of the 'showing of new evidence'" (*id.*).

DISCUSSION

The rule governing the joinder of necessary parties (CPLR 1001) provides

> **(a) Parties who should be joined.** Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.
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> **(b) When joinder excused.** When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
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> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

3. whether and by whom prejudice might have been avoided or may in the future be avoided;

4. the feasibility of a protective provision by order of the court or in the judgment; and

5. whether an effective judgment may be rendered in the absence of the person who is not joined.

"Under CPLR 1001(a), a person or entity ought to be joined as a party to an action if such person or entity 'might be inequitably affected by a judgment' in the action" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 6 [1st Dept 2007], *quoting Matter of Redhook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 457 [2005]). "In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party. It also must be determined if the court's decision in the case, in the absence of the proposed parties, will have the element of finality for the protection of those before the court" (*Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]). "There are two principal purposes of requiring dismissal owing to absence of an indispensable party. First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be 'embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard'" (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 820 [2003], *cert denied* 540 US 1017 [2003]; *quoting First Natl. Bank v Shuler*, 153 NY 163, 170 [1897]).

According to the Practice Commentaries to CPLR 1001, "a necessary party is one whose nonjoinder will jeopardize the outcome of the action in either of two ways: (1) complete relief cannot be according to the existing parties to the action; or (2) the absentee may be inequitably affected by judgment" (V. Alexander, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C1001:1). However, it is well settled that a joint and several tortfeasor (which is what ERP and the Excess Insurers are alleged to be in the California Action) is not a necessary party (*Hecht v City of N.Y.*, 60 NY2d 57 [1983]; *Levy, Siskind v Levy*, 13 AD2d 538 [2d Dept 1961]).

Defendants complain that this late motion was caused by: (1) Plaintiffs' late amendment in January 2019 to assert a claim of negligent procurement; and (2) the information Defendants learned during recent discovery (including Plaintiffs' expert reports) concerning Plaintiffs' damages. Defendants' protestations ring hollow in light of the true nature of the proceedings in this action as well as the California Action.

First, ERP has known since at least March 16, 2017[6] that the damages Plaintiffs are seeking exceed the HCC primary policy limit of $10 million.

Second, Plaintiffs' assertion of a negligent procurement claim arose as a defensive measure after Defendants filed their Third Amended Answer and Counterclaims on September 18, 2017 wherein Defendants first interposed an affirmative defense of no coverage and a counterclaim seeking a judgment declaring that Plaintiffs' litigation expenses incurred in the Prior Actions were not covered under the primary and excess policies (NYSCEF Doc. No. 719). Prior to Defendants' Third Amended Answer and Counterclaims, Plaintiffs steadfastly contended that there was coverage under the primary and excess policies and ERP stood silent leaving HCC to champion the defense of no coverage. However, after Plaintiff and HCC settled and Plaintiff obtained Justice Scheinkman's approval to discontinue the action against HCC over ERP's objection in May 2017, ERP decided to change course and argue no coverage. The Court is at a loss to understand why Defendants are taking this position since it appears to undermine their ultimate goal, which would be to the extent there is a liability finding against Defendants, that there would be a pool of money to satisfy any such obligation by Defendants. If Defendants were to decide to drop their affirmative defense and declaratory judgment counterclaim prior to trial, a determination over coverage would likely be rendered moot.

Third, Defendants' position is disingenuous given the arguments ERP made in its motion to stay the California Action.[7] While it is true that the negligent procurement claim was not a cause of action at the time ERP sought to stay the California Action, Defendants understood at that time that the damages Plaintiffs were seeking (*i.e.*, the litigation costs incurred in the Prior Actions)[8] would implicate the excess policies. Furthermore, ERP believed since at least July 5, 2017, when ERP filed its opposition to Plaintiffs' motion to discontinue the action as against HCC, that the issue over coverage was an essential issue to be resolved regardless of the existence of a negligent procurement claim. In its opposition, ERP specifically argued that whether the expenses Plaintiffs incurred in the Prior Actions were "covered 'defense expenses' under the primary and/or excess policies is fundamental to determining plaintiffs' alleged 'damages' against ERP in this action" (NYSCEF Doc. No. 1150 at 4-5; *see also* NYSCEF Doc. 1150 at 1 ["Where an insured seeks recovery against a broker of amounts the insured asserts are due under primary and excess insurance, the insurers are indispensable parties to the action until a coverage determination is made"]; NYSCEF Doc. 1150 at 7 ["actions seeking damages from brokers, even if not deemed

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[6] Indeed, Plaintiffs have shown some evidence that Defendants were aware at the time of ERP's original motion to dismiss in 2014 that the issue over coverage on the excess policies was implicated in this action yet ERP did not move to dismiss based on the failure to join the Excess Insurers.

