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

United States District Court for the Central District of California

April 20, 2006, Decided; April 21, 2006, Filed

Case No. CV 04-04756 DDP (RNBx)

Reporter
2006 U.S. Dist. LEXIS 107249 *

UMG RECORDINGS, INC., a Delaware Corporation, Plaintiff, v. AMERICAN HOME ASSURANCE COMPANY, a New York corporation, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., a Pennsylvania corporation, AIG EUROPE, S.A., a French corporation, Defendants.

Subsequent History: Affirmed by *UMG Recordings, Inc. v. Am. Home Assur. Co., 321 Fed. Appx. 553, 2008 U.S. App. LEXIS 18990 (9th Cir. Cal., Sept. 2, 2008)*

Prior History: *UMG Recordings, Inc. v. Am. Home Assur. Co., 2006 U.S. Dist. LEXIS 106162 (C.D. Cal., Feb. 27, 2006)*
UMG Recordings, Inc. v. Am. Home Assur. Co., 2004 U.S. Dist. LEXIS 33287 (C.D. Cal., Nov. 5, 2004)

Core Terms

alleges, policies, Album, Lawsuit, duty to defend, argues, occurrence, recordings, summary judgment, property damage, insured, Ja Rule, advertising injury, advertisement, coverage, artists, tangible property, disparages, products, fair dealing, infringement, implied covenant of good faith, claim for breach, provide coverage, punitive damages, summary judgment motion, cause of action, tortious breach, nonmoving, damages

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Judges: [*2] DEAN D. PREGERSON, United States District Judge.

Opinion by: DEAN D. PREGERSON

Opinion

ORDER GRANTING DEPENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross motions for summary judgment. After reviewing the parties' papers, the Court denies UMG's motion for partial summary judgment and grants American's motion for summary judgment.

I. Background

UMG Recordings, Inc. ("UMG") brings this diversity action against American Home Assurance Company ("American"),[1] alleging breach of contract regarding the

[1] The other defendants, National Union and AIG Europe, S.A., have reached a settlement with UMG.

duty to defend and tortious breach of the implied covenant of good faith and fair dealing, and requesting declaratory relief.

American sold Vivendi Universal two commercial general liability insurance policies (the "policies"), policy number RM GL 612-42-97 and policy number RM GL 612-49-59. The policies covered the period from January 1, 2001 to January 1, 2003. UMG is a subsidiary of Vivendi Universal. The Island Def Jam Music Group ("Island") is a division of UMG. Lyor Cohen ("Cohen") served as president of Island during the time at issue in this lawsuit. Island and Cohen are covered by the policies.

UMG is a Delaware **[*3]** corporation with its principal place of business in California. American is a New York corporation with its principal place of business in New York.

A. Policies RM GL 612-42-97 and RM GL 612-49-59

The policies obligate American to pay those sums that UMG (the "insured") becomes legally obligated to pay as damages resulting from "property damage" or "personal and advertising injury" to which the insurance applies. Further, the policies obligate American to "defend the insured against any 'suit' seeking those damages." (Policy No. 612-42-97 at 1, 4; Policy No. 612-49-59 at 1, 5.) The policies provide that American does not have the duty to defend the insured against any suit for "property damage" or "personal and advertising injury" to which the insurance does not apply. (Policy No. 612-42-97 at 1, 4; Policy No. 612-49-59 at 1, 5.)

The policies define "property damage" as:

> Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the **[*4]** 'occurrence' that caused it.

(Policy No. 612-42-97 at 11; Policy No. 612-49-59 at 15.) The insurance only applies to "property damage" caused by an "occurrence." The policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Policy No. 612-42-97 at 11; Policy No. 612-49-59 at 14.)

The policies define "personal and advertising injury" as including:

> Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services ... or infringing upon another's copyright, trade dress or slogan in your 'advertisement.'

(Policy No. 612-42-97 at 11; Policy No. 612-49-59 at 14.) The policies define "advertisement" as "a notice that is broadcast or published [policy number 612-49-59 includes the electronic media] to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." (Policy No. 612-42-97 at 9; Policy No. 612-49-59 at 12.)

B. TVT's Lawsuit Against UMG

In 2002, TVT Records, an independent record company, filed a lawsuit against UMG in the Southern **[*5]** District of New York entitled TVT Records v. Island Def Jam Music Group & Lyor Cohen, Case No. 02 CV 6644 (the "TVT Lawsuit"). The lawsuit arose out of a dispute over the release of an album by the rap group CMC (the "CMC Album").

In 1994, TVT signed Ja Rule (the "artist") and his group CMC (collectively the "artists"). The group recorded songs produced by Irv Gotti. After a member of CMC was incarcerated, TVT delayed the release of CMC's debut album. (See TVT Records v. Island Def Jam Music Group & Lyor Cohen, Amended Complaint ("Amended Complaint") ¶ 2.) In the meantime, Ja Rule and Irv Gotti entered into a production and recording contract with Island, and Ja Rule became one of Island's most successful recording artists. (Id. ¶ 3.) In 2001, Ja Rule and Irv Gotti entered into an agreement with TVT to make new recordings with CMC and to release the CMC Album. (Id. ¶¶ 2, 3.) TVT alleges that Cohen gave his verbal approval of the project to Ja Rule, Irv Gotti and their attorney. (Id.) TVT alleges that Island demanded certain profits made from the CMC Album in consideration of its consent to the release of the CMC Album on the TVT label. (Id. ¶ 14.) In October 2001, TVT sent Island an **[*6]** executed copy of the profit sharing agreement. TVT alleges that Island stated that it would execute and return the agreement, and that TVT and the artists could rely on the agreement. (Id.) Island did not return the agreement; rather, in August 2002, three months before the planned release of the CMC Album, Island rejected the terms of the agreement. (Id. ¶ 23.)

TVT alleges that, while the artists worked on the CMC Album, Island requested TVT's permission to use

certain of TVT's copyrighted recordings for an Island DVD entitled, "Irv Gotti Presents: The Inc." (Id. ¶ 18.) In addition, Island allegedly included other of TVT's copyrighted recordings on its CD entitled "Irv Gotti Presents: The Inc.," without requesting permission from TVT. (Id.) TVT alleges that Island knew about TVT's planned release of the album, and that the Irv Gotti CD announced the arrival of the CMC Album. (Id. ¶ 3.)

TVT alleges that Cohen, despite "his express agreement to the CMC Album project," later instructed Ja Rule and Irv Gotti not to deliver the CMC Album to TVT. (Id. ¶ 4.) TVT alleges that this conduct of "arbitrarily breaking his word with impunity for his own personal gain - is outrageous and unconscionable." **[*7]** (Id. ¶ 5.) TVT alleges that, at the time he withheld the album, Cohen had acknowledged that his contract was up for renegotiation and that the terms of his new contract was tied to Island's market share. Further, TVT alleges, Cohen had taken credit for discovering Ja Rule, and therefore had concerns about Ja Rule's ongoing relationship with TVT. (Id. ¶ 4.)

TVT alleges that UMG "intentionally concealed from TVT [its] intent never to permit the CMC Album to be released by TVT." (Id. ¶ 61.) TVT further alleges that their conduct "was engaged in willingly and maliciously with an intent to damage TVT." (Id. ¶ 66.)

TVT brought suit alleging, inter alia, claims for copyright infringement, breach of contract and other tortious acts. American disclaimed coverage and declined to defend UMG in the action. The action was ultimately resolved in favor of UMG.

C. UMG's Claims Against American

UMG asserts three causes of action against American: (1) breach of contract regarding the duty to defend; (2) tortious breach of the implied covenant of good faith and fair dealing, i.e., bad faith; and (3) declaratory relief. UMG requests punitive damages for its claim of tortious breach of the implied covenant **[*8]** of good faith and fair dealing.

UMG and American both seek summary judgment on the claim for breach of contract regarding the duty to defend. American also seeks summary judgment on the claim for breach of the implied covenant of good faith and fair dealing.

II. Legal Standard

A. Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" on that issue. *Fed. R. Civ. P. 56(c)*. In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson, 477 U.S. at 248*. Thus, the "mere existence of a scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary adjudication. *Id. at 252*. A moving party who bears the burden of proof at trial is entitled to summary adjudication only when **[*9]** the evidence indicates that no issue of material fact exists. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. If the moving party does not bear the burden of proof at trial, he is entitled to summary judgment if he can demonstrate that "there is an absence of evidence to support the nonmoving party's case." Id. Once the moving party meets its burden, the burden shifts to the nonmoving party resisting the motion for summary judgment, who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 256*.

B. Conflict of Laws

This case presents a problem of conflict of laws. When jurisdiction is based on diversity, the district court must apply the forum state's conflict of laws rules to determine the controlling substantive law. *Klaxon Co. v. Stentor Elect. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*.

California uses a "governmental interest" approach to resolve conflict of laws issues. *Offshore Rental Co., Inc. v. Cont'l Oil Co., 22 Cal. 3d 157, 163, 148 Cal. Rptr. 867, 583 P.2d 721 (1978)*. If the laws of the states are identical and no conflict exists, the Court should apply the law of the forum state. *Hurtado v. Superior Court, 11 Cal. 3d 574, 580, 114 Cal. Rptr. 106, 522 P.2d 666 (1974)*. If the laws of the states are in conflict, the court must determine whether the states have a "legitimate, but conflicting" interest in the application of their respective law. *Offshore, 22 Cal. 3d at 163* (citing

Bernhard v. Harrah's Club, 16 Cal. 3d 313, 319, 128 Cal. Rptr. 215, 546 P.2d 719 (1976)) . If only one state has an interest in having its law applied, the court should apply the law of the interested **[*10]** state. *Hurtado, 11 Cal. 3d at 580*. The court should resolve a "true conflict" between two or more states by applying the law of the state whose interest would be more impaired if the court did not apply its law. *Offshore, 22 Cal. 3d at 163-165*.

III. Discussion

A. Choice of Law

California and New York arguably have an interest in applying their substantive law to the claims at issue in these motions. UMG has its principal place of business in California. Furthermore, California is the forum state. American is a New York corporation with its principal place of business in New York.

American argues that New York law governs all issues concerning the policies. (Def.'s Mot. 11; Reply 5; Opp'n to Pl.'s Mot. 9.) In support, American relies on the Court's previous order in this case granting a motion to dismiss UMG's claim for declaratory relief insofar as UMG sought indemnification for punitive damages. (See Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss, Nov. 5, 2004 at 1.) The Court considered California and New York laws regarding one's ability to recover punitive damages under an insurance policy. (Id. at 7.) New York law prohibits the recovery of punitive damages, whereas California law provides an exception to the prohibition. (Id. **[*11]**) Using the governmental interest approach, the Court concluded that New York law governs American's policies with regards to the issue of punitive damages. (Id. at 21-22, 24.) The Court did not, however, determine whether it should apply California or New York law regarding the duty to defend or the duty to act fairly and in good faith. Further, under California's governmental interest approach, "[a] separate choice-of-law inquiry must be made with respect to each issue in a case." *S.A. Empresa de Viacao Aerea Rio Grandense v. Boeing Co., 641 F.2d 746, 749 (9th Cir. 1981)*. Therefore, New York law does not necessarily govern the claims at issue in these motions.

B. Claim for Breach of Contract Regarding Duty to Defend

UMG argues that the complaints in the TVT Lawsuit allege "property damage" and "personal and advertising injury" as those terms are defined in the policies. (Pl.'s Mot. 12-20.) Therefore, UMG argues, it is entitled to summary judgment because American breached its duty to defend UMG in the TVT Lawsuit. (Id. 1, 9.)

American argues that the complaints in the TVT Lawsuit do not allege an "occurrence" resulting in "property damage" or a "personal and advertising injury" as those terms are defined in the policies. (Def.'s Mot. 13-21.) Therefore, American argues, it is entitled to summary judgment **[*12]** because it had no duty to defend UMG in the TVT Lawsuit. (Id. 3.)

