AKH Company, Inc. v. Universal Underwriters Insurance Company Doc. 75

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AKH COMPANY, INC.,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 13-2003-JAR**
UNIVERSAL UNDERWRITERS INSURANCE COMPANY,	)	
	)	
Defendant/Counter-Claimant.	)	

MEMORANDUM AND ORDER

This case comes before the Court on Plaintiff AKH Company, Inc.'s Motion for Partial Summary Judgment (Doc. 7) and on Defendant Universal Underwriters Insurance Company's Motion to Bifurcate (Doc. 68). The motions are fully briefed, and the Court is prepared to rule. For the reasons explained in detail below, the Court denies both motions.[1]

I. Standards

A. Summary Judgment

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law."[2] In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[3] "There is no genuine issue of material fact unless the evidence,

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[1]The Court also rules on a number of motions, filed by both parties, which relate to Plaintiff's motion for partial summary judgment.

[2]Fed. R. Civ. P. 56(a).

[3]*City of Herriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010).

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construed in the light most favorable to the nonmoving party, is such that a reasonable jury could return a verdict for the nonmoving party."[4] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim."[5] An issue of fact is "genuine" if "'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'"[6]

The moving party initially must show the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[7] In attempting to meet this standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[8]

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial."[9] The nonmoving party may not simply rest upon its pleadings to satisfy its burden.[10] Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier

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[4]*Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

[5]*Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998)).

[6]*Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

[7]*Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)).

[8]*Adams v. Am. Guar. & Liab. Ins. Co.,* 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Adler*, 144 F.3d at 671); *see also Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010).

[9]*Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 324; *Spaulding*, 279 F.3d at 904 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986)).

[10]*Anderson*, 477 U.S. at 256; *accord Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001).

of fact could find for the nonmovant."[11] To accomplish this, the facts "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein."[12] Rule 56(c)(4) provides that opposing affidavits must be made on personal knowledge and shall set forth such facts as would be admissible in evidence.[13] The non-moving party cannot avoid summary judgment by repeating conclusory opinions, allegations unsupported by specific facts, or speculation.[14]

Finally, summary judgment is not a "disfavored procedural shortcut"; on the contrary, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[15] In responding to a motion for summary judgment, "a party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial."[16]

B. Bifurcation

Courts have the discretion to order a separate trial of one or more distinct issues or claims "for convenience, to avoid prejudice, or to expedite and economize."[17] "While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has

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[11]*Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1197–98 (10th Cir. 2000) (quoting *Adler*, 144 F.3d at 671); *see Kannady*, 590 F.3d at 1169.

[12]*Adams*, 233 F.3d at 1246.

[13]Fed. R. Civ. P. 56(c)(4).

[14]*Id.*; *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006) (citation omitted).

[15]*Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

[16]*Conaway v. Smith,* 853 F.2d 789, 794 (10th Cir. 1988).

[17]Fed. R. Civ. P. 42(b).

demonstrated its worth."[18] A court should not order bifurcation if the issues are not clearly separable or if doing so would be unfair or prejudicial to a party.[19]

II. Uncontroverted Facts

The following facts are either uncontroverted or taken in the light most favorable to Defendant.

Universal issued insurance policy number 268140 to AKH for the coverage period of May 1, 2007 to May 1, 2008. The policy was renewed for five consecutive one-year periods through May 1, 2013. The policy's insuring agreement for Unicover V "Garage" Coverage Part 500 includes coverage for liability for "DAMAGES" because of "INJURY." Those terms are defined in relevant part as follows:

> "DAMAGES" means amounts awardable by a court of law.
>
> "INJURY" means, with respect to: . . .
>
> Group 4 – plagiarism, misappropriation of advertising ideas or style, infringement of copyright, title, slogan or trademark.

The policy's insuring agreement for Unicover V "Umbrella" Coverage Part 980 also provides coverage for liability for "DAMAGES" because of "INJURY" and employs the same definitions. The policy also includes certain exclusions, including the following:

> EXCLUSIONS – This insurance does not apply to:

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[18] Fed. R. Civ. P. 42(b) advisory committee's note (quoted in *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 964 (10th Cir. 1993)).

