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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ONEBEACON INSURANCE COMPANY,)	3:09-CV-36-ECR-RAM
)	
Plaintiff,)	
)	
vs.)	<u>Order</u>
)	
PROBUILDERS SPECIALTY INSURANCE)	
COMPANY, FORMERLY KNOWN AS)	
BUILDERS & CONTRACTORS INSURANCE)	
COMPANY,)	
)	
Defendant.)	
)	
)	

This diversity case is a dispute between two insurers regarding litigation expenses incurred in the defense of a common insured. Plaintiff OneBeacon Insurance Company ("OneBeacon") alleges that it incurred defense fees and costs of at least \$470,000 in connection with defending the insured. OneBeacon seeks reimbursement of some of that amount from Defendant ProBuilders Specialty Insurance Company ("ProBuilders"). ProBuilders denies that it had any obligation to contribute to the defense of the insured.

Now pending are Probuilders' motion to dismiss (#10) and motion for summary judgment (#5), both of which were filed on March 4, 2009. For the reasons stated below, both motions will be denied.

1 **I. Factual Background**

2 OneBeacon is the transferee of certain rights and obligations
3 of Hawkeye-Security Insurance Company, which had insured Jess
4 Arndell Construction Company ("Arndell Construction"). (Complaint ¶
5 5 (#1).) OneBeacon alleges that ProBuilders (under its previous
6 name, Builders & Contractors Insurance Company) also issued "not
7 less than two annual liability insurance policies" to Arndell
8 Construction. (Id. ¶ 6.)

9 Arndell Construction was sued for alleged defects in the
10 construction of homes in a development called Hidden Meadows,
11 located in Reno, Nevada. (Id. ¶ 7.) OneBeacon, together with other
12 insurers not involved in this lawsuit, provided Arndell Construction
13 with a defense in that litigation, resulting in OneBeacon incurring
14 "not less than \$470,000.00" in defense fees and costs. (Id. ¶¶ 8-
15 9.) OneBeacon notified ProBuilders of the litigation and demanded
16 that ProBuilders participate in the defense pursuant to the
17 ProBuilders insurance policies covering Arndell Construction. (Id.
18 ¶ 10.) ProBuilders declined. (Id. ¶ 11.) This lawsuit ensued.

19
20 **II. Procedural Background**

21 OneBeacon's complaint (#1), filed on January 21, 2009, asserts
22 three causes of action. The first, for declaratory relief, seeks a
23 declaration that ProBuilders was obliged to "equitably contribute
24 toward the attorneys fees, costs, and expenses incurred" by
25 OneBeacon in defending Arndell Construction. (Id. ¶ 18.)
26 OneBeacon's second cause of action, for equitable contribution,
27 alleges that ProBuilders owes OneBeacon "not less than \$118,000.00"

1 as its contribution to the defense of Arndell Construction. (Id. ¶
2 23.) The third cause of action, for equitable subrogation, is pled
3 in the alternative to ProBuilders' equitable contribution claim.
4 (Id. ¶ 26.) In its equitable subrogation claim, OneBeacon alleges
5 that a portion of the fees and costs in the Hidden Meadows
6 litigation fell outside of the scope of the OneBeacon policies, but
7 that ProBuilders was required under its policies to bear that
8 portion of the litigation expenses. (Id. ¶ 26.) OneBeacon, having
9 already paid all of the litigation expenses, is therefore equitably
10 subrogated to Arndell Construction's rights against ProBuilders for
11 that portion of the expenses. (Id.)

12 On March 4, 2009, ProBuilders filed both a motion for summary
13 judgment (#5) and a motion to dismiss (#10), accompanied by
14 separately filed memoranda of points and authorities (##6, 11). On
15 March 19, 2009, OneBeacon filed oppositions (##12, 13) to both
16 motions. On March 23, 2009, ProBuilders replied (##17, 18).

17 18 III. Motion to Dismiss

19 ProBuilders argues in its motion to dismiss (#10) and the
20 memorandum of points and authorities in support thereof (#11) that
21 OneBeacon's complaint fails to state a claim pursuant to Federal
22 Rule of Civil Procedure 12(b)(6). In the alternative, ProBuilders
23 seeks a more definite statement pursuant to Federal Rule of Civil
24 Procedure 12(e).¹

25
26 ¹ Because we also rule on ProBuilders' motion for summary
27 judgment (#5) in this Order, ProBuilders' request for a stay of the
28 requirement of filing an answer pending the outcome of that motion is
moot.