[7] Indeed, as set forth *infra,* the Court agrees that Defendants should be judicially estopped from taking a position contrary to the position they took on the motion to stay the California Action.

[8] It is undisputed that Plaintiffs are seeking damages beyond just the expenses they incurred in the Prior Actions as Plaintiffs are also seeking, *inter alia*, reimbursement for the expenses they allegedly incurred in their pursuit of this action against HCC as well as punitive damages.

'coverage actions' by the insured, require a necessary determination of a right to coverage *first*"]; ["Plaintiffs' secret settlement with HCC does not prevent the court's eventual coverage decision from materially affecting the rights and duties as between HCC and the excess insurers"]; NYSCEF Doc. 1150 at 11 ["That the coverage issue is the root of this litigation, and that the determination concerning primary and excess coverage necessitates the inclusion of all carriers, including HCC, is entirely of plaintiffs' doing [*i.e.,* by Plaintiffs' amendment of the complaint in March 2017 [NYSCEF Doc. No. 338] to seek $25 million in damages thereby implicating the excess insurance]). ERP's motion to stay the California Action until this action was resolved was joined by the Excess Insurers, who also knew that by deferring to this Court, factual findings and judgments could be made that could impact the proceedings in the California Action. In granting ERP and the Excess Insurers' motion to stay the California Action, the California Court agreed with the arguments of comity and judicial efficiency (*i.e.,* avoidance of duplicative litigation) and the California Court explicitly acknowledged that "[a]lthough HCC is no longer a party in the New York Action, the correctness of HCC's coverage decision is still subject to dispute … The outcome of that dispute, as well as any factual findings in the New York Action, will impact the determination of the Excess Insurers' liability in this action" (NYSCEF Doc. No. 1146 at 8).

Fourth, the only claim for which Defendants assert that the Excess Insurers are necessary parties is Plaintiffs' Third Cause of Action for professional liability/negligence, which Defendants refer to as the negligent procurement claim, but which actually involves allegations beyond negligent procurement. The Court views a negligent procurement claim to be limited to allegations that the broker failed to obtain a sufficient amount of coverage. It is undisputed that the FAC asserts many claims against ERP other than this purported negligent procurement claim and a coverage determination is irrelevant to these other claims. The Court does not agree with Defendants' argument that there could be no finding of liability against ERP if there is coverage because Plaintiffs would not have sustained any damages. As this Court noted in its denial of this branch of ERP's motion for summary judgment contained in its April 2018 Decision, Plaintiffs' claims[9] against Defendants were

> not dependent upon whether or not Plaintiffs' [insurance] claims would have been covered under the FPC Policies. Instead, Plaintiffs are arguing that ERP's breach of contract, its fraud, its breach of fiduciary duty, constituted a substantial factor in causing Plaintiffs to have to incur millions of dollars defending against the Paine Parties' frivolous litigation … Since HCC and the Excess Carriers paid out on the FPC Policies as a settlement (while they were still contesting coverage), whether or not there was actual coverage is irrelevant (NYSCEF Doc. No. 875 at 70).[10]

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[9] At the time this Court decided ERP's motion for summary judgment, Plaintiffs had not asserted a negligent procurement claim against ERP.

[10] It is Plaintiffs' contention, which is supported by some evidence, that ERP's assistance to the Paine Parties in accessing the $10 million from HCC fueled at least some part of the Paine Parties' litigation against Plaintiffs. The Court has been advised that Plaintiffs are not seeking these expenses in the California Action as that action is limited to the damages Plaintiffs sustained by

To the extent Plaintiffs' negligence claim is predicated on the insufficiency of insurance, it is arguable that this aspect of Plaintiffs' negligence claim cannot succeed without an initial determination of no coverage. However, Plaintiffs' negligence claim is predicated on more than just an allegation that the policy was insufficient. In Plaintiffs' Third Cause of Action for breach of professional duty/negligence, Plaintiffs allege that