[19] *Angelo*, 11 F.3d at 964.

(b) any act committed by or at the direction of the INSURED with intent to cause harm.

* * *

(m) INJURY, as defined in Groups (3) and (4) if the first injurious offense was committed prior to the Coverage Part period.

Finally, the policy includes the following cooperation clause:

If there is an OCCURRENCE, the INSURED is sued, or a claim is made against the INSURED:

* * *

(3) Each INSURED must cooperate and assist US in the investigation, settlement, defense, enforcement of contribution or indemnification. . . .[20]

Although the parties agree that the policy says what it says–as they must because both sides attached a copy of the policy–they agree on virtually no other facts surrounding the policy's making or performance. For example, UUIC asserts that in April of 2007 its account executive met twice with AKH's insurance broker at AKH's California headquarters to discuss proposed coverage; AKH denies that a broker acted on its behalf in negotiating and purchasing the policy. UUIC asserts that its account executive hand-delivered to AKH's headquarters both the original policy in 2007 and the first renewal in 2008; AKH contends that it received both in the mail from UUIC's Kansas office. UUIC asserts that from May of 2007 through December of 2008, AKH mailed its premium payments to UUIC in California; AKH contends it mailed those payments to Kansas.

On May 14, 2010, the Reinalt-Thomas Corporation d/b/a Discount Tire; Southern California Tire Company, Inc.; and Bruce T. Halle (collectively, "R-T") sued AKH in the District of Arizona (the "R-T lawsuit"). The underlying dispute between R-T and AKH concerns the use of the

[20]The capitalized words are also defined, but those definitions are not at issue.

"Discount Tire" mark on the internet. In 1991 those parties had settled a trademark dispute concerning their brick-and-mortar operations, but with the advent of the internet they found themselves at odds over AKH's use of an internet domain to promote its nationwide mail-order sales. R-T alleged that it was the first to have an internet presence when it created and registered the domain name "tires.com" on April 30, 1995, and that AKH still had no such presence when on May 13, 1997, R-T created and registered the additional domains "discounttire.com," "americastire.com," and "discounttiredirect.com." R-T further alleged that since December of 1996, consumers had been able to use one or more of its websites to search online for and purchase tires and wheels directly from R-T and its wholly-owned subsidiary, Discount Tire Direct. On July 20, 1997, AKH created and registered the domain "discounttires.com," which R-T alleged was simply the plural form of its own "disccounttire.com" domain and "DISCOUNT TIRE" mark.

Ultimately, the dispute came to a head with the May 14, 2010 filing of the R-T lawsuit. The eight-count amended complaint sounds in trademark infringement and other related causes of action. Five months later, AKH brought suit against R-T in the Central District of California ("the AKH lawsuit"), alleging that R-T breached the 1991 settlement agreement between the parties. On AKH's motion, the R-T lawsuit was transferred to the Central District of California and the two were consolidated ("the consolidated lawsuits"). In December of 2012, after extensive litigation, the consolidated lawsuits were settled. UUIC asserts that R-T and AKH engaged in settlement negotiations between late September and November 20, 2012, but that AKH did not notify UUIC of these discussions until R-T had presented AKH with a settlement demand. AKH asked UUIC for settlement authority, and UUIC authorized a $5 million payment on behalf of AKH to settle the R-T lawsuit. In the second half of December, R-T and AKH settled the consolidated lawsuits. R-T

accepted UUIC's $5 million offer. Simultaneously, R-T agreed to pay $13 million to AKH to settle the AKH lawsuit.

In a letter dated December 28, 2012, UUIC stated that AKH would receive the $5 million settlement check by December 31. UUIC repeated that the payment was subject to a reservation of its right to file a declaratory relief action against AKH to seek reimbursement of the settlement contribution, as well as a reservation of its right to seek reimbursement and defense fees and costs it paid for claims never potentially covered and pre-judgment interest. On January 2, 2013, AKH filed the instant action.