1 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
2 normally limited to the complaint itself. See Lee v. City of L.A.,
3 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
4 materials outside the pleadings in making its ruling, it must treat
5 the motion to dismiss as one for summary judgment and give the non-
6 moving party an opportunity to respond. FED. R. CIV. P. 12(d);
7 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
8 court may, however, consider certain materials - documents attached
9 to the complaint, documents incorporated by reference in the
10 complaint, or matters of judicial notice - without converting the
11 motion to dismiss into a motion for summary judgment." Ritchie, 342
12 F.3d at 908.

13 If documents are physically attached to the complaint, then a
14 court may consider them if their "authenticity is not contested" and
15 "the plaintiff's complaint necessarily relies on them." Lee, 250
16 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
17 A court may also treat certain documents as incorporated by
18 reference into the plaintiff's complaint if the complaint "refers
19 extensively to the document or the document forms the basis of the
20 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
21 adjudicative facts or matters of public record meet the requirements
22 of Fed. R. Evid. 201, a court may judicially notice them in deciding
23 a motion to dismiss. Id. at 909; see FED. R. EVID. 201(b) ("A
24 judicially noticed fact must be one not subject to reasonable
25 dispute in that it is either (1) generally known within the
26 territorial jurisdiction of the trial court or (2) capable of

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1 accurate and ready determination by resort to sources whose accuracy
2 cannot reasonably be questioned.”).

3 **B. Analysis**

4 ProBuilders’ argument that OneBeacon’s complaint (#1) fails to
5 state a claim is based on the lack of “any allegation of the terms
6 of the ProBuilders’ [sic] policy or the reasons underscoring the
7 belief that [OneBeacon] is entitled to contribution.” (D.’s Memo.
8 at 2 (#11).) ProBuilders cites a California case for the
9 proposition that “contribution exists only between two insurers for
10 the same insured, who share the same level of risk, i.e., primary or
11 excess coverage.” (Id. (citing Md. Cas. Co. v. Nationwide Mut. Ins.
12 Co., 81 Cal. App. 4th 1082, 1089 (2000)).) Because the complaint
13 (#1) does not allege details such as “the policy numbers, the policy
14 years, the terms of the coverage, whether it is primary or excess,
15 or other critical information,” ProBuilders argues that OneBeacon
16 has failed to state a claim for contribution. (D.’s Memo. at 2
17 (#11).)

18 The Federal Rules of Civil Procedure describe “a liberal system
19 of ‘notice pleading.’” Leatherman v. Tarrant County Narcotics
20 Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993). Federal
21 Rule of Civil Procedure 8(a)(2) requires only “a short and plain
22 statement of the claim showing that the pleader is entitled to
23 relief.” Even after Twombly, as noted above, “[s]pecific facts are
24 not necessary; the statement need only give the defendant fair
25 notice of what the . . . claim is and the grounds upon which it
26 rests.” Erickson 551 U.S. at 93 (2007) (internal quotation marks
27 omitted).

1 Here, OneBeacon's complaint (#1) provides a short and plain
2 statement of its claim that is more than adequate. ProBuilders has
3 received fair notice of what OneBeacon's claim is and the grounds
4 upon which it rests, namely, that ProBuilders was contractually
5 obligated to contribute to the defense of Arndell Construction, but
6 it failed to do so, to OneBeacon's detriment. Specific facts, such
7 as policy numbers and the precise language of the policies giving
8 rise to the alleged contractual obligation, need not be pleaded.
9 Thus, ProBuilders' motion to dismiss pursuant to Rule 12(b)(6) will
10 be denied.

11 **C. Motion for a More Definite Statement**

12 In the alternative to its motion to dismiss pursuant to Rule
13 12(b)(6), ProBuilders moves for a more definite statement pursuant
14 to Rule 12(e). ProBuilders' argument again rests on the lack of
15 detail in the complaint: ProBuilders argues that the "requisite
16 terms of the contract under which [OneBeacon] seeks contribution"
17 must be alleged in the complaint. (D.'s Memo. at 3 (#11).)