> In the event that it is determined that the HCC Policy does not afford coverage, in whole or in part, for the losses that Plaintiffs incurred in connection with the Fox-Paine Litigation, ERP failed to use the skill and care that a reasonably careful insurance broker would have used under similar circumstances to procure the proper PE Insurance for FPC, Fox and FPC's affiliated companies by, among other things:
>
> (a) failing to ensure that the insurance placement documents and policy terms would not provide any basis on which individuals acting as representatives of, or performing services for, FPM III or otherwise acting contrary to FPC's interests, or FPM III itself could claim entitlement to any policy benefits;
>
> (b) failing to procure PE Insurance coverage that indisputably afforded full coverage for the losses Plaintiffs could incur as a result of employment-related claims made by made by or on behalf of FPC employees;
>
> (c) failing to procure PE Insurance coverage that did not contain a form of the insured v. insured exclusion that could be invoked by HCC as a basis for denying coverage to Plaintiffs;
>
> (d) failing to procure PE Insurance coverage for Plaintiffs that indisputably afforded full coverage for defense costs that Plaintiffs could incur as a result of proceeding such as those in the Fox-Paine Litigation;
>
> (e) failing to inform Plaintiffs timely or adequately regarding potential problems in securing insurance coverage needed to protect against the risks of FPC's business;
>
> (f) failing to inform Plaintiffs about the availability of other policies and/or policy provisions that could provide such needed coverage;
>
> (g) failing to timely or adequately inform Plaintiff of material terms, definitions, conditions and/or limitations in the HCC Policy, which ERP procured, that might serve to preclude or limit coverage; and
>
> (h) failing to take steps to ensure satisfaction of all policy conditions and other terms that could be invoked by HCC as a basis for its refusal to reimburse Plaintiffs for the losses incurred in connection with the Fox-Paine Litigation (FAC at ¶ 254).

ERP's alleged assistance in obtaining a settlement for the Paine Parties from the Excess Insurers, which occurred well after the final settlement of the Prior Actions and could not have fueled them.

Based on the foregoing, there are several allegations of negligence that are irrelevant to the issue of coverage. For example, based on the allegations contained in subsections (g) and (h), Plaintiffs are seeking damages based on ERP's alleged negligence in failing to advise and assist ERP in pursuing a claim against the policies so as to avoid the ability of the insurers to invoke defenses. Plaintiffs have also argued that ERP was negligent in only advising Amy Ghisletta (who they claim at the time was aligned with the Paine Parties and not an FPC representative), that ERP had provided a notice of claim on FPC's behalf. The Court agrees with Plaintiffs that *Third Eye Blind, Inc.*[11] is relevant to the issues presented in this motion. In *Third Eye Blind,* after the trial court ruled in plaintiff's favor against the insurer that the insurer should have provided coverage in a lawsuit instituted against plaintiff by one of its band members, the trial court granted the insurance broker's motion to dismiss plaintiff's negligence claims based on its contention that plaintiff's claims were predicated on a finding that the insurance policy did not provide coverage. The California Court of Appeals reversed the trial court's dismissal because, like the negligence claim asserted here, plaintiff's claims of negligence against its insurance broker were

> not premised on any conclusions as to the sufficiency of the CGL policy ... the complaint does not simply assert that the respondents were negligent because they procured an insufficient policy. Rather, it alleges that, despite their superior insurance knowledge and expertise, respondents failed to notify appellants that the policy contained an FELE – under which coverage for certain events might be excluded—and failed to so advise them that an errors and omissions policy would be necessary to cover this potential shortfall. These claims do not depend on an assumption that the CGL policy was deficient. The point is that respondents failed to alert appellants that the FELE would give [the insurer] a viable basis for refusing coverage under some circumstances and, consequently, failed to recommend that

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[11] *Jordache Enter., Inc.* is also relevant. It involved a legal malpractice action against a law firm based on its alleged failure to notify or advise plaintiff that it should notify its insurers of an action brought against plaintiff, where the issue involved whether plaintiff had timely asserted its malpractice action against the law firm, the court found that plaintiff had sustained actual injury from the law firm's alleged negligence no later than December 1987 since "[b]y then, [plaintiff] had lost millions of dollars – both in unpaid insurance benefits for defense costs in the Marciano action and in lost profits from the diversion of investment funds to pay these defense costs" (*Jordache Enter., Inc.*, 18 Cal 4th at 752). The court further noted that plaintiff's insurance coverage litigation against its insurers "could not determine the existence or effect of [the law firm's] alleged negligence ... the alleged failure to advise [plaintiff] on insurance matters was not an issue in the coverage lawsuits. Thus, the resolution of that litigation could not determine the consequences resulting from [the law firm's] alleged breach of duty. The coverage litigation's resolution was relevant to [the law firm's] alleged negligence only insofar as it potentially affected the amount of damages [plaintiff] might recover from [the law firm] ... Although the outcome of the coverage litigation may have reduced [plaintiff's] damages, that action could neither necessarily exonerate [the law firm], nor extinguish [plaintiff's] action against [the law firm] for failure to render timely advice on insurance issues" (*id.* at 753). The same reasoning applies to this case.