III. Summary Judgment Discussion

Two weeks after serving its complaint and approximately one week before Defendant's answer was due, AKH filed this motion for partial summary judgment. The parties have not made their initial disclosures and no discovery is underway. The factual record is therefore truncated. Nonetheless, AKH seeks partial summary judgment that: (1) UUIC has duties to defend and settle the consolidated lawsuits under the policy dated May 1, 2008 to May 1, 2009; (2) no exclusion bars UUIC's duties to defend or settle the consolidated lawsuits; and (3) UUIC has no right to reimbursement of any of its expenses in the consolidated lawsuits despite its stated reservation of rights.

A. Duties to defend and settle

AKH contends that UUIC's duties to defend and settle the consolidated lawsuits are capable of declaration as a matter of law. AKH asserts that the law of Kansas should apply to UUIC's duties because there is no conflict between the laws of Kansas and California concerning the general

propositions regarding an insurer's duty to defend and indemnify.[21] UUIC does not dispute that the law of the state where the insurance contract is made controls.[22]

Throughout its memorandum in support of its motion for partial summary judgment, AKH speaks of UUIC's duties vis-a-vis the consolidated lawsuits, which it refers to collectively without distinguishing between the two. In the R-T lawsuit, AKH was the defendant. In the AKH lawsuit, AKH was the plaintiff. By its joint reference, however, AKH is arguing that UUIC owes it the same duties to defend and settle with respect to both lawsuits.

As UUIC points out, neither Kansas nor California law require an insurer to pay for an insured's offensive lawsuit as part of its duty to defend. AKH does not directly respond, but instead asserts that UUIC is trying to confuse the issue of its duty to defend with the scope of the defense it was required to provide.

At some point, this case may be in a posture whereby the Court is called upon to allocate fees between covered and non-covered claims, or to determine whether the claims of the two suits were inextricably intertwined such that no allocation is possible. AKH cites cases in which courts have made these determinations as examples of secondary issues that the Court can consider at a later time.[23] For now, though, AKH continues to assert that UUIC has a duty to defend AKH in *both*

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[21]AKH cites *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 767, 732 P.2d 1286, 1291 (1987) ("[I]f the law of Kansas was not in conflict with any of the other jurisdictions connected to the suit, then there would be no injury in applying the law of Kansas.").

[22]*Safeco Ins. Co. of Am. v. Allen*, 262 Kan. 811, 822 , 941 P.2d 1365, 1372 (1997); *see also Moses v. Halstead*, 581 F.3d 1248, 1252 (10th Cir. 2009) (when question raised by contractual dispute goes to substance of obligation, Kansas courts apply *lex loci contractus,* which calls for application of law of state where contract made; if manner and method of performance is at issue, place of performance likely applies).

[23]Doc. 57 at 37 n. 74 (citing *Foxfire, Inc. v. New Hampshire Ins. Co.*, Nos. C-91-2940 MPH, C-91-3464 MHP, 1994 WL 361815 (N.D. Cal. July 1, 1994) and *Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 229 F. Supp. 2d 284 (continued...)

actions.[24] On the state of the record, the Court cannot make that determination as a matter of law. For that reason, the Court will not grant summary judgment on UUIC's duties to defend both lawsuits.

In addition, AKH specifically seeks summary judgment that UUIC had duties to defend and settle the consolidated lawsuits under the May 1, 2008 to May 1, 2009 policy. AKH asserts that any injury it may have caused to R-T arose after AKH changed its web presence in August of 2008 by creating two separate websites to segregate its Southern California store sales from its nationwide sales. UUIC points to the allegations of R-T's Second Amended Complaint in which R-T alleged that AKH's injurious conduct began in October of 2007, when AKH began using discounttires.com for its own online platform to sell wheels and tires online to consumers.[25] As the parties' submissions reveal, material facts are at issue with respect to when AKH's allegedly infringing conduct began. For this additional reason, the Court will not grant summary judgment on UUIC's duties to defend and settle.