18 ProBuilders' argument fails because "Rule 12(e) is designed to
19 strike at unintelligibility, rather than want of detail." Woods v.
20 Reno Commodities, Inc., 600 F. Supp. 574, 580 (D. Nev. 1984).
21 "Parties are expected to use discovery, not the pleadings, to learn
22 the specifics of the claims being asserted." Sagan v. Apple
23 Computer, Inc., 874 F. Supp. 1072, 1077 (C.D. Cal. 1994). If a
24 complaint is "specific enough to apprise the defendant of the
25 substance of the claim asserted against [it]," a Rule 12(e) motion
26 should be denied. San Bernardino Pub. Employees' Ass'n v. Stout,
27 946 F. Supp. 790, 804 (C.D. Cal. 1996).

1 Here, as noted above, OneBeacon's complaint is sufficient to
2 apprise ProBuilders of the substance of the claim asserted against
3 it. Indeed, ProBuilders has demonstrated that it does not find
4 OneBeacon's claims in any way unintelligible: it immediately moved
5 for summary judgment, making very specific arguments regarding
6 OneBeacon's claims, instead of waiting to conduct discovery first.
7 Thus, ProBuilders' motion to dismiss (#10) will be denied.

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IV. Motion for Summary Judgment

10 ProBuilders seeks summary judgment based on the language of
11 ProBuilders' insurance policies covering Arndell Construction.
12 Specifically, ProBuilders argues that under its policies it was only
13 obligated to provide a defense to Arndell Construction on a
14 contingent basis, if no other insurance coverage was available.
15 ProBuilders notes that Arndell Construction received a full defense
16 from OneBeacon. Hence, according to ProBuilders, other insurance
17 coverage was available, and ProBuilders' contingent duty to defend
18 was not triggered.

19

A. Standard

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21 Summary judgment allows courts to avoid unnecessary trials
22 where no material factual dispute exists. N.W. Motorcycle Ass'n v.
23 United States Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994).
24 The court must view the evidence and the inferences arising
25 therefrom in the light most favorable to the nonmoving party,
26 Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should
27 award summary judgment where no genuine issues of material fact
28 remain in dispute and the moving party is entitled to judgment as a

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1 matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law
2 is appropriate where there is no legally sufficient evidentiary
3 basis for a reasonable jury to find for the nonmoving party. FED.
4 R. Civ. P. 50(a). Where reasonable minds could differ on the
5 material facts at issue, however, summary judgment should not be
6 granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir.
7 1995), cert. denied, 116 S.Ct. 1261 (1996).

8 The moving party bears the burden of informing the court of the
9 basis for its motion, together with evidence demonstrating the
10 absence of any genuine issue of material fact. Celotex Corp. v.
11 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
12 its burden, the party opposing the motion may not rest upon mere
13 allegations or denials in the pleadings, but must set forth specific
14 facts showing that there exists a genuine issue for trial. Anderson
15 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the
16 parties may submit evidence in an inadmissible form - namely,
17 depositions, admissions, interrogatory answers, and affidavits -
18 only evidence which might be admissible at trial may be considered
19 by a trial court in ruling on a motion for summary judgment. FED. R.
20 Civ. P. 56(c); Beyene v. Coleman Security Services, Inc., 854 F.2d
21 1179, 1181 (9th Cir. 1988).

22 In deciding whether to grant summary judgment, a court must
23 take three necessary steps: (1) it must determine whether a fact is
24 material; (2) it must determine whether there exists a genuine issue
25 for the trier of fact, as determined by the documents submitted to
26 the court; and (3) it must consider that evidence in light of the
27 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
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1 judgment is not proper if material factual issues exist for trial.
2 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
3 1999). "As to materiality, only disputes over facts that might
4 affect the outcome of the suit under the governing law will properly
5 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
6 Disputes over irrelevant or unnecessary facts should not be
7 considered. Id. Where there is a complete failure of proof on an
8 essential element of the nonmoving party's case, all other facts
9 become immaterial, and the moving party is entitled to judgment as a
10 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
11 disfavored procedural shortcut, but rather an integral part of the
12 federal rules as a whole. Id.