> appellants purchase errors and omissions insurance to ensure complete, uncontestable coverage .... Whether respondents failed to give competent advice to appellants is an independent question and does not depend on whether [the insurer] was justified in denying coverage under the CGL policy (*id.* at 457-458).

Furthermore, even if a finding of no coverage were a necessary prerequisite to Plaintiffs' negligent procurement claim, that does not mean that the Excess Insurers thereby become necessary parties to this action.

For example, in *St. George Hyatt, LLC v National Ins. Brokerage of N.Y., Inc.* (2016 WL 1610949 [Sup Ct. NY County 2016]), plaintiff was the owner of a building in Staten Island and National Insurance Brokerage of N.Y., Inc. ("NIBNY") was plaintiff's insurance broker. Plaintiff requested that NIBNY procure comprehensive general liability insurance (CGLI) and at the time of the request, the building was being renovated. NIBNY procured the CGLI policy from Seneca Insurance. It was undisputed that NIBNY indicated on the application for insurance that no structural alterations were contemplated and that no demolition exposure was contemplated. It was further undisputed that there was an exclusion for personal injury claims arising from construction, demolition or renovation work. After Seneca disclaimed coverage, Plaintiff sued NIBNY for, among other things, negligent procurement.

In denying the branch of NIBNY's motion to dismiss for failure to join Seneca as an indispensable party, the court held that "NIBNY has failed to demonstrate that complete relief cannot be 'accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action'" as plaintiff's "claims are directly addressed to NIBNY's alleged misfeasance and do not involve allegations against Seneca" (*St. George Hyatt*, 2016 WL 1610949 at *3). Similarly, here, Plaintiffs' negligence claim against ERP is not necessarily dependent upon a coverage determination.

The Court finds the case of Staten Is. Hosp. (and other similar cases cited by Defendants) distinguishable. In that case, *Staten Is. Hosp.* sued its broker in advance of it actually sustaining any damages that would potentially eventually arise from: (1) Staten Island being held liable in a future medical malpractice action for more than $1,000,0000; and (2) the primary excess insurance company denying Staten Island's claim. State Island Hospital sued its broker seeking a declaratory judgment that the broker had breached its contractual obligation by failing to provide reinsurance with a cut-through clause and insurance and reinsurance for liabilities arising from occurrences between July 1, 1976 and July 1, 1980. The Appellate Division, Second Department affirmed the trial court's grant of defendants' motion to dismiss agreeing that "any declaratory judgment would be premature since the future event, in this case a rejection of SIH's insurance claim, is beyond the control of the parties and may never occur" (*Staten Is. Hosp.*, 137 AD2d at 676). In *dicta,* the Second Department further stated that although the trial court did not reach the second basis asserted for dismissal, which was that plaintiff had failed to join the primary excess insurer and the reinsurers, it too could have provided a basis for dismiss because, in essence, plaintiff "was seeking a declaration that certain clauses in its policy with [the primary excess insurer] did not provide the protection which it had contracted with defendants [brokers] to obtain. Since a judicial determination as to the meaning and validity of the disputed clauses would perforce affect the legal

rights and relationships between SIH and the insurers, [the primary excess insurer] and the reinsurers are necessary parties to the action" (*id.* at .677).

In contrast to *Staten Is. Hosp.*, Plaintiffs have not asserted a declaratory judgment action against Defendants for a declaration that the FPC Policies did not cover Plaintiffs as it is not essential to their claims, and Plaintiffs have every intention of arguing that they were covered. It is only if Defendants argue that there is no coverage that Plaintiffs will take the position that the lack of coverage means that Defendants are liable for negligent procurement in failing to obtain policies with sufficient insurance. Given the different procedural posture of this case (including the inconsistent positions taken by Defendants and the Excess Insurers in seeking the stay of the California Action and the fact that this motion was only made on the eve of trial), the Court does not agree that *Staten Is. Hosp.* stands for the proposition that the Excess Insurers are necessary parties in this action.