B. Policy Exclusions

AKH argues that it is entitled to judgment as a matter of law that the UUIC policy contains no exclusion which would bar UUIC's defense of AKH. UUIC contends that the prior publication, intentional conduct, and cooperation clauses of the policy all apply, as well as the willful conduct exclusion created by California Insurance Code Section 533. Although AKH has the burden to

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[23](...continued)
(S.D.N.Y. 2002)).

[24]Doc. 57 at 37.

[25]Doc. 9, Ex. 4, at ¶ 57.

establish that a claim falls within the general coverage provisions of the policy, UUIC has the burden to establish facts which bring the case within an exclusion.[26]

UUIC sets forth a number of exclusions, but the parties primarily focus their attention on prior publication, which is exclusion (m) in both the Garage and Umbrella coverage parts of the policy. The exclusion states as follows:

> EXCLUSIONS – This insurance does not apply to:
>
> * * *
>
> (m) INJURY, . . . if the first injurious offense was committed prior to the Coverage Part period.

The defined term "INJURY" includes trademark infringement, which R-T alleged in its second amended complaint. AKH asserts that R-T must have been injured by AKH's trademark infringement before the May 1, 2007 inception of UUIC's policy for the exclusion to apply. That is not necessarily so. In *Kim Seng Company v. Great American Insurance Co. of New York*, 179 Cal. App. 4th 1030 (2009), a case which the parties discuss at length, the court held that a policy's prior publication exclusion applied to a trademark infringement claim because the infringer used the mark before the policy period and then continued to use it in various iterations during the policy period.[27] The court rejected the argument that marks adopted by the infringing party during the policy period which had different words or logos than the marks used before the policy period–different because they had more words–were not subject to the prior publication exclusion. The court wrote the following:

> But the test for the prior publication exclusion is whether the claimed actionable

[26] *Westchester Fire Ins. Co. v. City of Pittsburg,* 768 F. Supp. 1463, 1468 (D. Kan. 1991).

[27] 179 Cal. App. 4th at 1042.

> language or mark used during the policy period is substantially similar to the language or mark used prior to the policy period. We do not deal with whether there was infringement, but rather whether there is coverage.[28]

The language of *Kim Seng* does not support AKH's argument that the prior publication exclusion is inapplicable under the 2008-09 policy year. Recognizing that the Court may so conclude, AKH alternatively argues that the Court should find coverage in the inaugural policy year, 2007-08, because "the AKH website was launched in October 2007, creating an entirely new use for the phrase 'discounttires.com' and a new potential source of infringement."[29] AKH does not dispute that the domain name was unchanged, which is the relevant inquiry under *Kim Seng*.

Moreover, as the Court explains in the following subsection, a determination as to which policy year applies may have a dispositive effect on a contested choice of law issue. The facts surrounding where the contract was made and performed may be different as between 2007 and 2008, because how the policy was delivered, where AKH made its payments, servicing the policy, and other relevant details may have changed from one year to the next. Accordingly, the Court denies AKH's motion for partial summary judgment that no exclusion barred UUIC's duties to defend or settle.

C. Right to reimbursement

AKH's final argument is that Universal has no right as a matter of law to seek reimbursement of any of its expenses, despite having reserved its right to do so, because the policy provides no such right and because Kansas law applies to this action and Kansas does not recognize a right of

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[28]*Id*. at 1043.