13 **B. Analysis**

14 1. Applicable Law

15 A federal court sitting in diversity must apply the substantive
16 law of the forum state in which it resides. Vacation Village, Inc.
17 v. Clark County, Nev., 497 F.3d 902, 913 (9th Cir. 2007) (citing
18 Hanna v. Plumer, 380 U.S. 460, 465 (1965)). Accordingly, we must
19 construe the policies at issue in this case as a Nevada state court
20 would if presented with the same question. Capitol Indem. Corp. v.
21 Blazer, 51 F. Supp. 2d, 1080, 1084 (D. Nev. 1999). In the absence
22 of Nevada Supreme Court precedent, we "must make a reasonable
23 determination of the result [it] would reach if it were deciding the
24 case." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 885
25 n.7 (9th Cir. 2000) (quoting Aetna Cas. & Sur. Co. v. Sheft, 989
26 F.2d 1105, 1108 (9th Cir. 1993)).

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1 The policies that risk retention groups issue are not
2 "insurance like products," they are insurance. See 15 U.S.C. § 3901
3 (a)(1) ("'insurance' means primary insurance, excess insurance,
4 reinsurance, surplus lines insurance, and any other arrangement for
5 shifting and distributing risk which is determined to be insurance
6 under applicable State or Federal law"); see also Nat'l Warranty
7 Ins. Co., 214 F.3d at 1082 ("We believe that in passing the LRRRA,
8 Congress decided that RRGs, as a group, were sufficiently
9 trustworthy providers of insurance . . .") (emphasis added); Home
10 Warranty Corp. v. Caldwell, 777 F.2d 1455, 1467 (11th Cir. 1985) ("A
11 risk-retention group, by definition, was an organization providing
12 insurance only to its members.") (emphasis added); 15 U.S.C. §
13 3905(c) ("The terms of any insurance policy provided by a risk
14 retention group shall not provide or be construed to provide
15 insurance policy coverage prohibited [by State law]") (emphasis
16 added); NEV. REV. STAT. § 695E.200 ("A risk retention group shall not
17 . . . (4) Issue any insurance policy coverage prohibited [by Nevada
18 law] ") (emphasis added). Moreover, the ProBuilders policies
19 themselves repeatedly use the phrase "this insurance," including in
20 the sections of the policies quoted above. (Podesta Decl., Exs. A,
21 B (#9).) We conclude that Nevada law governing how insurance
22 policies are to be construed is fully applicable to the ProBuilders
23 policies at issue in this case.

24 ProBuilders' reliance on Alamo Rent-A-Car, Inc. v. State Farm
25 Mut. Auto Ins. Co., 953 P.2d 1074 (Nev. 1998), is misplaced. Unlike
26 the car rental agency in Alamo, ProBuilders is primarily in the
27 business of underwriting insurance. See 15 U.S.C. § 3901(a)(4)(A),
28

1 (G) (defining "risk retention group" as an organization "whose
2 primary activity consists of assuming, and spreading all, or any
3 portion, of the liability exposure of its group members" and "whose
4 activities do not include the provision of insurance other than (i)
5 liability insurance for assuming and spreading all or any portion of
6 the similar or related liability exposure of its group members; and
7 (ii) reinsurance with respect to the similar or related liability
8 exposure of any other risk retention group"). In contrast,
9 Alamo Rent-A-Car was not primarily in the insurance business, and it
10 is this circumstance that provides the foundation for the Nevada
11 Supreme Court's decision in Alamo. See Alamo, 953 P.2d at 1077 ("We
12 conclude it is better policy to make an insurance company the
13 primary insurer over a rental agency which is not in the business of
14 underwriting insurance for individual drivers."). Alamo's
15 discussion of the law applicable to a self-insurance policy issued
16 by a car rental agency to a renter simply does not apply to this
17 case.

18 In short, ProBuilders' arguments that its policies must be
19 treated differently under Nevada law from an insurance policy issued
20 by an ordinary insurance company are without merit. With that issue
21 resolved, we now turn to an examination of ProBuilders' duty to
22 defend arising from its policies.

23 3. The Policies at Issue

24 Both ProBuilders and OneBeacon issued commercial general
25 liability insurance policies to Arndell Construction. OneBeacon
26 issued three policies to Arndell Construction, each covering one
27 year of the period July 1, 1997, to July 1, 2000. (Gothold Decl.,
28

1 Exs. 1-3 (#16).) OneBeacon's claims in the present action are based
2 on two of ProBuilders' policies with Arndell Construction, Policy
3 No. TRI 3600034 and Policy No. TRI 3600087. (Podesta Decl., Exs. A,
4 B. (#9).) These policies contain (at least as relevant here)
5 identical terms, covering the periods July 19, 2002, to July 19,
6 2003, and July 19, 2003, to July 19, 2004, respectively.² (Id.)