Furthermore, based on the holding of *Shy v Insurance Co. of the State of PA* (528 Fed Appx 752 [9th Cir 2013]), it is clear that the Excess Insurers would not be bound by the decision by HCC to pay under the primary policy (*i.e.*, that Plaintiffs' losses were covered under the primary policy) even though the Excess Policies were follow form policies.

Based on the foregoing, Defendants have "failed to demonstrate that [the Excess Insurers are] needed to be [made parties] if complete relief is to be accorded between the plaintiff and the defendant ... [or] that [the Excess Insurers] will be inequitably affected by a judgment in this action absent [their] joinder" (*Spector v Toys "R" Us, Inc.*, 12 AD3d 358, 359 [2d Dept 2004]; *see also Mr. San, LLC v Zucker & Kwestel, LLP*, 112 AD3d 796 [2d Dept 2013]; *Halliwell v Gordon*, 61 AD3d 932 [2d Dept 2009]).

But even if the Excess Insurers were necessary parties, the Court would not dismiss or stay the action based on their absence from this case[12] given that the factors listed in CPLR 1001(b) weigh resoundingly in favor of this action continuing to trial in their absence. Furthermore, as discussed *infra*, the Court agrees that Defendants should be judicially estopped from arguing a stay or dismissal based on the absence of the Excess Insurers given that they prevailed in their motion for a stay of the California Action when they believed coverage to be an issue to be resolved in this action and actually advocated for this Court's resolution of this issue.

1. Whether Plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder

Plaintiffs initiated the California Action against ERP and the Excess Insurers after two and a half years litigating this action, when they learned during discovery that ERP had assisted the Paine Parties in obtaining a $9 million settlement from the Excess Insurers. This action is limited to Plaintiffs' claims arising from ERP's alleged wrongful acts of assisting the Paine Parties in obtaining the $10 million under the HCC Policy, whereas the claims in the California Action are

[12] The Court is satisfied that Plaintiffs have established this Court's lack of jurisdiction over the Excess Insurers for purposes of this motion.

limited to ERP's alleged wrongful acts of assisting the Paine Parties in obtaining $9 million from the Excess Insurers. The statute of limitations on Plaintiffs' claims in this action have expired and the Court has serious doubts over Plaintiffs' ability to join the claims it has against Defendants in this action in the California Action. But even if Plaintiffs had asserted these same claims in the California Action, the Court does not view this to be an effective remedy. The California Action has been stayed for three years and no discovery has occurred. By contrast, during this case's six-year tenure, numerous dispositive motions have been decided, discovery is complete and the case will likely proceed to trial in December or January. Plaintiffs would be forced to relitigate many of the issues that have already been decided, they would have to redo much of the document discovery and depositions that occurred since the Excess Insurers were not present for the depositions except to the extent the depositions involved the Excess Insurers. Thus, while Plaintiff has a remedy – it can hardly be said to be an effective one given the overwhelming prejudice that would result to Plaintiffs by having to essentially start over in California. Accordingly, the Court views this factor as weighing in Plaintiffs' favor.

2. The prejudice which may accrue from the nonjoinder to Defendant or to the Excess Insurers

The second factor requires the Court to evaluate potential prejudice to Defendants and the Excess Insurers if the action proceeds without the Excess Insurers. The purpose of joinder rules is to protect parties against "multiple, inconsistent judgments relating to the same controversy . . . joinder [also] protects the otherwise absent parties who would be 'embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard" (*Saratoga Count Chamber of Commerce*, 100 NY2d at 820). If Defendants ultimately choose to litigate the issue of coverage,[13] Defendants will have a full and fair opportunity to litigate it and as against Plaintiffs, they will not be required to relitigate it. Furthermore, as against the Excess Insurers in the California Action, although the Court does not have a crystal ball as to what the California Court will do, Defendants will likely not be precluded from relitigating the issue over again because the Excess Insurers are not parties nor are they in privity with any party in this action. To the extent the California Court decides that certain issues resolved in this action have