[29]Doc. 57 at 28.

reimbursement. UUIC asserts that California law applies, and under that state's law an insurer is entitled to obtain reimbursement of defense expenses paid for claims that are not potentially covered by its policy, if the insurer reserves its right to do so, even absent an express provision in the policy allowing reimbursement.[30]

Clearly, a choice of law decision is a necessary predicate to determining whether UUIC may assert a claim for reimbursement. Not surprisingly, UUIC argues in its opposition to the instant motion, as well as in other filings,[31] that the Court should first decide which state's law applies to this insurance coverage dispute. As UUIC frames the argument, its right to reimbursement could arise from policy exclusions as well as from lack of coverage. UUIC points to this as an additional reason for the Court to decide choice of law before considering the issues upon which AKH seeks partial summary judgment. This is an indication of how this case, in its current posture, is circular: if the Court were to decide choice of law first, many other factual issues may fall by the wayside. For instance, if the Court were to determine that Kansas law applies, there may be no need to investigate facts relevant to an insurer's right to reimbursement. On the other hand, if the Court first focuses on the underlying facts of alleged trademark infringement in the R-T lawsuit to determine which (if any) policy year applies, that could have a dispositive effect on choice of law because the state where the contract was made and performed may be different as between the first and second years of the policy.

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[30]*E.g., Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 659-60, 115 P.3d 460, 469 (2005) ("California law clearly allows insurers to be reimbursed for attorney's fees and other expenses paid in defending insureds against claims for which there was no obligation to defend.").

[31]Indeed, UUIC has most recently filed a motion to bifurcate the issue of choice of law for discovery and for trial (Doc. 67), in which it explicitly asks the Court to allow discovery on the making and performance of the policy and to then determine whether the law of Kansas or the law of California should apply as to that issue. Issues of liability would follow. The Court considers and rules on that motion in this Memorandum and Order.

AKH disagrees that the Court has any reason to apply conflict of law analysis to any issue other than the right to reimbursement. The conflict of law with respect to an insurer's reimbursement right is that California recognizes the right, and to date Kansas does not.[32] UUIC has repeatedly reserved this right, challenging AKH's coverage based on: the dates of the allegedly infringing conduct, which UUIC asserts preceded the policy's existence or at least preceded the 2008-09 policy year; the fact that the R-T lawsuit included a breach of contract claim which the policy does not cover; an exclusion in the policy for "prior publication," which excludes coverage if the alleged trademark infringement began before AKH purchased the policy on May 1, 2007; an exclusion for intentional conduct, which R-T asserted AKH engaged in; AKH causing loss to R-T through willful conduct, as to which California Insurance Code Section 533 bars coverage; and AKH's alleged violation of the policy's cooperation clause which precluded UUIC from participating in settlement negotiations between AKH and R-T because AKH did not tell UUIC such negotiations were ongoing, and once UUIC did learn of the talks and received a settlement demand, UUIC was not afforded a reasonable amount of time to evaluate R-T's demand.

Because this is a diversity action and Kansas is the forum state, the substantive laws of Kansas will apply, including its choice of law rules.[33] If a conflict of laws analysis is necessary, the parties agree that the Court should apply the law of the state where the contract is made.[34] At this

[32]AKH originally agreed with UUIC's position that California law allows an insurer to seek reimbursement for defense costs for claims that are not potentially covered, but that Kansas would likely reject such reimbursement rights, "thus creating a conflict." Doc. 8 at 18. Most recently, however, AKH has shied away from identifying a conflict, saying instead that there is no basis for UUIC to presume that Kansas would not permit reimbursement or that California would. Doc. 70 at 6-7.

[33]*Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1169 (10th Cir. 2010).

[34]The parties addressed this issue in greater detail in their briefs addressing UUIC's motion to transfer. Doc. 18 at 24; Doc. 25 at 25. *See Moses v. Halstead*, 581 F.3d 1248, 1252 (10th Cir. 2009) (when question raised by (continued...)

point, material facts relating to the making and performance of the contract are at issue, thereby precluding a pronouncement as to which state's law applies. And if it is premature to know which state's law applies, then the Court is likewise unable to determine as a matter of law whether UUIC is entitled to pursue a right of reimbursement. Accordingly, the Court denies AKH's motion for partial summary judgment on the issue of right to reimbursement.

