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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BANKERS INSURANCE COMPANY, a
Florida corporation,

Plaintiff,

v.

A-1 AIR CONDITIONING & HEATING,
a partnership; et al.,

Defendants.

AND RELATED THIRD PARTY
COMPLAINT

No. 2:16-cv-00177-JAM-CKD
**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

This insurance coverage dispute was sparked by a state court lawsuit over a residential fire. It heated up with a cross-complaint filed against Defendants in the state court action for which Defendants tendered their defense to Bankers Insurance Company ("Bankers"). Bankers further fanned the flames by filing this present action for declaratory relief and it now seeks summary judgment concerning its duties to defend and indemnify the Defendants in the underlying action. For the reasons described below the Court grants Bankers' Motion for Summary Judgment.

1 I. FACTUAL BACKGROUND

2 A-1 Air Conditioning & Heating ("A-1") is a sole
3 proprietorship owned by Daniel Edward Michael Webb ("Webb") that
4 installs and services heating and air conditioning equipment.
5 Defendants' Responses to Plaintiff's Separate Statement of
6 Undisputed Facts ("SUF"), ECF No.42, at ¶¶ 10, 27. A-1, Webb,
7 and Daniel Fisher ("Fisher") applied to Bankers for general
8 liability coverage in 2002 and held a Bankers policy from August
9 2003 to August 2005. SUF ¶¶ 4, 5, 6; Exh. 8. Webb and Fisher
10 also partnered to create Homestead Installations ("Homestead"),
11 a fireplace and stove installation business that incorporated in
12 April 2002 and for which Webb and Fisher were the sole
13 shareholders. Defendants' Opposition at 2; SUF at ¶¶ 8, 11.
14 Although Homestead attempted to secure insurance from Bankers in
15 2004, Homestead has never been listed as a named insured on a
16 Bankers policy. SUF at ¶¶ 7, 21; Filipoone Decl. at ¶ 6.

17 In 2004, Fisher—working for Homestead—installed a wood
18 burning stove and flue system at 9753 Ben Hall Drive in Galt,
19 California. SUF at ¶¶ 12, 15, 25. Custom Fireside Shop, Inc.
20 ("Custom") contracted Homestead to perform the work and required
21 Homestead to procure a one million dollar general liability
22 insurance policy naming Custom as an additional insured. SUF at
23 ¶¶ 12, 13. Homestead attempted to apply for this insurance with
24 the Scott Alberts Insurance Agency ("Alberts") through the
25 Alberts' employee Linda Shook ("Shook"). Alberts and Shook then
26 provided Defendants with an ACORD form Certificate of Liability
27 Insurance, which names A-1 and Homestead as insureds, Custom as
28 the certificate holder, and Alberts as the producer. SUF at

1 ¶¶ 16, 17; Exh. 7. Around March 28, 2012, the residence in which
2 Fisher installed the above-described stove was destroyed in a
3 fire. SUF at ¶ 18.

4 II. PROCEDURAL BACKGROUND

5 About a year and a half after the fire, Safeco Insurance
6 Company ("Safeco") filed a state lawsuit against several
7 parties, including Custom, due to the fire and the money Safeco
8 paid the insured for damage to the residence. SUF at ¶ 19; Exh.
9 4. Custom filed a cross-complaint naming Homestead, A-1, Webb,
10 and Fisher, among others. SUF at ¶ 19; Exh. 5. Custom,
11 Homestead, A-1, Webb, and Fisher each tendered their defense to
12 Bankers and requested that Bankers defend and indemnify them in
13 the Safeco lawsuit. SUF at ¶ 20. Bankers filed the present
14 suit in January 2016 seeking a judicial declaration—pursuant to
15 28 U.S.C. § 2201—that it does not owe a duty to defend or
16 indemnify A-1, Fisher, Webb, Homestead, or Custom in the Safeco
17 suit. Complaint for Declaratory Relief, ECF No. 1. Bankers
18 also named Safeco as a defendant in order for the judgment to
19 bind Safeco. Compl. at ¶ 7. A default was entered against A-1,
20 Homestead, Safeco and Webb on May 25, 2016. ECF No. 11. The
21 default was set aside on June 29, 2016 as to Webb and A-1. ECF
22 No. 14. By stipulation and Court order, Custom was not required
23 to file any responsive pleading and dismissed from this action.
24 ECF Nos. 5 & 6. A-1, Webb, Fisher, and Homestead¹ filed their

25
26 ¹ The default against Homestead was never set aside. Homestead
27 is also admittedly a "dissolved California Corporation."
28 Homestead has no legal basis to oppose this motion for summary
judgment and it was not necessary for Bankers to include
Homestead as a party in its summary judgment motion.

1 Answer and "cross-complaint"² against Alberts and Shook ("Cross-
2 Defendants") alleging that Cross-Defendants failed to secure the
3 requested Bankers insurance coverage and asserting related
4 claims. See Cross-Complaint, ECF No. 15.

5 Plaintiff filed its Motion for Summary Judgment on January
6 13, 2017. ECF No. 28. Cross-Defendants requested a continuance
7 of the hearing on the motion, which the Court denied. ECF Nos.
8 29 & 33. A-1, Webb, Fisher, and Homestead (hereinafter
9 "Defendants") filed an opposition, as did Cross-Defendants. ECF
10 Nos. 40 & 34. Although Plaintiff contests Cross-Defendants'
11 standing to oppose its motion, Plaintiff replied to each
12 opposition. ECF Nos. 43 & 44.

14 III. OPINION

15 A. Declaratory Relief

16 In a suit seeking declaratory judgment pursuant to 28
17 U.S.C. § 2201, a district court must first inquire whether there
18 is an actual case or controversy within its jurisdiction.
19 Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir.
20 2005). This standard is identical to Article III's
21 constitutional case or controversy requirement and thus
22 determines the court's jurisdiction to award relief. Am. States
23

24 ² Defendants named their pleading a "cross-complaint" and assert
25 claims against Alberts and Shook, who are third parties. In
26 federal court, this pleading is a "third-party complaint" under
27 Federal Rule of Civil Procedure 14. A "crossclaim" is a claim
28 asserted by one party against a co-party. Fed. R. Civ. P. 13(g).
Throughout this order, all references to the "cross-complaint"
are to the "third-party complaint" and reference to "cross-
defendants" are to the "third-party defendants."

1 Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1994).

2 The Ninth Circuit has held that in a declaratory judgment
3 action brought to determine an insurer's duty to defend and
4 indemnify in a pending state court liability suit, the case or
5 controversy requirement is met. Kearns, 15 F.3d at 144 (1994).
6 In this case, the underlying state lawsuit was pending when
7 Bankers' instigated the action and there is no indication in the
8 record that the state case has resolved. The Defendants
9 tendered their defense to Bankers and Bankers—as the present
10 litigation demonstrates—contests its obligations to Defendants.
11 Under Ninth Circuit precedent and the present facts, the case or
12 controversy requirement is met.

13 The Court must also exercise its discretion to determine
14 whether entertaining the action is proper. Gov't Emp. Ins. Co.
15 v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998). Prudential
16 guidance for retention is found in Brillhart v. Excess Ins. Co.
17 of Am. and includes considerations of the needless determination
18 of state law issues, forum shopping, and avoidance of
19 duplicative litigation. Id. at 1223-25 (Citing Brillhart, 316
20 U.S. 491 (1942)). The Ninth Circuit has indicated that other
21 considerations may be appropriate, such as "whether the
22 declaratory action will settle all aspects of the controversy;
23 whether the declaratory action will serve a useful purpose in
24 clarifying the legal relations at issue; whether the declaratory
25 action is being sought merely for the purposes of procedural
26 fencing or to obtain a 'res judicata' advantage; [] whether the
27 use of a declaratory action will result in entanglement between
28 the federal and state court systems[;] . . . convenience of the

1 parties[;] and the availability and relative convenience of
2 other remedies." Id. at 1225 n. 5 (quoting Kearns, 15 F.3d at
3 145 (J. Garth, concurring)).

4 The Court finds that retention is proper in this case.
5 Defendants have not objected to this Court deciding the action.
6 Although the case turns on state law, it is not an anticipatory
7 lawsuit and there is no indication that Bankers is forum
8 shopping. Bankers is not a party to the underlying litigation
9 and, to the Court's knowledge, there are no parallel state
10 proceedings involving the same issues between the parties. Cf.
11 Chamberlain v. Allstate Ins. Co., 931 F.2d 1361, 1366-67 (9th
12 Cir. 1991) ("[W]hen a party requests declaratory relief in
13 federal court and a suit is pending in state court presenting
14 the same state law issues, there exists a presumption that the
15 entire suit should be heard in state court."). Thus, the Court
16 does not find that declaratory relief is sought for the purposes
17 of procedural fencing, nor that a decision will entangle the
18 federal and state court systems. Further, the declaratory
19 action will settle the controversy and clarify the legal
20 relations between Bankers and Defendants. For these reasons,
21 the Court turns to the merits of the declaratory action.

22 B. Summary of Parties' Arguments

23 Bankers' motion provides several grounds on which this
24 Court might grant summary judgment or adjudication. Bankers
25 argues that Homestead was never a Bankers' insured, that Webb
26 and Fisher were not insured for work they did for Homestead,
27 that A-1 has no coverage apart from Webb because A-1 is a sole
28 proprietorship, that the certificate does not confer coverage to

1 Custom or the other defendants, and that, even assuming the
2 policies applied, the fire at issue was not an "occurrence"
3 within the policy period. See generally MSJ.

4 Defendants concede that Homestead was never insured under a
5 Bankers policy, but seem to argue—though it is not at all clear—
6 that Bankers may still owe Defendants a duty to defend and
7 indemnify due to Alberts' ostensible authority to provide them
8 with a Bankers insurance policy. Def. Opp. at 4-5. Defendants
9 do not counter the substantive legal arguments in Bankers'
10 motion and admit that most facts are undisputed. See Def. Opp.;
11 SUF.

12 Cross-Defendants launch a more substantial attack. First,
13 they argue that the allegation in the underlying cross-complaint
14 (Custom's cross-complaint against A-1, Homestead, Webb, and
15 Fisher in the Safeco lawsuit) that A-1 and Homestead are alter
16 egos creates potential liability on the part of A-1, Fisher, and
17 Webb and thus confers a continuing duty on Bankers. Cross Def.
18 Opp. at 9. Second, they argue that Bankers' policy language is
19 ambiguous as to who is an "insured." Id. at 10-11. Bankers
20 contests Cross-Defendant's standing to oppose its motion herein
21 against the Defendants because this lawsuit does not include a
22 claim or cross-claim between Bankers and Cross-Defendants. Rep.
23 to Cross Def. at 2-4.

24 As explained below, the undisputed facts show that the
25 Bankers policies do not cover the fire at issue in the
26 underlying lawsuit. Neither Defendants nor Cross-Defendants
27 challenge Bankers' argument that the fire is not an "occurrence"
28 covered by the policies. The relevant material facts on this

1 question are undisputed. SUF ¶¶ 34-36; Cross-Defendants'
2 Response to Plaintiff's Separate Statement of Undisputed Facts,
3 ¶¶ 34-36. As this determination is dispositive, the Court need
4 not address the arguments raised in the oppositions or whether
5 Cross-Defendants have standing to contest the motion.

6 C. The Fire is Not an Occurrence Under the Policy

7 This declaratory action concerns the duty to defend and the
8 duty to indemnify. "The insurer's duty to indemnify runs to
9 claims that are actually covered, in light of the facts proved."
10 Buss v. Super. Ct., 16 Cal.4th 35, 45 (1997). "By contrast, the
11 insurer's duty to defend runs to claims that are merely
12 potentially covered, in light of facts alleged or otherwise
13 disclosed." Id. at 46. This duty is not unlimited; "[i]t
14 extends beyond claims that are actually covered to those that
15 are merely potentially so—but no further." Id.

16 Insurance policies are interpreted by the rules of
17 construction applicable to contracts. Borg v. Transamerica Ins.
18 Co., 47 Cal. App. 4th 448, 456 (1996). The mutual intention of
19 the parties at the time the contract was formed governs its
20 interpretation and such intent is to be inferred, if possible,
21 solely from the written provisions of the contract. Montrose
22 Chem. Corp. v. Admiral Ins. Co., 10 Cal.4th 645, 666 (1995).
23 "The 'clear and explicit' meaning of these provisions,
24 interpreted in their 'ordinary and popular sense,' controls
25 judicial interpretation unless 'used by the parties in a
26 technical sense, or unless a special meaning is given to them by
27 usage.'" Id. (citing Cal. Civ. Code §§ 1638, 1644). "If the
28 meaning a layperson would ascribe to the language of a contract

1 of insurance is clear and unambiguous, a court will apply that
2 meaning." Id. at 666-67. Where there is ambiguity, however,
3 "the language of an insurance policy must be interpreted broadly
4 in order to protect the objectively reasonable expectations of
5 the insured." Borg, 47 Cal. App. 4th at 456.

6 Bankers issued Commercial General Liability Coverage
7 Policies covering policy periods from August 2, 2003, to August
8 2, 2004, and August 2, 2004, to August 2, 2005, listing A-1
9 Heating and Air Conditioning, Edward Webb, and Daniel Fisher as
10 the insured. Exh. 2 & 3. Fisher installed the stove in 2004 and
11 thus Bankers' duties, if any, would arise from these contracts
12 (i.e. if Homestead had been added onto the policies or the
13 policies otherwise extended to Fisher's installation work).

14 The "Insuring Agreement" of the policies state:

15 [The insurer] will pay those sums that the insured
16 becomes legally obligated to pay as damages because of
17 "bodily injury" or "property damage" to which this
18 insurance applies. We will have the right and duty to
19 defend the insured against any "suit" seeking those
20 damages. However, we will have no duty to defend the
21 insured against any "suit" seeking damages for "bodily
injury" or "property damage" to which this insurance
does not apply. . . . b. This insurance applies to
"bodily injury" and "property damage" only if: . . .
(2) The "bodily injury" or "property damage" occurs
during the policy period.

22 Exh. 2 at BIC000238; Exh. 3 at BIC000281.

23 Each policy contains an "Amendatory Endorsement" modifying
24 the policy's definitions. Exh. 2 at BIC000225; Exh. 3 at
25 BIC000268. The definitions of "occurrence" and "property

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1 damage" are modified as follows (emphasis added):

2 "Occurrence" means an accident which results in
3 "bodily injury" or "property damage" that first occurs
4 during the policy period and is neither expected nor
5 intended by an insured. "Bodily injury" or "property
6 damage" first occurs during the policy period only if:
7 a. The "bodily injury" or "property damage" is first
8 sustained by a person or entity during the policy
9 period as a direct result of an accident that first
10 occurs during the policy period; or b. The "bodily
11 injury" or "property damage" actually is or reasonably
12 should be first apparent during the policy period to
13 an "insured". . . .

9 "Property damage" means: a. Physical injury to
10 tangible property which is caused by an "occurrence",
11 including all resulting loss of use of that property.
12 All loss of use shall be deemed to occur at the time
13 of the physical injury that caused it; or b. Loss of
14 use of tangible property that is not physical injury,
15 provided such loss of use is caused by an occurrence
16 during the policy period. All such loss of use shall
17 be deemed to occur at the time of the occurrence that
18 caused it.

15 Id. Taking these paragraphs together, the policy unambiguously
16 states that Bankers does not have a duty to defend unless a suit
17 seeks damages from the insured for an accident that occurred
18 during the policy period that caused property damage first
19 sustained during the policy period.

20 The underlying suit does not meet these requirements. It
21 is undisputed that the fire and resulting damage occurred in
22 2012 and the insurance policies expired in 2005. Safeco's suit
23 against Custom does not allege any property damage prior to that
24 fire. See Exh. 4 at ¶¶ 8, 22. Custom's cross-complaint against
25 Defendants does not allege any property damage beyond Safeco's
26 alleged injuries. See, e.g., Exh. 5 at ¶ 29. Based on the
27 allegations in the underlying suit and the unambiguous text of
28 the insurance contracts, the 2012 fire is not covered under the

1 policies.

2 The contrast between the facts of this case and those in
3 Borg v. Transamerica Ins. Co. is instructive. In Borg, the
4 policy at issue defined "occurrence" as "an accident, including
5 exposure to conditions, which results, during the policy period,
6 in . . . property damage," which, in turn, was defined as
7 "physical injury to, destruction of, or loss of use of tangible
8 property." 47 Cal. App. 4th at 456. The case turned on whether
9 Transamerica owed Borg a duty to defend for damage to his
10 neighbor's property even though the damage was attributable to
11 an occurrence predating the Transamerica policy period. The
12 Borg court concluded that the policy only required "the property
13 damage itself [to] take place during the policy period to
14 trigger coverage; the 'occurrence' that was the ultimate cause
15 of this damage need not have taken place during the term of the
16 policy." Id. It noted: "[T]here is nothing in the policy
17 requiring that the damage first appear during the policy term in
18 order for it to be covered." Id. Thus, because the complaint
19 in the underlying lawsuit alleged continuous property damage,
20 the damage fell within the ambit of the policy and triggered the
21 duty to defend.

22 Here, the Bankers' policies are clear that the damage must
23 first be sustained during the policy period. Likewise, the
24 occurrence causing the damage must first occur during the policy
25 period. Because the underlying suit contains no such
26 allegations, there is no potential for coverage and the duty to
27 defend does not arise. On this reasoning it further follows
28 that Bankers has no duty to indemnify Defendants in the

1 underlying lawsuit.

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IV. ORDER

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For the reasons set forth above, Bankers' Motion for
5 Summary Judgment on all its claims is GRANTED.

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Dated: March 23, 2017

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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