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[13] The Court is hopeful that Defendants will ultimately recognize that noncoverage would not absolve them of their liability and that it could actually hurt their posture in front of a jury both given the stance they took on behalf of the Paine Parties, in which they advocated that coverage existed and because the crux of Plaintiffs' claims in the New York Action is that ERP wrongfully assisted the Paine Parties in obtaining the settlement from HCC and in the California Action, that ERP did the same thing with regard to the Excess Insurers, even though HCC and the Excess Insurers took the position that the Paine Parties were not covered under the FPC Policies. Thus, if Plaintiffs prove their claims, they may be entitled to a recovery regardless of whether they were likewise actually covered under the FPC Policies. The Court does not agree with Defendants' "no harm, no foul" position that if there was no coverage, ERP's alleged conduct in assisting the Paine Parties cannot be wrongful as there were no wrongful payments made. The Court has further rejected Defendants' argument that Plaintiffs have sustained no damages because they have proceeds available under the Excess Policies. If Plaintiffs are successful against Defendants in this action, Defendants may proceed against the Excess Insurers for contribution.

applicability in the California Action, Defendants and the Excess Insurers have themselves to blame as they were the ones who sought to stay that action in favor of this action proceeding first.

Furthermore, this case involves many other claims other than negligent procurement for which coverage is a nonissue, and therefore, there is no argument that this action's proceeding on these claims would result in prejudice to either Defendants or the Excess Insurers. In addition, the damages Plaintiffs seek are not simply the amounts that would be subject to a claim of coverage under the FPC Policies (*i.e.*, the expenses incurred in the Prior Actions). Further, the fact that there is still a pool of money that exists under the excess policies from which Plaintiffs could be made whole does not thwart Plaintiffs' right to first pursue their claims against Defendants and not the Excess Insurers.

In conclusion, the Court views this factor as weighing in Plaintiffs' favor.

3. Whether and by whom prejudice might have been avoided or may in the future be avoided

As noted in the CPLR 1001(b) Practice Commentaries, this factor "focus[es] on an existing party's responsibility for contributing to the prejudice or taking steps to help avoid it. Is the prejudice of the plaintiff's own making? Could the absentee avoid prejudice by intervening or accepting an invitation to anticipate in the litigation? Could the defendant interplead absentees who may assert conflicting claims? … Should the burdens of nonjoinder rest more heavily on the party whose dealings with the absentee gave rise to the absentee's claim? … The timing of the motion to dismiss for nonjoinder should be taken into account in the prejudice analysis. As noted elsewhere, nonjoinder may be raised at any time during the litigation … Nevertheless, if the defendant makes a delayed motion, asserting the risk of another suit by the absentee, he may have no one to blame but himself for the prejudice that has accrued … Conversely, a Court may be more sympathetic to a belated motion where the absentee's interests are at stake" (V. Alexander, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C1001:2).

While it is true that the negligent procurement claim was not a cause of action in this case at the time Defendants sought a stay of the California Action, Defendants understood at that time that Plaintiffs' damages resulting from the costs incurred in the Prior Actions would implicate the excess policies in this action. Despite their belief that coverage was an issue even before Plaintiffs amended their complaint to add the negligent procurement claim, Defendants nevertheless waited until the eve of trial to move to dismiss based on the lack of necessary parties. Defendants never sought to join the Excess Insurers at any point during the three years since they filed their declaratory judgment counterclaim and affirmative defense of no coverage.

As such, Defendants could have sought to mitigate or avoid any prejudice by: (1) seeking to join the Excess Insurers in this action following ERP's filing in September 2017 of its Third Amended Answer and Counterclaims or moving to dismiss based on their nonjoinder; or (2) allowing the California Action to proceed rather than seeking a stay. Likewise, by joining in ERP's arguments in support of the stay of the California Action knowing full well that determinations over coverage could occur in this action and not seeking to intervene in this action, the Excess Insurers have no one to blame but themselves for any prejudice that may ensue (*see L-3*

Communications Corp., 45 AD3d at 13 ["Courts have routinely recognized that the ability of a nonjoined party to intervene in an action to avoid prejudice is a compelling factor in determining whether to dismiss a case for failure to join a necessary party"]). However, because the Excess Insurers are neither parties nor in privity with any parties, the Court cannot see how collateral estoppel or *res judicata* could be employed.

Based on the foregoing considerations and for the reasons discussed *infra* in the judicial estoppel analysis, the Court views this factor as weighing in Plaintiffs' favor.

