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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 RICHARD L. BRADLEY, ET AL.

No. C 11-00292 SI

9 Plaintiffs,

**ORDER DENYING MOTION TO
DISMISS**

10 v.

11 CONTINENTAL CASUALTY CO.,

12 Defendant.
13 _____/

14 On April 22, 2011, the Court heard argument on defendant Continental Casualty's motion to
15 dismiss. Having considered the arguments of counsel and the papers submitted, the Court hereby
16 DENIES defendant's motion.
17

18 **BACKGROUND**

19 Plaintiff West Coast Scrap Producers, Inc. ("West Coast Scrap") is a dissolved California
20 corporation. Compl. ¶ 1. Plaintiff Richard L. Bradley ("Bradley") was the beneficial owner of all of
21 the stock of West Coast Scrap. *Id.* ¶ 2.

22 In March 2009, the guardian ad litem for certain minor plaintiffs filed a lawsuit in Sonoma
23 County Superior Court naming as defendants, among others, West Coast Scrap and Bradley. *Id.* ¶ 16
24 & Ex. 2. The suit was captioned *Gill v. West Coast Welders Supply Co.* (Case No. SCV 244778). The
25 *Gill* plaintiffs allege that West Coast Scrap and Bradley "owned and/or operated scrap metal operations
26 whose operations related to the use, storage, handling and release of Contaminants at 99 Frances Street
27 in Santa Rosa" and on the adjacent property, "1143 Briggs Avenue." *Id.* ¶ 17 (quoting *Gill* complaint
28 ¶ 2, attached as exhibit 2). The *Gill* plaintiffs allege that "Contaminants were released" at the two

1 properties, which contaminated “properties plaintiffs lived at and/or occupied, and drinking water used
2 and consumed by Plaintiffs and their parents.” *Id.* ¶ 18 (quoting *Gill* complaint ¶ 2). The *Gill* plaintiffs
3 also allege that

4 31. . . . Contaminants migrated from [99 Frances] into ground water where
5 it was transferred, in part, via sewer lines and underground utilities
6 onto properties Plaintiffs and their parents lived and/or occupied, and
7 into drinking water used and consumed by Plaintiffs and their parents.
8 Defendants knew or should have known that Plaintiffs’ [sic] were
9 likely to have their water contaminated with chemicals known to cause
10 cancer and other serious illness. In failing to prevent continued
11 migration of chemicals from their properties and into Plaintiffs’ water
12 and onto properties Plaintiffs and their parents lived and/or occupied,
13 these Defendants breached their duty to control the Contamination their
14 business operations created.

15 32. . . . the Defendants knew for several years that Contaminants were
16 migrating from their property in Plaintiffs’ drinking water and onto
17 properties Plaintiffs and their parents lived and/or occupied. However,
18 Defendants fraudulently and purposefully failed in their duty to
19 conduct adequate testing and/or environmental assessments of the
20 contamination spreading from the Property with the intent to avoid
21 liability. As such, Defendants failed in their duty to warn Plaintiffs and
22 their guardians that Plaintiffs were likely ingesting Contaminants in
23 their drinking water. In failing to adequately control the contamination
24 emanating from the Property, and in failing to warn Plaintiffs and their
25 guardians that they were probably ingesting Contaminants emanating
26 from the Property, Defendants breached their duty of due care.

27 *Id.* ¶ 19 (quoting *Gill* complaint ¶¶ 31–32).

28 Bradley and West Coast Scrap purchased and were named insureds under an umbrella insurance
policy that was issued in August 1974. *Id.* ¶ 8. The policy continued in effect until October 1, 1976,
at which point another umbrella policy was issued, which continued in effect until at least January 1,
1978. *Id.* ¶¶ 8–9. West Coast Scrap operated scrap metal operations at 99 Frances Avenue and 1143
Briggs Avenue during the umbrella policy periods, but ceased operating prior to the end of the later
umbrella policy. *Id.* ¶ 21.

Bradley and West Coast Scrap allege that, according to the terms of the umbrella policies,
Continental Casualty is obliged to defend them in the *Gill* litigation. *Id.* ¶ 23. Continental Casualty has
refused to do so. *Id.* ¶ 28. Plaintiffs have filed a complaint for declaratory relief and damages, alleging
a breach of the duty to defend, and a breach of the implied covenant of good faith and fair dealing.