IV. Motion to Bifurcate

In several of its filings, UUIC urges the Court to engage in choice of law analysis before considering any other issues in this case. After the Court denied UUIC's motion to transfer,[35] UUIC formally moved for an order bifurcating the issue of choice of law for discovery and for trial.[36] (Doc. 67). UUIC contends that separating this issue for discovery and trial will greatly expedite and economize future proceedings. AKH opposes the motion, arguing that UUIC has not demonstrated that an actual conflict exists which would require a choice of law analysis. In its reply, UUIC points out that its motion is limited to seeking a choice of law decision on the making and performance of the policy.

The Court concludes that UUIC has not demonstrated that bifurcation would create convenience, avoid prejudice, expedite, or economize the proceedings in this case. As the Court has

[34](...continued)
contractual dispute goes to substance of obligation, Kansas courts apply *lex loci contractus,* which calls for application of law of state where contract made; if manner and method of performance is at issue, place of performance likely applies). They address it further, including whether the location of the contract's performance is relevant, in their briefs on UUIC's motion to bifurcate. Docs. 68, 70, 71.

[35]*See* Memorandum and Order (Doc. 66).

[36]UUIC moves pursuant to Fed. R. Civ. P. 26(d) for bifurcation of discovery and Fed. R. Civ. P. 42(b) for bifurcation for trial.

discussed throughout this order, the issue of whether UUIC has a right of reimbursement is not easily separated from other issues. Moreover, the Court observes that the parties have taken inconsistent positions at various points throughout their multiple motions and lengthy briefs, seemingly tailoring their positions for the sake of expediency. The Court is therefore reluctant to shape these proceedings in a manner that could allow for even more selective posturing.

The Court recognizes that because AKH's summary judgment motion was filed on the heels of service of process and has been pending, the parties do not have a scheduling order and have not engaged in case management discussions with Magistrate Judge Gale. The Court's denial of UUIC's motion to bifurcate with respect to discovery is therefore without prejudice, as the parties will appropriately look to Magistrate Judge Gale's rulings throughout his supervision of the case.

Finally, UUIC includes in its motion to bifurcate a request that, if the Court denies its motion but makes a choice of law determination, the Court make a finding pursuant to 28 U.S.C. § 1292(b) so that the Court of Appeals would have discretion to grant an immediate appeal. The Court has made no choice of law determination so the Court considers this request moot.

IT IS THEREFORE ORDERED BY THE COURT that AKH Company, Inc.'s Motion for Partial Summary Judgment (Doc. 7) is denied.

IT IS FURTHER ORDERED BY THE COURT that Universal Underwriters Insurance Company's Motion to Bifurcate (Doc. 68) is denied, and the Court makes no finding pursuant to 28 U.S.C. § 1292(b) with respect to this order.

IT IS FURTHER ORDERED BY THE COURT that UUIC's Motion to Stay the Deadline

for Universal Underwriters Insurance Company to Respond to AKH Company, Inc.'s Motion for Partial Summary Judgment (Doc. 21) is denied as moot.

IT IS FURTHER ORDERED BY THE COURT that UUIC's Motion to Strike the Declarations of Michael Schaeper and David Gauntlett filed in Support of Motion for Partial Summary Judgment (Doc. 40); UUIC's Motion for Leave to File Sur-reply in Opposition to AKH Company, Inc.'s Motion for Partial Summary Judgment (Doc. 60); and UUIC's Motion to Strike the Supplemental Declaration of Michael Schaeper Filed in Support of Motion for Partial Summary Judgment (Doc. 61) are denied.

IT IS FURTHER ORDERED BY THE COURT that AKH Company's Request for Judicial Notice in Opposition to Universal's Motion to Strike (Doc. 51); Plaintiff AKH Company's Request for Judicial Notice in Support of its Motion for Partial Summary Judgment (Doc. 54); and SEALED Plaintiff AKH Company's Second Request for Judicial Notice in Support of its Motion for Partial Summary Judgment (Doc. 59) are granted.

IT IS SO ORDERED.

Dated: July 9, 2013

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE