UMG Recordings, Inc. v. Am. Home Assur. Co.

United States District Court for the Central District of California

November 5, 2004, Decided; November 5, 2004, Filed

Case No. CV 04-04756 DDP (RNBx)

Reporter
2004 U.S. Dist. LEXIS 33287 *

UMG RECORDINGS, INC., a Delaware Corporation, Plaintiff, v. AMERICAN HOME ASSURANCE COMPANY, a New York corporation, et al., Defendants.

Core Terms

insured, punitive damages, policies, parties, Umbrella, vicarious liability, indemnity, lawsuit, principal place of business, declaratory relief, NY Law, negotiations, defendants', indemnification, coverage, asserts, contracts, insurance coverage, cause of action, indemnified, residents, place of performance, choice of law, CA Law, contacts, damages, premium, seeing, risks, choice of law provision

Counsel: **[*1]** For UMG Recordings Inc, a Delaware corporation, Plaintiff: Cassandra S Franklin, LEAD ATTORNEY, Dickstein Shapiro LLP, Los Angeles, CA; Clyde M Hettrick, III, LEAD ATTORNEY, Hettrick Law PC, Los Angeles, CA; Kirk A Pasich, LEAD ATTORNEY, Pasich LLP, Los Angeles, CA; Sharon T Yuen, LEAD ATTORNEY, Callahan and Blaine APLC, Santa Ana, CA.

For American Home Assurance Company, a New York corporation, AIG Europe SA, a French corporation, Defendants: David J McMahon, LEAD ATTORNEY, Barger & Wolen LLP, San Francisco, CA; Dawn N Valentine, LEAD ATTORNEY, Barger & Wolen, San Francisco, CA; Lawrence Klein, LEAD ATTORNEY, PRO HAC VICE, Sedgwick LLP, New York, NY; Robert G Levy, LEAD ATTORNEY, Barger and Wolen, San Francisco, CA; Scott D Greenspan, LEAD ATTORNEY, PRO HAC VICE, Sedgwick LLP, New York, NY; Susan Koehler Sullivan, LEAD ATTORNEY, Clyde and Co US LLP, Los Angeles, CA.

For National Union Fire Insurance Company of Pittsburgh PA, a Pennsylvania corporation, Defendant: Archie S Robinson, LEAD ATTORNEY, Robinson and Wood, San Jose, CA; David J McMahon, LEAD ATTORNEY, Barger & Wolen LLP, San Francisco, CA; Dawn N Valentine, LEAD ATTORNEY, Barger & Wolen, San Francisco, CA; John L Winchester, **[*2]** III, LEAD ATTORNEY, Robinson and Wood, San Jose, CA; Lawrence Klein, LEAD ATTORNEY, PRO HAC VICE, Sedgwick LLP, New York, NY; Robert G Levy, LEAD ATTORNEY, Barger and Wolen, San Francisco, CA; Scott D Greenspan, LEAD ATTORNEY, PRO HAC VICE, Sedgwick LLP, New York, NY; Susan Koehler Sullivan, LEAD ATTORNEY, Clyde and Co US LLP, Los Angeles, CA.

Judges: DEAN D. PREGERSON, United States District Judge.

Opinion by: DEAN D. PREGERSON

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

The instant matter is before the Court on the defendants' motion to dismiss or strike the plaintiff's claims for declaratory relief insofar as the plaintiff seeks indemnity for punitive damages. On August 17, 2004, the Court ordered both parties to provide additional briefing on the choice of law issues. After reviewing and considering the papers submitted by the parties, the Court grants the defendants' motion with regard to the Fifth and Seventh Causes of Action and denies the motion with regard to the Sixth Cause of Action and adopts the following order.

I. Background

The instant motion involves an insurance coverage dispute whereby the plaintiff seeks indemnification from its insurers for a previously rendered **[*3]** judgment against it.

UMG Recordings, Inc. ("UMG") is a Delaware corporation with its principal place of business in Los Angeles County, California. (Compl. at 1.) UMG is a

subsidiary of Vivendi Universal S.A. ("Vivendi"), a French corporation with its principal place of business in the United States in New York. (Defendant National Union's Amended Memorandum of Law in Support of New York Law ("National Union Memo") at 3.) The Island Def Jam ("Def Jam") is a division of UMG, and its principal place of business is in New York. (Memorandum of Law in Support of the Application of New York Law ("Support of NY Law") at 2.) Lyor Cohen was at all pertinent times the Chairman of Def Jam (Compl. at 6.) and a resident of New York. (Support of NY Law at 2.)

UMG brought this action for declaratory relief and breach of contract against the insurance companies American Home Assurance Company ("American Home"), AIG Europe, S.A. ("AIG Europe"), and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") (collectively, the "defendants"). (Compl. at 1.) All three defendants are insurance companies of the American International Group, Inc. ("AIG") family of insurance companies. (Id.) **[*4]** The defendants sold liability insurance policies to UMG. American Home, a New York corporation with its principal place of business in New York, provided insurance coverage to UMG pursuant to commercial general liability ("CGL") policies. (Id. at 2.) AIG Europe, a French corporation with its principal place of business in France, and National Union, a Pennsylvania corporation with its principal place of business in New York, provided umbrella insurance coverage to UMG pursuant to an Umbrella Policy. (Id. at 2-3.) National Union also provided coverage to UMG through an Entertainment Errors & Omissions ("E&O") Policy. (Id. at 4.)

A. The TVT Lawsuit

On or about August 20, 2002, Def Jam and Lyor Cohen were named as defendants in a lawsuit entitled TVT Records, TVT Music, Inc. v. The Island Def Jam Music Group and Lyor Cohen, Case No. 02 CV 6644, in the United States District Court, Southern District of New York (the "TVT lawsuit"). (Id. at 6.)

In response to the TVT lawsuit, UMG states that it asked Aon Risk Services, Inc. ("Aon"), an insurance broker, to advise UMG's liability insurers of the TVT lawsuit. (Id.) On or about October 16, 2002, Aon notified AIG claims personnel of the TVT lawsuit. AIG referred the matter to **[*5]** an AIG claims department. (Id.) As a result, all AIG companies, including American Home, AIG Europe, and National Union, allegedly had notice of the TVT lawsuit. (Id.)

The amended complaint in the TVT case alleged various forms of "Media Liability," which UMG argues are consistent with a number of the "offenses" covered by the National Union E&O Policy. (Id.) According to UMG, TVT also alleged "property damage" and "personal and advertising injury" as those terms are defined in the CGL and Umbrella Policies. (Id.) Specifically, TVT alleged copyright infringement, breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with contract, promissory and equitable estoppel, fraud, and disparagement. (Id.)

On March 21, 2003, the jury found that Def Jam was liable for breach of contract, promissory estoppel, tortious interference with contractual relations, fraudulent concealment, and copyright infringement. (Id.) The jury found that Lyor Cohen was liable for tortious interference with contractual relations, fraud by fraudulent concealment, and copyright infringement. (Id. at 9.) In total, Def Jam and Lyor Cohen were held liable for approximately $23 million in **[*6]** compensatory damages and $108 million in punitive damages. (National Union Memo at 1.)

UMG's appeal of the judgment is still pending. (Plaintiff's Request for Judicial Notice, Ex. 1; Opp. at 4.)

B. The Instant Lawsuit

American Home, AIG Europe, and National Union have not paid any portion of the fees and costs that Def Jam and Lyor Cohen have incurred in the defense of the TVT lawsuit. (Compl. at 10.) The defendants also have not agreed to indemnify or pay any portion of the judgment or possible settlement. (Id.)

UMG brought the instant action seeking damages for the defendants' tortious breach of their duty to defend, and declaratory relief regarding the defendants' duty to indemnify UMG for any judgments in the TVT lawsuit. The plaintiff asserts the following causes of action: (1) breach of contract regarding the duty to defend against American Home; (2) breach of contract regarding the duty to defend against National Union; (3) tortious breach of the implied covenant of good faith and fair dealing against American Home; (4) tortious breach of the implied covenant of good faith and fair dealing against National Union; (5) declaratory relief against American Home regarding the CGL Policy; (6) declaratory relief against **[*7]** National Union regarding

the E&O Policy; (7) declaratory relief against AIG Europe and National Union regarding the Umbrella Policy; (8) declaratory relief against Does 1 through 10. (Id. at 11-17.)

The instant matter is before the Court on the defendants' motion to dismiss or strike the plaintiff's claims for declaratory relief insofar as the plaintiff seeks indemnity for punitive damages.[1]

II. Choice of Law

Before the Court addresses the merits of the defendants' motion, it must determine which state's law governs the policies at issue. The plaintiff asserts that California law applies and the defendants contend that New York law applies. In a diversity case, a federal district court applies the law of the forum state for choice of law purposes. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. All parties agree that California's conflict of law rules apply here. (Opp. at 6; Reply at 7.)

"[W]here the parties have made a choice of law, their choice is usually enforced." *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, 14 Cal. App. 4th 637, 645-46, 17 Cal. Rptr. 2d 713 (1993)*(Stonewall) (citations omitted). Absent such a provision, California resolves conflicts of law using a "governmental interest" analysis. *Van Winkle v. Allstate Ins. Co., 290 F. Supp. 2d 1158, 1162 (2003)* (citing *Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 161, 148 Cal. Rptr. 867, 583 P.2d 721 (1978)*). Under this approach, the Court must "search to find the proper law to apply based upon the interests of the litigants and the involved states." **[*8]** *Stonewall, 14 Cal. App. 4th at 645* (citation omitted).

The governmental interest analysis is a multi-step inquiry. The Court must first determine whether the respective states' laws differ. *Denham v. Farmers Ins. Co., 213 Cal. App. 3d 1061, 1065, 262 Cal. Rptr. 146 (1989)*. Even if the states' laws differ, a "true conflict" does not necessarily arise. Id. Rather, a true conflict arises only if both states have an interest in having their laws applied. *Van Winkle, 290 F. Supp. 2d at 1163* (citations omitted). If only one state has an interest in having its law applied, courts will apply the law of that state. Id. If both states have a legitimate interest in having their law applied, then a "true conflict" exists, and the Court must determine which state's interest predominates. See *McGhee v. Arabian American Oil Co., 871 F.2d 1412, 1422 (9th Cir. 1989)*.

The Court determines the strength of the states' relative interests by examining the factors set forth in *§ 188 of the Restatement (Second) Conflict of Laws* in conjunction with the purposes and policies at issue. *Stonewall, 14 Cal. App. 4th, at 646*. These factors include: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Restatement (Second) of Conflict of Laws § 188* (1971).

Once the Court has determined the nature and extent of the states' interests, the Court will undertake **[*9]** a "comparative impairment" analysis to determine which interest is more substantial. *Van Winkle, 290 F. Supp. 2d at 1166*.

A. The CGL Policy

1. The Existence and Nature of a Conflict

The parties do not dispute that California and New York laws differ regarding one's ability to recover punitive damages under an insurance policy. (Support of NY Law at 14; Plaintiff's Memorandum in Support of CA Law ("Support of CA law") at 1.) As discussed in greater detail below, New York law contains a blanket prohibition against the recovery of punitive damages, whereas California law provides an exception to that prohibition where the punitive damages were awarded based on vicarious liability. Therefore, a conflict of laws exists.

Next, the Court must determine whether both jurisdictions maintain an interest in having their laws applied to the controversy. See *Van Winkle, 290 F. Supp. 2d at 1163*. If not, then a "true conflict" does not exist, and the state that maintains an interest is entitled to have its law applied. Id.

The plaintiff contends that California has a genuine interest in applying California law to the instant case. Specifically, the plaintiff asserts that "California has a vested interest in seeing that its resident, UMG, receives the full benefit of the **[*10]** insurance coverage for which it paid a substantial premium." (Support of CA Law at 20.) The plaintiff bases this assertion on the fact

[1] The plaintiff's complaint does not specifically address the issue of punitive damages, but requests a declaration of rights and obligations with respect to the insurance policies at issue.

that Vivendi is a major participant in an important local industry (entertainment) and that it provides California residents with thousands of jobs. (Id. at 19-20.)

Relying on *Zimmerman v. Allstate Ins. Co., 179 Cal. App. 3d 840, 224 Cal. Rptr. 917 (1986)*, the defendants argue (1) that "California retains no interest in the application of its law where an insurer's allegedly improper conduct occurred in another state" and (2) that "UMG's citizenship [does not] provide California with an interest in seeing its laws applied . . . ." (Support of NY Law at 15, 17.) Defendants contend that because the underlying incidents occurred in New York, UMG's mere residence in California does not create a legally cognizable interest for the state in seeing its law applied.

The Court finds that Zimmerman is distinguishable and that California has a genuine interest in seeing its law applied. Zimmerman involved an insurance dispute arising from an automobile accident that occurred in Oklahoma. Following the automobile accident, the insured moved to California. After arriving in California, a dispute arose over the insurance coverage, which the insured contended **[*11]** should be governed by California law. The Zimmerman court held that California's interest in having its insurance laws applied, based merely on the insured's residence, was subordinate to Oklahoma's interest. The Court finds that Zimmerman is distinguishable from the issue and case at hand because, first, the Zimmerman court did not hold that the insured's residence afforded California *no* interest; it merely held that Oklahoma's interest was greater.[2] At this stage in the inquiry, the Court is concerned solely with whether California has a genuine interest in having its law applied, not the comparative strength of that interest. Second, the plaintiff in Zimmerman, unlike the plaintiff here, relocated to California after the underlying incident which led to the insurance dispute. *Id. at 843*. This fact is important because the Zimmerman court was concerned that if it applied California law it would unduly promote forum shopping. In the instant case, the underlying incidents occurred while UMG was a resident of California, and while its parent corporation Vivendi had substantial contacts with the state. Thus, the Zimmerman concerns regarding forum shopping do not seem applicable. Third, UMG is a **[*12]** significant employer in California, engaged in a substantial state industry. (Support of CA law at 19; Hettrick Decl. ¶ 15, Ex. D.) UMG cannot operate in California without being able to rely on the enforcement of the state's insurance laws; thus, California's ability to attract commercial activity depends on its ability to to ensure that its commercial residents receive the full benefit of the insurance coverage for which they pay. Part of that full benefit may, in some situations, include indemnity for punitive damages awarded under vicarious liability. See *Downey Venture v. LMI Ins. Co, 66 Cal. App. 4th 478, 512-514, 78 Cal. Rptr. 2d 142 (1998)* (*California Insurance Code § 533* "does not bar indemnity of an insured who does not personally commit the act but is vicariously liable for another person's act of malicious prosecution.") Thus, the Court finds that Zimmerman does not compel a finding that California has no interest in seeing its laws applied.

The defendants also contend that California has no interest in protecting out-of-state corporations such as UMG that reside in California and do business throughout the world. (Support of NY Law at 16.) The cases cited by the defendants in support of this contention are also distinguishable.[3] Based on UMG's

---

[2] The court stated, "We are satisfied that Oklahoma has the *greater* interest in regulating the conduct of the insurer, as well as in protecting the insurer, and through it the insured, against third party bad faith claims." *Id. at 847* (citations omitted) (emphasis added).

[3] Citing *Pacific Diamond Co. v. Superior Court, 85 Cal. App. 3d 871, 149 Cal. Rptr. 813 (1978)*, the defendants assert that California does not have an interest in having its laws applied because "an out-of-state corporation that resides in California but does business throughout the world is not entitled to particular protection by California Courts." (Support of NY Law at 16.) Pacific Diamond involved a California corporation that suffered theft losses while on business in Colorado. *Pacific Diamond, 85 Cal. App. 3d at 874*. The issue was whether California or Colorado law-both of which contained special provisions limiting the liability of hotel owners for thefts that occurred on their premises-applied. The court found that California had no interest in applying its law to the case because the hotel at issue was in Colorado, and California's law limiting liability of hotel owners was designed specifically to protect hotels situated in California. Thus, Pacific Diamond is inapposite.

For the same proposition, the defendants also cite *Liew v. Official Receiver and Liquidator, 685 F. 2d 1192 (9th Cir. 1982)*, which involved a dispute over whether the effect of an assignment of contract rights to a Singapore company by the chairman of a group of Asian companies should be governed by California or Singapore law. The court in that case stated that "[a]ny interest that California had in regulating the banking industry was viewed as irrelevant under the circumstances."

residence in California and California's **[*13]** interest in protecting its residents, the Court finds that California maintains a legally cognizable interest in applying its laws to the instant case.

Next the Court must determine whether New York has a legitimate interest in having its laws applied to this dispute. The defendants assert that the underlying incidents occurred in New York and that New York has a legitimate interest in effecting its public policy prohibiting the indemnity of punitive damages. (Support of NY Law at 18-19.) Defendants cite several New York cases which support their contention and the plaintiff offers no contrary authority. Thus, the Court finds that New York also has an interest in enforcing its policy regarding the indemnity of punitive damages.

2. Balancing the States' Interests Under the Restatement

Because both states have an interest in seeing their laws applied to the instant dispute, a "true conflict" exists, and the Court must now determine which state's interest is more substantial considering the relevant contacts with regard to the particular issue involved. In considering the interests of the parties and the states involved, the Court notes that there is **[*14]** no express choice of law provision in the CGL policies. Where no effective choice of law has been made, the factors in *§ 188 of the Restatement (Second) Conflict of Laws* are examined in connection with the interest of the involved state in the issues, the character of the contract, and the relevant purposes of the contract law under consideration. *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, 14 Cal. App. 4th 637, 646, 17 Cal. Rptr. 2d 713 (1993)*. The Restatement instructs courts to apply the law of the state with the most substantial interest in the dispute, and it provides a five-factor test to evaluate each state's interest. As stated above, these factors include: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Restatement (Second) of Conflict of Laws § 188*.

(Support of NY Law at 17.) The "circumstances" in the case, however, were that the conflict of law issue arose when the only remaining issue in the case involved the distribution of California property based on an assignment of property rights that occurred in Singapore between Singapore residents. Id. The instant case, however, involves a commercial resident of California and has important consequences for that resident. Thus, Liew is inapposite.

a. Place of Contracting

The defendants assert, and the plaintiff does not dispute, that the place of contracting was New York. (Support of NY Law at 20-21.) Thus, the Court finds that this factor weighs in favor of applying New York law.

b. Place of Negotiation of the Contract

The negotiations for the insurance contracts also took place in New York. (See Support of NY Law at 21-22; Support of CA Law at 13.) **[*15]** The policies were issued to Vivendi through Aon, a New York broker. According to the defendants, Vivendi generally did not negotiate the terms and conditions of the policies directly with AIG; rather, this task was left to Aon. (Decl. Laufer ¶ 5.) The defendants assert that all of the meetings between Aon and AIG regarding the contracts took place in New York. (Support of NY Law at 21; Decl. Laufer ¶¶ 5-8.) The plaintiff does not dispute these assertions, but contends that the negotiations were of minimal significance because the policies were issued using pre-printed standard Insurance Services Office forms. (Support of CA Law at 13.)

The Court finds that there were genuine negotiations that occurred in New York and, therefore, that this factor weighs in favor of applying New York law. The Court notes that the use of standard forms might in some cases indicate a lack of negotiation, but here the parties have submitted evidence suggesting that genuine negotiations as to terms and pricing occurred. (See, e.g., Decl. Laufer ¶ 8 (at meeting between Aon and AIG in New York on December 8, 2000 terms and pricing were discussed); Decl. Laufer ¶ 9 (AIG, in New York, sent e-mail to Seagram Company, **[*16]** Ltd., owned by Vivendi and also in New York, requesting the information necessary to underwrite the policy); Decl. Laufer Ex. E at 12 (fax from Adam Larson, working in Aon's New York offices, to AIG, requesting confirmation of certain terms that had been negotiated and discussed).)

c. Place of Performance

Cal. Civ. Code § 1646 states that "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed . . . ." Pursuant to this section, the place of performance of an insurance

contract has been interpreted as the "state where premiums are paid and the policy is serviced . . . ." *Safeco Ins. Co. of America v. Simmons, 642 F. Supp. 305, 307 (N.D. Cal. 1986)*. The defendants assert that the place of performance was New York because that was where the claims were to be made and the policies serviced. (Support of NY Law at 22; Decl. Laufer ¶ 12.) The plaintiff seems to contend that the place of performance was California, demonstrated by the fact that certain claims for indemnification were communicated to the insurers from California. (See Support of CA Law at 16.)

The Court finds that the CGL policies were to be performed in New York. Pursuant to the definition of the place of performance articulated in Safeco Ins. Co. of America, the Court first **[*17]** notes that it is not entirely clear where the premiums were paid, although it seems to have been in New York. (See CGL Declarations Page in Request for Judicial Notice in Support of Defendants' Motion to Dismiss, Ex. A at 27 (identifying both the insurer and the insured as using New York addresses).) In any event, the defendants contend, and the plaintiff does not dispute, that the CGL contract was serviced in New York. (See Decl. Laufer at ¶ 12.) Based on these considerations, the Court finds that the policy's place of performance was in New York and, therefore, that this factor weighs in favor of applying New York law.

d. Location of Subject Matter of the Contract

Section 193 of the Restatement (Second) Conflict of Laws provides further guidance when the subject of the conflict of laws involves contracts of casualty insurance:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy . . . .

Id. at *§ 193*. The comment to this section states that in an insurance contract "[t]he location of the insured risk will be given greater weight than any other single **[*18]** contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state." Id. *Comment (b)*; *California Cas. Indem. Exch. v. Pettis, 193 Cal. App. 3d 1597, 1607, 239 Cal. Rptr. 205 (1987)*. Thus, if the Court finds that the risk insured by the CGL was principally in one state, it will give this factor added weight in the *§ 188* contact analysis.

The defendant contends that the location of the subject matter of the contract was New York because the underlying issues in this case revolve around the TVT lawsuit, which occurred in New York. (Support of NY Law at 23.) UMG counters that the parties understood the insured risk to be principally located in California. (Support of CA Law at 15.) UMG bases this assertion on the fact that a substantial portion of Vivendi's business occurs in California. "Specifically, payroll amounts provided to American [Home] were used by it to set premium prices for the 2001-02 policy . . . American [Home] knew that a substantial portion of the payroll amounts were attributable to California." (Support of CA Law at 15.) UMG further contends that it was obvious that the principal location of the insured business, "MUSIC/MOVIES/TV," was primarily in California. According to UMG, most of Vivendi's management **[*19]** and employees are located in California. (Id.) In further support of this argument, UMG asserts that it managed the underlying TVT litigation from California, that UMG submitted its insurance claim from California, and that the defendants directed their denial of coverage to California. (Id. at 16.)

The Court finds that although a substantial portion of Vivendi's business was located in California, the parties appear to have reasonably expected that the policy insured multiple risks located in various jurisdictions and, therefore, the key inquiry here is where the underlying liability arose. As stated above, in a conflict of law analysis California law generally places particular weight on the location of the bulk of the insured risk; however, there is an exception to this rule for multiple risk policies. In addressing the *Restatement (Second) of Conflict of Laws § 193*, the Stonewall court articulated this exception:

> Where a multiple risk policy insures against risks located in several states, it is likely that the courts will view the transaction as if it involved separate policies, each insuring an individual risk, and apply the law of the state of principal location *of the particular risk involved*.

Stonewall, 14 Cal. App. 4th at 646-47 (citation omitted) (emphasis added); **[*20]** see also *Restatement (Second) Conflict of Laws § 193, Comment (b)*("[T]he location of the risk has less significance . . . where the policy covers a group of risks that are scattered throughout two or more states."

In Stonewall, the insured provided its insurance broker with "a list of 18 states and 5 foreign countries where

[the insured] operates manufacturing facilities and 128 locations from . . . Australia to . . . Ohio where the corporation has sales and service facilities." Id. The court stated:

> [T]he record here supports the conclusion that [the insured] is a large corporation with worldwide operations and, more importantly, both [the insured] and its insurers carefully considered the complexity of the corporation's activities at the time the policies were issued . . . [U]nder these circumstances we believe [the insured] and its insurers would reasonably expect not only that the corporation's liability to a third party might be governed by the law of a state with significant interests at stake, but that [the insured's] right to indemnity for such a claim might also be governed by that state's law.

Id. at 648. The Stonewall court concluded that because the policy at issue was a "multiple risk" policy, wherein the insured risks were spread among **[*21]** many states, it would examine the location of the particular risk at issue. See *id. at 649*.

The Court finds that the CGL contract at issue in this case involves, like the contract in Stonewall, a multiple risk policy. This is suggested by the manner in which the premiums were calculated and the fact that the insured risks were distributed throughout multiple states. The contract states that "[t]he total *Subject Premium* for the policies will be determined separately by state and kind of insurance." (Support of CA Law, Ex. A at 45, quoting from the Endorsement effective on January 1, 2001.) The defendants calculated the premium based on Vivendi's payroll figures, which include employees in 46 states and the District of Columbia.[4] (Decl. Murkey ¶ 3, Ex. A at 81-84.) The payroll figures for UMG alone cover eleven states. (Id. at 77.) While California is the state with the largest payroll figure at approximately $127 million, New York is a close second with payroll approximating $117 million. Based on these considerations, the Court finds that the policy at issue was really a multiple risk situation, in that the parties were seeking to protect "a group of risks that are scattered throughout two or more states." **[*22]** *Restatement Second of Conflict of Laws § 193, Comment (b)*.

Because this is a multiple risk situation, the Court must determine in which state the underlying risk at issue was located. See *Stonewall, 14 Cal. App. 4th, at 646-47* (For multiple risk policies, the court should "apply the law of the state of principal location of the particular risk involved.")(citations omitted). In the instant case, all of the underlying incidents involving the TVT lawsuit, which gave rise to the instant case, occurred in New York. (Support of NY Law at 23.) Based on the fact that the underlying liability arose from conduct in New York, the Court finds that this factor in the analysis weighs in favor of applying New York law.

e. Domicile, Residence, Nationality, Place of Incorporation and Place of Business of the Parties

As stated above, UMG is a Delaware corporation with its principal place of business in California. (Compl. at 1.) Vivendi is a French corporation with its principal place of business in the United States in New York. (National Union's Memo at 3.) Def Jam is a division of UMG, and its principal place of business is in New York. (Support of NY Law at 2.) American Home is a New York corporation with its principal place of business in New York. (Id. at 2.) AIG Europe is a French corporation with its principal place of business in France. National **[*23]** Union is a Pennsylvania corporation with its principal place of business in New York. (Id. at 2-3.)

While these contacts are located in various jurisdictions, the Court finds that this factor weighs in favor of applying New York law because the most numerous contacts among the relevant parties are with New York. Additionally, although plaintiff UMG's principal place of business is in California, it is the parent company of Def Jam, which is at the center of this dispute and which maintains New York as its principal place of business. (Id. at 2.)

f. Weighing the Restatement Factors

The Court finds that the balancing of the relevant contacts favors the application of New York law. New York is the state in which the parties entered into the contract, where they negotiated the terms of the contract, and where the contract was to be performed. Furthermore, the subject matter of the contract was spread throughout many states and the particular dispute at issue arose from events in New York. The only important contact that California has with this dispute is that UMG conducts most of its business in the state; this does not outweigh the other factors.

3. "Comparative Impairment" Analysis: The States' Policy Interests **[*24]**

[4] Six of the states listed reflect payroll figures of $0. However, this does not affect the Court's conclusions.

The Court does not automatically apply New York law because the relevant contacts analysis weighs in favor of applying New York law. See *Stonewall, 14 Cal. App. 4th at 648-49*. Rather, the Court must also consider the policy interests and the relative impairment of the states if the other's laws are applied.[5] *Id. at 645*.

Based on the policy considerations, the Court finds that New York has a greater interest in regulating the contract at issue. The defendants offer substantial authority suggesting that New York has a strong and clearly articulated policy against allowing indemnification for punitive damages. (Support of NY Law at 18-19.) This policy's purpose is to deter conduct that gives rise to such damages. See *Town of Massena v. Healthcare Underwriters Mutual Ins. Co., 281 A.D.2d 107, 724 N.Y.S. 2d 107, 112 (2001)* (The court "should have dismissed plaintiff's claims for coverage of punitive damages because public policy precludes indemnification for such damages."); *Parker v. Agricultural Ins. Co., 109 Misc. 2d 678, 440 N.Y.S. 2d 964, 966 (1981)* ("Coverage of punitive damages is barred by the fundamental principle that no one should be allowed to take advantage of his own wrong.") New York law contains no exception to this general prohibition based on the insured's vicarious liability.

As discussed above, California clearly has an interest in seeing its residents obtain the full benefit of the insurance **[*25]** policies that they obtain. However, the strength of California's interest in this particular circumstance is only as strong as its interest in seeing its exception to the general prohibition against coverage for punitive damages applied. As discussed below in greater detail, it appears that California's exception to the general prohibition is narrow. In fact, the plaintiff cites no positive, on-point authority clearly stating that punitive damages are insurable when the insured is merely vicariously liable. (See Opp. at 9-10.) Rather, the plaintiff's arguments are based on the fact that California has permitted parties found vicariously liable for the intentional acts of others (including malicious prosecution and libel) to recover the damages awarded against them. The specific issue of vicarious liability with regard to coverage for punitive damages, however, has not been squarely addressed by the courts or statutes of California. Thus, because New York has a clear, unambiguous policy on this issue, the Court finds that New York has a greater interest in asserting its law.

In conclusion, because the states' policy interests and contacts to the controversy favor New York law, the Court finds that **[*26]** New York law governs the CGL Policy.

B. The Umbrella Policy

The Umbrella Policy under which UMG seeks indemnification is the 2002 renewal of the 2001 Umbrella Policy number 7109028, issued by AIG Europe. (Decl. Le Jean at 2.) That policy's coverage of Universal's United States operations was negotiated in New York by American Home. (Id.) For purposes of determining which law applies to the policy, the Umbrella Policy's only significant difference from the CGL Policy is that the insurer AIG Europe resides in France instead of New York. Nonetheless, nearly all of the negotiations regarding the United States coverage occurred in New York.

While the Umbrella policy may cover some risks that were not covered under the CGL policy, the Umbrella Policy was understood to be secondary coverage to the CGL Policy discussed above. See California Insurance Law & Practice § 14.02 (Matthew Bender 2004) ("[E]xcess insurance is insurance that is expressly understood by both the insurer and the insured to be secondary to specific underlying coverage . . . ."). Because the Umbrella Policy contemplated the same risks covered by the CGL Policy, the multiple risk analysis of the CGL policy is equally applicable here. **[*27]** See supra section II.A.2.d.

The Court finds that the same analysis which determined that New York law applies to the CGL Policy also establishes that New York law applies to the Umbrella Policy. This is based on the fact that (1) the relevant contacts regarding the CGL and Umbrella Policies are substantially similar; (2) the Umbrella Policy was predicated on the CGL policy; and (3) the strength of the states' relative interests remains unchanged from the analysis of the CGL policy. See supra section II.A.3.

C. The E&O Policy

[5] In Van Winkle the court stated that in the "comparative impairment" analysis a court may consider: (1) whether the policy underlying each state's law is one that was much more strongly held in the past than now; (2) whether one of the competing laws is archaic; (3) how best to promote the law's purpose; (4)whether the policy underlying a statute may easily be satisfied by some other means; (5)the relative commitment of the respective states to the policy involved; and (6) the location the injury. *290 F. Supp. 2d at 1166-67* (citations omitted).

In order to determine which state's law applies to the E&O Policy, the Court first examines the policy itself. Unlike the other policies at issue in this dispute, the E&O Policy expressly states that California law governs its application. Section VI.N, entitled "Choice of Law," states, "This agreement shall be interpreted in accordance with the laws of the State of California without reference to conflict of laws principles." (Hettrick Decl., Ex. B, page 57.) The general rule in California is that "where the parties have made a choice of law, their choice is usually enforced." *Stonewall, 14 Cal. App. 4th at 645*.

The plaintiff asserts that the Court should enforce the choice of law provision in the **[*28]** E&O Policy based on *§ 1646.5 of the California Civil Code*. *Section 1646.5* provides:

> [T]he parties to any contract, agreement, or undertaking . . . relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars ($250,000) . . . may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state.

The plaintiff argues that *§ 1646.5* applies because the E&O Policy's $1.5 million premium and $10 million policy limit exceed the section's dollar amount requirement. (Plaintiff's memo support CA law at 5; Hettrick Decl. ¶ 13, Ex. B.) Therefore, plaintiff argues, *§ 1646.5* requires this Court to enforce the choice of law provision in the E&O Policy. (Plaintiff's memo support CA law at 5-6.) Defendant National Union does not dispute that the dollar amount requirement of *§ 1646.5* is met, nor does National Union contend that any of the statutory exceptions to *§ 1646.5* apply. National Union argues, however, that a proper choice of law analysis would include consideration of New York's policy of prohibiting indemnification for punitive damages. National Union contends that a failure to consider New York's policies **[*29]** "would subvert other states' autonomy to enact contractual laws which may be contrary to California." (National Union's Memo at 7.) National Union offers no authority to support this contention.

The Court finds that *§ 1646.5* applies to the E&O Policy and, therefore, that the choice of law provision should be enforced. National Union's assertion that New York's interests should be considered fails in light of the clear language of *§ 1646.5*, which unambiguously states that California law governs large commercial contracts that select California law. Furthermore, the legislative history to *§ 1646.5* demonstrates that "the Legislative purpose behind the bill was 'to promote California as an international commercial arbitration center' by ensuring 'the effectiveness of California choice of law clauses in large commercial contracts." *Credit Lyonnais Bank Nederland N.V. v. Manatt, Phelps, Rothenberg & Tunney, 202 Cal. App. 3d 1424, 1434 n. 14, 249 Cal. Rptr. 559* (quoting Sen. Com. and Assem. Com. on Judiciary Analysis of Assem. Bill No. 3223 (1985-86 Reg. Sess) as amended Mar. 31, 1986). Thus, the purpose of *§ 1646.5* is best served by enforcing the choice of law provision selecting California law. The legislative history also reveals that the lawmakers believed that *§ 1646.5* "would exempt court actions 'arising from such contracts, agreements or undertakings from provisions of law **[*30]** which authorize the court to stay or dismiss actions on the basis that the interests of substantial justice require the action to be heard in an out-of-state forum.'" *Credit Lyonnais Bank Nederland N.V., 202 Cal. App. 3d at 1434 n. 14* (quoting Sen. Rules Com., 3d reading, Analysis of Assem. Bill No. 3223 (1985-86 Reg. Sess)). This statement, although somewhat convoluted, suggests that the section is designed to trump other considerations that might normally be raised.

The plaintiff also contends that the choice of law provision should be enforced based on *Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (1992)*. (Memo. in Support of Cal. Law at 8.) Because the Court finds that the choice of law provision should be enforced based on *§ 1646.5*, it need not address the Nedlloyd analysis. Based on this conclusion, the Court finds that the E&O Policy is governed by California law.

III. Defendants' Motion to Dismiss

As stated above, in the TVT lawsuit UMG was held liable for at least $23 million in compensatory damages and $108 million in punitive damages. (Motion at 1.) The defendants argue that as a matter of law, punitive damages cannot be indemnified. (Id.) Thus, they filed motion to dismiss, or in the alternative, to strike plaintiff's claims for declaratory relief insofar as those claims seek indemnity for punitive **[*31]** damages.

A. Legal Standards

1. Motion to Dismiss

Dismissal under 12(b)(6) is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir. 1987). The court must view all allegations in the complaint in the light most favorable to the non-movant and must accept all material allegations - as well as any reasonable inferences to be drawn from them - as true. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). The court need not accept conclusory legal assertions as true. Benson v. Arizona State Bd. of Dental Exam'rs, 673 F.2d 272, 275-76 (9th Cir. 1982).

2. Motion to Strike

A motion to strike may be used to strike any part of the prayer for relief when the damages sought are not recoverable as a matter of law. Bureerong v. Uvawas, 922 F. Supp. 1450, 1479 (C.D. Cal. 1996) (citing Tapley v. Lockwood Green Engineers, Inc., 502 F.2d 559, 560 (8th Cir. 1974)).

B. Application

As stated above, the defendants seek to dismiss or strike the plaintiff's claims to the extent that the plaintiff seeks indemnification from the defendants for punitive damages awarded in the TVT lawsuit.[6] The defendants argue that under New York law punitive damages may not be indemnified by an insurer.[7] (Mot. at 4.) The plaintiff responds that California law applies to this action and that it allows indemnification of punitive damages awarded as a result of vicarious liability. (Opp. at 7.)

1. The **[*32]** CGL Policy

The fifth cause of action seeks a judicial determination of UMG's and American Home's obligations and duties under the CGL policies regarding the TVT lawsuit. As stated above, the Court has determined that the CGL policies are governed by New York law. The defendants assert, and the plaintiff does not dispute, that New York law bars indemnification of an insured for punitive damages awarded in third-party lawsuits. (Motion at 4.) The defendants support this assertion by citing Zurich Ins. Co. v. Shearson. Lehman Hutton, Inc., 84 N.Y. 2d 309, 321, 642 N.E.2d 1065, 618 N.Y.S.2d 609 (1994) (New York policy precludes indemnification for punitive damage awards) Soto v. State Farm Ins. Co., 83 N.Y. 2d 718, 725, 635 N.E.2d 1222, 613 N.Y.S.2d 352 (1994) (same), and others. Furthermore, as stated above, New York does not recognize an exception to its prohibition based on the insured's mere vicarious liability. See Zurich Ins. Co., 84 N.Y. 2d at 320. (Motion at 6.)

Based on New York's prohibition against indemnifying punitive damages, the Court dismisses the fifth cause of action for declaratory relief insofar as it implicates indemnification for punitive damages under the CGL policy. A Court may dismiss a claim for declaratory relief where no such relief can be granted as a matter of law. See Homedics, Inc. v. Valley Forge Ins. Co., 315 F.3d 1135, 1138 (9th Cir. 2002); Cubic Corp. v. Ins. Co. of North America, 33 F.3d 34 (9th Cir. 1994). Furthermore, a Court may dismiss a claim insofar as it is precluded as a matter of law. See Lazar v. Trans Union LLC, 195 F.R.D. 665, 674-675 (C.D. Cal. 2000) (dismissing cause of action **[*33]** under Unfair Practices Act "to the extent" that plaintiff sought restitutionary relief on behalf of public).

2. The Umbrella Policy

The seventh cause of action seeks a declaration of UMG's, AIG Europe's, and National Union's obligations and duties under the Umbrella Policy. As stated above, the analysis of the Umbrella Policy involves a similar set

---

[6] The plaintiff contends that the defendants' motion is premature because the verdict in the TVT lawsuit is being appealed. The defendants contend that the issue is ripe because a judgment has been entered in the TVT suit and in the instant case UMG is seeking coverage for its liability for that judgment. The defendants cite Maryland Casualty v. Pacific Coal & Oil Co., 312 U.S. 270, 273-74, 61 S. Ct. 510, 85 L. Ed. 826 (1941) (insurer's declaratory judgment action regarding its duty to defend and indemnify was sufficiently ripe, even when the underlying liability action in state court had not yet proceeded to judgment); Aetna Casualty and Sur. Co. v. Merritt, 974 F.2d 1196, 1199 (9th Cir. 1992)(same); American States Ins. Co. v. Kearns, 15 F.3d 142, 144 (9th Cir. 1994) (controversy exists where insurer seeks declaration regarding its obligations in pending state court liability suits). Based on the aforementioned authority, the Court finds that the present controversy is ripe.

[7] The defendants' motion does not seek to dismiss the claims in so far as they include compensatory damages and the Court does not address the issue of compensatory damages here. The fifth, sixth, and seventh causes of action, which seek declaratory relief regarding the policies at issue, are the only causes of action implicating the indemnification for punitive damages. These causes of action are the subject of the Court's analysis only insofar as they implicate punitive damages.

of considerations as the CGL policy and is also governed by New York law. For the same reasons articulated above regarding the CGL policy, the Court finds that the seventh cause of action should be dismissed insofar as indemnity for punitive damag-es is implicated by the prayer for declaratory relief.

3. The E&O Policy

The sixth cause of action seeks a declaration of UMG's and National Union's obligations under the E&O Policy.[8] As stated above, the Court has determined that the E&O Policy is governed by California law. The plaintiff asserts that California's prohibition against recovery for punitive damages does not apply when the damages are awarded for vicarious liability. (Opp. at 10, citing *Downey Venture, 66 Cal. App. 4th at 512*.) The plaintiff asserts that the defendants have failed "to demonstrate that there are no facts in support of UMG's claim that would entitle it to declaratory **[*34]** relief regarding defendants' indemnity obligations." (Opp. at 10-11.)

The defendants acknowledge that "California law suggests that, under some circumstances, a narrow exception to the rule against the indemnification of punitive damages exists when a company is held vicariously liable . . . ." (Reply at 11.) Defendants contend, however, that the TVT case involved direct, not vicarious liability and, therefore, the exception to the California rule does not apply to the case at hand. (Reply at 11.)

The Court first must determine if California law contains an exception to the general prohibition against indemnity for punitive damages. In PPG Industries, the California Supreme Court held that it agreed with the highest court of New York "that an insured may not shift to its insurance company, and ultimately to the public, the payment of punitive damages awarded in a third party lawsuit against the insured as a result of the insured's intentional, morally blameworthy behavior against the third party." *20 Cal. 4th at 319*. UMG contends that PPG Industries did not reach the issue of whether insurers may indemnify an insured held liable for punitive damages. (Opp. at 9.) Furthermore, UMG urges that the policy concerns behind **[*35]** the holding in PPG Industries-that the deterrent effect of punitive damages would be undermined if intentional wrongdoers could pass off their liability to insurance companies-do not apply to situations involving vicarious liability. Thus, the plaintiff argues that PPG Industries is distinguishable.

The plaintiff also asserts that California case law interpreting *§ 533 of the California Insurance Code* supports the argument for an exception. *Section 533* states, "An insurer is not liable for a loss caused by the wilful act of the insured . . . ."[9] *Cal. Ins. Code § 533*. The California Court of Appeal interpreted *§ 533* in *Downey Venture, 66 Cal. App. 4th 478, 78 Cal. Rptr. 2d 142*. Downey Venture involved a lessee who had brought an action against its commercial lessors. After summary judgment was granted to the lessors, the lessors brought an action for malicious prosecution against the lessee. The lessee's insurance company ultimately contributed money to the settlement of the malicious prosecution action. The Downey Venture court found that 533 precluded insurance coverage for a malicious prosecution claim. The portion of the opinion relevant to the issue at hand stated, "Although *section 533* bars indemnity of an insured who *personally* commits an act of malicious prosecution, the statute does not bar indemnity of an insured who **[*36]** does not personally commit the act but who is vicariously liable for another person's act of malicious prosecution." *Id. at 512* (emphasis in original).

The Court notes that although there is a distinction between insurance for malicious prosecution and for punitive damages, a similar set of policy considerations arise in both circumstances because the underlying issue is whether one can be insured for intentional, malicious acts. The Downey Venture court further stated, "The public policy underlying *section 533*-to deny coverage for and thereby discourage commission of wilful wrongs-is not implicated when an insurer indemnifies an 'innocent' insured held liable for the willful wrong of another person . . . ." *Id. at 514*.

The plaintiff also cites *Lisa M. v. Henry Mayo Newhall*

---

[8] The TVT lawsuit "involves claims of copyright infringement, breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with contract, promissory estoppel, . . . fraud . . . and disparagement . . . ." (Compl. ¶ 23.) In addition, the TVT lawsuit involved claims that Mr. Cohen allegedly "made various misrepresentations leading to infringement of copyrighted material, wrongful use of other TVT recordings and use of name, likeness and performances of other artists under contract with TVT." (Compl. ¶ 23.) UMG contends that these claims fall within the definition of "Media Liability" coverage provided by the E&O Policy. (Compl. ¶ 23.)

[9] Although the court in PPG Industries cited *§ 533* of the Insurance Code, the discussion and holding appear to be grounded primarily in policy considerations, not *§ 533*.

Memorial Hospital, 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510, 907 P.2d 358 (1995). Lisa M. involved an action by a hospital patient against the hospital and its staff based on alleged sexual molestation during a medical procedure. An important issue in the case was whether or not the hospital could be held vicariously liable for the acts of its employees. On the related matter of insurance coverage, the California Supreme Court stated, "Neither Insurance Code *section 533* nor related policy exclusions for intentionally caused injury or damage preclude a **[*37]** California insurer from indemnifying an employer held vicariously liable for an employees willful acts." *Id. at 305 n. 9*. Although this statement does not directly address the issue of punitive damages, it does articulate a distinction between direct and vicarious liability in terms of insurance coverage for intentional wrongdoing, and suggests that California law provides certain exceptions to the general prohibition against the indemnity for willful acts, presumably including those that lead to punitive damages.

Further evidence of an exception is found in *Dart Industries, Inc. v. Liberty Mutual Insurance Co., 484 F.2d 1295 (9th Cir. 1973)*. In Dart Industries, a corporation brought an action against its insurer to recover the amount of a libel judgment that a party had obtained against the corporation based on a letter that the corporate president had written to a credit association. The Ninth Circuit found that *§ 533* does not preclude recovery from an insurer for an act of libel where the corporation's liability was solely based on a theory of vicarious liability. The court stated that the policy concerns of *§ 533* are "limited to a situation where the insured is at fault." *Id. at 1297*.

Based on the logic and policy articulated in the relevant case law, the Court finds that the prohibition against recovery **[*38]** for punitive damages, as articulated in PPG Industries, contains certain narrow exceptions involving vicarious liability. California's primary concern in PPG Industries and *§ 533* seems to be that an intentional "wrongdoer should not be indemnified against the effects of his wrongdoing." *Dart Industries, 484 F.2d at 1298*. This policy implicates issues of justice and deterrence that do not apply to innocent parties. Because vicarious liability can be assigned to an employer or corporation that has not personally committed any wrongdoing, it is reasonable that California appears to have carved out an exception to its prohibition against indemnity for intentional acts of wrongdoing where the insured is an innocent party, guilty only of vicarious liability. The reasoning behind this exception suggests that the exception extends to punitive damages that have been awarded solely on the basis of vicarious liability. Therefore, the Court finds that California does permit a party to obtain insurance coverage for punitive damages when those damages arise solely from vicarious liability.

Next, the Court must determine whether the case at hand falls within California's exception. The Court cannot, however, at this stage in the proceeding, make determinations **[*39]** regarding the factual scenario and theories of liability that led to the TVT judgment. As stated above, a dismissal under *12(b)(6)* is only appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. *Newman, 813 F.2d at 1521-22*. If the plaintiff were able to show that the TVT judgment was based on vicarious liability, it is possible that the narrow exception to California's bar against indemnity for punitive damages would apply. Based on this consideration, the Court denies the defendants' motion with regard to the E&O Policy.

IV. Conclusion

For the reasons stated above, the Court grants the defendants' motion to dismiss the plaintiff's claims for declaratory relief with regard to the CGL and Umbrella Policies insofar as the plaintiff seeks indemnity for punitive damages. The Court denies the defendants' motion with regard to the E&O Policy.

IT IS SO ORDERED.

Dated: 11-5-04

/s/ Dean D. Pregerson

DEAN D. PREGERSON

United States District Judge