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LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 544, 555.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court must assume that the plaintiff’s allegations are true and must draw all reasonable inferences in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

DISCUSSION

“Liability insurers owe a duty to defend their insureds for claims that potentially fall within the policy’s coverage provisions. The carrier must defend a suit which potentially seeks damages within the coverage of the policy. However, in an action where no claim is even potentially covered, the insurer owes no duty to defend.” *Hameid v. National Fire Ins. of Hartford*, 31 Cal. 4th 16, 21 (2003).

Defendant moves to dismiss, arguing that no claim in *Gill* is even potentially covered. Defendant argues that, under the terms of the policies, both the wrongful act and the resulting injury must occur during the policy periods. Because the umbrella policies were not in effect after 1978, and because the *Gill* plaintiffs were minors as of 2009, meaning that they were not yet born in 1978 and therefore could not have been injured while the policy was in effect, there is no possible coverage.¹

Plaintiffs argue that the *Gill* plaintiffs made certain claims that, under California law, constitute

¹ For the purpose of this motion, defendant does not challenge any other legal assertions or allegations in plaintiffs’ complaint.

1 claims for invasion of private property, and that such claims are covered under the terms of the umbrella
2 policies even where only the wrongful act (but not the resulting injury) occurred during the policy
3 periods.

4 The relevant terms of the insurance policies are as follows.

5 **2. Coverage B – Excess Liability Indemnity Over Retained Limit**

6 The company will indemnify the insured, with respect to any occurrence not
7 covered by underlying insurance . . . for ultimate net loss in excess of the
8 insured’s retained limit which the insured shall become obligated to pay as
9 damages by reason of liability imposed upon the insured by law . . . because
10 of

11 personal injury
12 property damage, or
13 advertising injury

14 to which this coverage applies, caused by an occurrence. The company, with
15 respect to an occurrence not covered in whole or in part by underlying
16 insurance or to which there is no other insurance in any way applicable, shall
17 have the right and duty to defend any suit against the insured seeking damages
18 on account of such personal injury, property damage or advertising injury, even
19 if any of the allegations of the suit are groundless, false or fraudulent. . . .

20 **5. Policy Period**

21 . . . Coverage B – The coverage applies to personal injury, property damage or
22 advertising injury taking place during this policy period. . . .

23 **Definitions**

24 “bodily injury” means bodily injury, sickness or disease, including death and care and
25 loss of services resulting therefrom, sustained by any person

26 “occurrence” means

27 (1) with respect to subsection (1) of the definition of personal injury and with respect
28 to property damage, an accident, including injurious exposure to conditions, which
results, during this policy period, in such personal injury, or property damage neither
expected nor intended from the standpoint of the insured. All ultimate net loss arising
out of continuous or repeated exposure to substantially the same conditions shall be
considered as arising out of one occurrence;

(2) with respect to subsection[] (2) . . . of the definition of personal injury, an act or
series of acts of the same or similar nature, committed during this policy period which
causes such personal injury. All ultimate net loss arising out of such act or series of
acts, regardless of the frequency thereof or the number of claimants, shall be deemed
to arise out of one occurrence; . . .

“personal injury” means

(1) bodily injury, shock, mental injury or mental anguish;

(2) false arrest, detention or imprisonment, wrongful entry or eviction or other invasion
of private occupancy, malicious prosecution or humiliation; except that maliciously
inflicted by, at the direction of, or with the consent of the insured;

1 Compl. Ex. 1, Ex. B.

2 In *Martin Marietta Corp. v. Insurance Company of North America*, 40 Cal App. 4th 1113 (1995),
3 the California Court of Appeal interpreted a definition of “personal injury” in an insurance contract that
4 was substantially similar to the second definition of personal injury in the umbrella policy in this case.
5 In that case, the California Court of Appeal held that policy language insuring Martin Marietta’s liability
6 for “wrongful entry or eviction, or other invasion of the right of private occupancy,” provided coverage
7 for certain suits brought by governmental entities which sought to require Martin Marietta to remediate
8 groundwater and other contamination emanating from landfill and other sites. *Id.* at 1117. The court
9 explained that “wrongful entry . . . may include nuisance,” and “other invasion of the right of private
10 occupancy . . . may include nuisance claims.” *Id.* at 1131–32 (internal quotation marks omitted).

11 At least for the purposes of this motion, defendant acknowledges that some of the injuries pled
12 in *Gill* may fall under the second definition of personal injury in the umbrella policies. Defendant
13 argues, however, that the injuries in *Gill* could not have occurred while the policy was in effect, because
14 the plaintiffs were not yet living, and therefore it has no duty to defend. Defendant argues that the
15 policy, by its language, only “applies to personal injury . . . taking place during this policy period,” and
16 that “personal injury” means the result of an injurious act.

17 “In questions of insurance coverage the court’s initial focus must be upon the language of the
18 policy itself, not upon ‘general’ rules of coverage that are not necessarily responsive to the policy
19 language.” *Am. Cyanamid Co. v. Am. Home Assurance Co.*, 30 Cal. App. 4th 969, 978 (1994). In
20 *American Cyanamid*, the plaintiff alleged that the defendants had duty to defend under any one of eight
21 different policies with different language. The underlying lawsuit was for anticompetitive behavior,
22 brought by a competitor that had not existed during the relevant policy periods.

23 Two of the policies covered personal injury, property damage, or advertising injury caused by
24 an occurrence, and the policies defined “occurrence” as “an injurious exposure to conditions, which
25 results during the policy period, in personal injury, advertising injury or property damage” *Id.* at
26 979. Under these policies, the trigger of coverage was an injury during the policy periods, and the
27 claimed injury could not have occurred during the policy periods, because the competitor “was not even
28

1 in existence.” *Id.* at 980.² Similarly, a third policy defined “advertising injury” as “injury or damage
2 arising out of one or more [enumerated] offenses,” meaning “that the triggering event is the injury, not
3 the act.” *Id.* at 981.

4 In contrast, another policy at issue in *American Cyanamid* limited coverage to “occurrences
5 which happen during the policy period,” but provided no definition of “occurrence.” *Id.* at 980. As to
6 that policy, the court concluded that it could refer to “anticompetitive conduct during the policy period
7 even though the injury . . . resulted later.” *Id.* The remaining four policies provided coverage for
8 “offenses committed . . . during the policy period.” *Id.* at 981. The policies covered “advertising injury
9 arising out of offenses committed anywhere during the policy period,” and “advertising injury” was
10 defined to mean “injury or damage arising out of one or more [enumerated] offenses.” *Id.* at 981 n.5.
11 The court explained that language providing coverage for “offenses committed” during the policy period
12 “indicates that the triggering event is the act, not the injury.” *Id.* at 982. Thus, “[i]nsofar as [the
13 competitor’s] complaint alleges that American Cyanamid’s anticompetitive practices before 1986 caused
14 injury to [the competitor] after it was formed in 1986, the complaint alleges that an ‘offense’ was
15 committed during the policy periods.” *Id.*

16 Under the umbrella policies at issue in this case, the triggering event is “personal injury.”
17 Defendant would like the Court to read “personal injury” to mean the result of an injurious act.
18 However, the policy defines “personal injury” further, and the Court may not ignore the language of the
19 policies. One definition of personal injury is “bodily injury.” An “occurrence” of bodily injury is one
20 where the bodily injury “results, during th[e] policy period.” This language is nearly identical to the
21 language in the first two policies discussed in *American Cyanamid*, and it is clear that defendant does
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23 ² The California Supreme Court has explained that
24 “trigger of coverage” is a term of convenience used to describe that which, under the
25 specific terms of an insurance policy, must happen in the policy period in order for the
26 potential of coverage to arise. The issue is largely one of timing—what must take
27 place within the policy’s effective dates for the potential of coverage to be “triggered”?
28 Whether coverage is ultimately established in any given case may depend on the
consideration of many additional factors, including the existence of express conditions
or exclusions in the particular contract of insurance under scrutiny, the availability of
certain defenses that might defeat coverage, and a determination of whether the facts
of the case will support a finding of coverage.
Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 655 n.2 (1995).