7 The policy terms relevant here relate to ProBuilders' duty to
8 provide a defense against suit to Arndell Construction. Section
9 I(A)(1)(a) of the "Commercial General Liability Coverage Form" of
10 both ProBuilders policies states that ProBuilders is obligated to
11 defend Arndell Construction "against any suit seeking [damages for
12 bodily injury or property damage to which this insurance applies]
13 provided that no other insurance affording a defense against such a
14 suit is available to [the insured]." (Podesta Decl., Exs. A, B
15 (#9).) The same section notes certain limitations of this duty,
16 including that ProBuilders "will have no duty to defend any insured
17 against any suit seeking damages . . . to which this insurance does
18 not apply." (Id.)

19 In addition, section IV(8)³ of the "Commercial General
20 Liability Coverage Form" of ProBuilders' policies contains further
21 limitations on ProBuilders' obligations that apply "[i]f other
22

23 ² ProBuilders has also submitted evidence of two other insurance
24 policies it issued to Arndell Construction, covering the following two
25 years until July 19, 2006. (Podesta Decl., Exs. C, D (#9).) These
two later policies, however, are not presently at issue in this case.

26 ³ This section is titled "Other Insurance, Deductibles and Self-
27 Insured Retentions," a circumstance that is in some tension with
28 ProBuilders' assertion that "the provisions of the ProBuilders' policy
at issue are not 'Other Insurance' clauses." (D.'s Memo. at 12 (#6).)

1 insurance is available to an insured for a loss we cover under
2 Coverages A or B of this policy." (Id.) Specifically, where other
3 insurance is available, the ProBuilders policies are "excess over
4 any other insurance . . . whether such insurance is primary, excess,
5 contingent or contributing" (Id.) Further, this section
6 states that "[w]hen this insurance is excess, we will have no duty
7 under Coverage A or B to defend any claim or suit that any other
8 insurer has a duty to defend." (Id.)

9 4. Duty to Defend

10 An insurance company's duty to defend its insured arises from
11 the provisions of the insurance policy. United Nat'l Ins. Co. v.
12 Frontier Ins. Co., 99 P.3d 1153, 1158 (Nev. 2004); Allstate Ins.
13 Co. v. Sanders, 495 F. Supp. 2d 1104, 1106 (D. Nev. 2007).

14 Ambiguous terms in an insurance policy will be construed broadly,
15 affording the greatest possible coverage to the insured. See
16 Harvey's Wagon Wheel v. MacSween, 606 P.2d 1095, 1098 (Nev. 1980);
17 Farmers Ins. Group v. Stonik, 867 P.2d 389, 391 (Nev. 1994).

18 Nevertheless, the Court must neither "rewrite contract provisions
19 that are otherwise unambiguous," nor "increase an obligation to the
20 insured where such was intentionally and unambiguously limited by
21 the parties. Capitol Indem. Corp. v. Wright, 341 F. Supp. 1152,
22 1156 (D. Nev. 2004) (internal citations omitted).

23 Under Nevada law, an insurer "must defend any lawsuit brought
24 against its insured which potentially seeks damages within the
25 coverage of the policy." Allstate, 495 F. Supp. 2d at 1106 (quoting
26 Rockwood Ins. Co. v. Federated Capital Corp., 694 F. Supp. 772, 776
27 (D. Nev. 1988).) Even if coverage is only "arguable or possible," a

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1 duty to defend arises. United Nat'l Ins., 99 P.3d at 1158 (citing
2 Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1090 (Colo. 1991)
3 (stating that "[t]he appropriate course of action for an insurer who
4 believes that it is under no obligation to defend, is to provide a
5 defense to the insured under a reservation of its rights to seek
6 reimbursement should the facts at trial prove that the incident
7 resulting in liability was not covered by the policy, or to file a
8 declaratory judgment action after the underlying case has been
9 adjudicated"))).

10 The primary thrust of ProBuilders' motion for summary judgment
11 is that there was "other insurance" available to Arndell
12 Construction. It is undisputed that Arndell Construction received
13 a full defense in the Hidden Meadows litigation from OneBeacon and
14 other insurance carriers. On this basis, ProBuilders argues that
15 under the policy terms quoted above it had no arguable or possible
16 duty to defend Arndell Construction.