4. The feasibility of a protective provision by order of the court or in the judgment

As far as this Court is concerned, because the Court cannot envision a circumstance under which the Excess Insurers would be bound by a determination in this action, the Court fails to see the need for a protective order to protect their interests. Regarding the Defendants, in the event Plaintiffs are successful, the Court may entertain at the conclusion of this case a stay the execution of any favorable judgment until a final disposition of the California Action so that in the event the Excess Insurers are found liable, any judgment rendered in this case could be offset by the settlement or judgment in that action.[14] The Court is by no means determining herein that it would grant such a stay, particularly since Defendants may seek contribution from the Excess Insurers in the California Action or in another plenary action. However, since it is feasible for this Court to institute protective measures, this factor weighs in Plaintiffs' favor.

5. Whether an effective judgment may be rendered in the absence of the person who is not joined

Here, the Excess Insurers are not required to be joined in order for an effective judgment to be rendered since this element focuses on whether complete relief as between Plaintiffs and Defendants can be afforded and there is no issue that if Plaintiffs are successful on one or more of their claims, they may be made whole through a damage award against Defendants (*L-3 Communications Corp., supra*; *Huber Lathing Corp. v Aetna Cas. and Sur. Co.*, 132 AD2d 597 [2d Dept 1987]). The only issue is that if Plaintiffs were to succeed in their claims against the Excess Insurers in the California Action, Defendants' liability would be reduced by the amount obtained from them, but Plaintiffs have no obligation to sue the Excess Insurers. The Court does not agree with Defendants' assertion that this action is premature. In *Staten Is. Hosp.*, the Second Department held that plaintiff's contract claim against its broker was premature because plaintiff had not yet made a claim against the policy and there was no showing that the insurance was not available (*i.e.*, plaintiff failed to show that it sustained any damages as a result of the broker's alleged negligence). By contrast, here, Plaintiffs have sufficiently alleged (and submitted evidence in opposition to ERP's prior summary judgment motion) that they sustained damages as a result

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[14] In *Matter of State Mut. Ins. Co. v Mercado* (70 AD2d 513 [1st Dept 1979], *modified on other grounds* 52 NY2d 840 [1981]), the First Department held that the potential excess insurer who was not joined in an arbitration was not a necessary party, but even if it were, that fact could be argued to the arbitrators as a reason for reducing the insurer's liability without the necessity of joining the excess insurer.

of Defendants' conduct irrespective of the coverage issue (*see Jordache, supra*; *Third Eye Blind, supra*).

Furthermore, it is largely up to Defendants whether the issue of coverage is raised in this action since Plaintiffs have always intended (following their settlement with HCC) on sidestepping a resolution of this issue as it was irrelevant to the action until Defendants interposed their affirmative defense and declaratory judgment counterclaim on no coverage. If Defendants ultimately decide not to pursue this affirmative defense and counterclaim, Plaintiffs have continuously represented to the Court that they would not be making coverage an issue and this Court will require them to drop their negligent procurement claim to the extent it is based on a claim of insufficient insurance. The Court fails to see how a determination of coverage in this action prejudices Defendants more than a finding of no coverage.[15]

Based on the foregoing, even if the Excess Insurers were necessary parties to this action, the weighing of the factors set forth in CPLR 1001(b) results in the conclusion that this action must nevertheless proceed in their absence. A dismissal (or a stay) of this action at this late date would inequitably prejudice Plaintiffs and result in the waste of six years of dispositive rulings on motions, a reopening of discovery that has been concluded, and the loss of a trial date that will be set within the next couple of months.

JUDICIAL ESTOPPEL BARS DEFENDANTS FROM ASSERTING THAT THIS ACTION SHOULD BE DISMISSED AND PLAINTIFFS RELEGATED TO PROCEEDING IN CALIFORNIA

The doctrine of judicial estoppel precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed (*see, e.g., Tedesco v Tedesco*, 64 AD3d 583 [2d Dept 2009]; *Environmental Concern, Inc. v Larchwood Constr. Corp.*, 101 AD2d 591, 593 [2d Dept 1984]). The doctrine of judicial estoppel requires that: (1) the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and (2) the prior inconsistent position must have been adopted by the tribunal in some manner (*Matter of 67 Vestry Tenants Assn. v Raab,* 172 Misc 2d 214, 219 [Sup Ct, NY County 1997]; *see Kalikow 78/79 Co. v State of*

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[15] Again, the Court does not agree with Defendants' position that if there is a finding of no coverage, ERP cannot be found to have done anything wrongful because no wrongful payments to the Paine Parties were made, particularly given that neither HCC nor the Excess Insurers agreed that there was coverage and, instead, they settled with the Paine Parties under a reservation of rights. A finding of coverage means the negligent procurement claim based on insufficient insurance would have to be decided in Defendants' favor. Furthermore, a finding of coverage here would have a positive impact in the California Action as the Excess Insurers may be willing to contribute from the excess policies to satisfy any judgment rendered against Defendants in this action. Furthermore, if Defendants are found liable here, they may seek contribution from the Excess Insurers.

N.Y., 174 AD2d 7, 11 [1st Dept 1992], *lv dismissed* 79 NY2d 1040 [1992]). In general, judicial estoppel only applies where the court has relied on or adopted a party's prior inconsistent position in ruling in that party's favor (*Herman v 36 Gramercy Park Realty Assoc., LLC*, 165 AD3d 405, 406 [1st Dept 2018] *lv denied* 35 NY 3d 907, 33 NY3d 1045; *Lory v Parsoff*, 296 AD2d 535, 536 [2d Dept 2002]).

In seeking the stay of the California Action, ERP successfully argued that the actions were duplicative and that comity and judicial efficiency dictate that the California Action be stayed until the first-filed New York Action fully resolves (NYSCEF Doc. No. 1145 at 1). In support, ERP argued, among other things, that: (1) Plaintiffs "seek recovery of the exact same 'damages' in both the New York and California actions" (*id.* at 10); (2) Plaintiffs have "put the excess coverage squarely in issue" since "Plaintiffs' alleged damages against ERP in New York consist of expenses that plaintiffs purportedly incurred litigating with their former business partner Dexter Paine … These are the same amounts that plaintiffs seek to recover from the excess insurers and ERP in this action" (NYSCEF Doc. No. 1156 at 1); (3) "Plaintiffs placed the excess coverage at issue in the first-filed New York Action. It is at issue here. To avoid duplicative litigation and inconsistent rulings, this Court should stay the matter as to all issues raised herein, and hence, as to all parties" (*id.* at 2); and (4) the Excess Insurers raised no objection to ERP's motion for the stay and "ERP has a real and vested interest in avoiding potentially inconsistent determinations on questions raised in both actions, including but not limited to the excess coverage question" (*id.* at 3).

As set forth in the California Court's Decision and Order, the Excess Insurers joined in ERP's motion (NYSCEF Doc. No. 1146 at 1), which occurred despite the fact that ERP argued that the issues over excess coverage were before this Court. Furthermore, at the time of ERP's motion to stay, ERP and the Excess Insurers knew that HCC was no longer involved in the New York Action and, as such, it was not there to champion the noncoverage argument ERP belatedly raised in this action. In deciding to stay the California Action, the California Court adopted the critical arguments made by ERP, which included:

> (1) Plaintiffs' seventh cause of action is brought against the Excess Insurers for aiding and abetting ERP's breaches of its fiduciary duties to plaintiffs, and, as such whether ERP had fiduciary duties and whether those duties were breached are necessary elements of plaintiffs' claims. It would be inefficient to proceed on plaintiffs' claim for aiding and abetting while these questions remain unresolved in the New York Action. Proceeding would also raise the possibility of conflicting rulings (*id.* at 8);
>
> (2) Although HCC is no longer a party in the New York Action, the correctness of HCC's coverage decision is still subject to dispute … The outcome of that dispute, as well as any factual findings in the New York Action, will impact the determination of the Excess Insurers' liability in this action (*id.*).

Based on the foregoing, it is clear that in moving to stay the California Action, ERP believed that the issue over coverage on the primary and excess policies was at issue in this action and yet, it chose to argue that the California Court should stay its action and defer to this Court to

resolve this issue. The California Court, in granting ERP's motion to stay, specifically adopted ERP's arguments in its ruling. As such, Defendants are judicially estopped from arguing that they and the Excess Insurers are prejudiced by this action proceeding to conclusion based on the failure to join the Excess Insurers as necessary parties.

CONCLUSION

Based on the foregoing and for the reasons stated above, it is hereby

ORDERED that the motion of Defendants Equity Risk Partners, Inc. and HUB International Insurance Services, Inc. to dismiss this action based on the failure to join necessary parties (CPLR 1001) is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 21 , 2020

ENTER

HON. GRETCHEN WALSH, J.S.C.

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