17 ProBuilders' argument does not hold water: Nevada has adopted
18 the "complaint rule," pursuant to which an insurer that seeks to
19 avoid its duty to defend its insured may only do so by comparison of
20 the complaint in the underlying litigation to the terms of the
21 policy. See United Nat'l Ins., 99 P.3d at 1158 ("Determining
22 whether an insurer owes a duty to defend is achieved by comparing
23 the allegations of the complaint with the terms of the policy.")
24 (citing Hecla, 811 P.2d at 1090).⁴ The complaint rule is consistent

25
26 ⁴ Although the Nevada Supreme Court did not address the issue in
27 United National Insurance - nor elsewhere, apparently - other
28 jurisdictions following the complaint rule have recognized some
exceptions to it. For example, where an insurer has provided a

1 with the principle that a duty to defend arises as soon as the
2 insurer "ascertains facts which give rise to the potential of
3 liability under the policy" and "continues throughout the course of
4 the litigation." Id. at 1158 (footnotes and internal quotation
5 marks omitted). Thus, the circumstance that Arndell Construction in
6 fact received a full defense in the Hidden Meadows litigation from
7 its other insurers is irrelevant to the inquiry into whether
8 ProBuilders, too, owed Arndell Construction a duty to defend.

9 The relevant complaint for determining whether ProBuilders had
10 a duty to defend is the complaint filed against Arndell Construction
11 in the Hidden Meadows litigation.⁵ (Podesta Decl., Ex. F (#9).)
12 This complaint alleges property damage occurring in the period from
13 1994 to the date of the complaint, which is August 4, 2004. (Id. ¶
14 12-13.) The period covered by the ProBuilders policies at issue in
15 the present case - July 19, 2002, to July 19, 2004 - falls within
16 the temporal scope of the Hidden Meadows complaint. (Podesta Decl.,
17 Exs. A, B.) Though the ProBuilders policies are "excess" to any
18 other insurance that covers such claims, it is impossible to

19
20 defense and then seeks to recover defense costs, the insurer may rely
21 on facts outside of the complaint to show that the incident resulting
22 in liability was not covered by the policy. See Pompa v. Am. Family
Mut. Ins. Co., 520 F.3d 1139, 1145 (10th Cir. 2008). No exception to
the complaint rule, however, appears to apply in the present case.

23 ⁵ There were, apparently, two such complaints, and the two
24 separate lawsuits were eventually consolidated. Although ProBuilders
25 seems to have tried to submit both of these complaints as exhibits in
26 support of its motion for summary judgment, it failed; in place of one
27 of the two complaints, it instead attached what appears to be an order
from the case issued by the Nevada state court. (Podesta Decl., Ex.
G (#9); see D.'s Memo at 3 (#6) (describing Exs. F and G to the
Podesta Decl. as "the two Complaints" from the Hidden Meadows
litigation).) For present purposes, however, the one complaint from
the Hidden Meadows litigation that is in our record is sufficient.

1 determine from the complaint against Arndell Construction what other
2 insurance, if any, was available to cover its potential liability in
3 the Hidden Meadows litigation.

4 We conclude, therefore, that the Hidden Meadows litigation
5 arguably or possibly sought damages within the coverage of the
6 ProBuilders policies, giving rise to a duty to defend under Nevada
7 law. In light of this conclusion, ProBuilders' motion for summary
8 judgment will be denied.

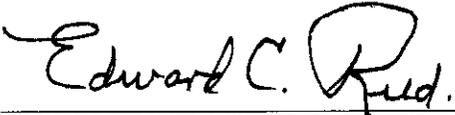
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10 **V. Conclusion**

11 OneBeacon's complaint (#1) contains an adequate "short and
12 plain statement of the claim." Also, the complaint (#1) is not
13 unintelligible, so no more definite statement is required. Thus,
14 ProBuilders' motion to dismiss (#10) is without merit. Further,
15 ProBuilders had a duty to defend Arndell Construction in the Hidden
16 Meadows litigation; its motion for summary judgment (#5), premised
17 on the notion that it did not have such a duty, must be denied.

18
19 **IT IS, THEREFORE, HEREBY ORDERED THAT** ProBuilders' Motion to
20 Dismiss (#10) is **DENIED**.

21
22 **IT IS FURTHER ORDERED THAT** ProBuilders' Motion for Summary
23 Judgment (#5) is **DENIED**.

24
25 DATED: August 3, 2009.

26 
27 UNITED STATES DISTRICT JUDGE