1. Choice of Law for Claim for Breach of Contract Regarding Duty to Defend

UMG argues that California and New York courts apply the same law concerning an insurer's (1) general duty to defend, (Pl.'s Mot. 9-12; Pl.'s Opp'n to Def.'s Mot. 5-7) (2) duty to defend with regards to an "occurrence" resulting in "property damage," (Pl.'s Mot. 12-15; Pl.'s Reply 6-9; Pl.'s Opp'n to Def.'s Mot. 8-14) and (3) duty to defend with regards to a "personal and advertising injury." (Pl.'s Mot. 15-20; Pl.'s Reply 9-18; Pl.'s Opp'n to Def.'s Mot. 14-17). Therefore, UMG argues that the Court should apply California law to the claim for breach of the duty to defend. See *Hurtado, 11 Cal. 3d at 580*.

California and New York law does not conflict with regards to an insurer's general duty to defend. In both states, the duty to defend requires an insurance company to defend its insured against any loss potentially covered by the insurance policy. *Anthem Elecs., Inc. v. Pac. Employers Ins. Co., 302 F.3d 1049, 1054 (9th Cir. 2002)*; *First Investors Corp. v. Liberty Mut. Ins. Co., 152 F.3d 162, 165-66 (2d Cir. 1998)*. The court must construe liberally the allegations in the complaint in favor of a duty to defend. *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co., 307 F.3d 944, 951, n. 4 (9th Cir. 2002)*; *Ruder & Finn, Inc. v. Seaboard Sur. Co., 52 N.Y. 2d 663, 669, 422 N.E.2d 518, 439 N.Y.S.2d 858 (1981)*. The court must resolve any doubt as to whether facts in the underlying complaint fall within the policy in favor of the insured. **[*13]** *Anthem, 302 F.3d at 1054*; *U.S. Fidelity & Guar. Co. v. Executive Ins. Co., 893 F.2d 517, 519 (2d Cir. 1990)*. Further, once the duty to defend attaches, the insurer must defend against all of the claims involved in the action, whether or not the other claims fall within the coverage provided. *Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 N.Y. 2d 169, 175, 690 N.E.2d 866, 667 N.Y.S.2d 982 (1997)*; *Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076,*

1084, 17 Cal. Rptr. 2d 210, 846 P.2d 792 (1993).

The policies provide coverage for "property damage" caused by an "occurrence," which the policies define as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Policy No. 612-42-97 at 11; Prolicy No. 612-49-59 at 14.) Both states have considered the terms "occurrence" and its definition as an "accident" in the context of commercial general liability policies like the ones at issue in this case. In those cases, both states interpret "occurrence" as an unexpected or unintentional happening. Commercial Union Assur. Co. v. Oak Park Marina, Inc., 198 F.3d 55, 59 (2d Cir. 1999); Chatton v. Nat'l Union Fire Ins. Co., 10 Cal. App. 4th 846, 860-61, 13 Cal. Rptr. 2d 318 (1992). An "occurrence" does not apply when the insured performs a deliberate act unless an additional, unexpected or unforeseen happening occurs that produces the damage. Upper Deck Co., LLC v. Fed. Ins. Co., 298 F. Supp. 2d 994, 999 (S.D. Cal. 2002) (quoting Merced Mut. Ins. Co. v. Mendez, 213 Cal. App. 3d 41, 50, 261 Cal. Rptr. 273 (1989)); Commercial Union, 198 F.3d at 59 ("damages arising from an intended act may also be deemed accidental, so long as they arise out of a chain of unintended ... events"). The event may not be deemed an "occurrence" merely because the insured did not intend to cause injury. Allstate Ins. Co. v. Salahutdin, 815 F. Supp. 1309, 1311 (N.D. Cal. 1992); Merced, 213 Cal. App. 3d at 50; Fed. Ins. Co. v. Cablevision Systems Dev. Co., 637 F. Supp. 1568, 1576 (E.D.N.Y. 1986) (courts "distinguish between damages **[*14]** which flow directly and immediately from an intentional act, thereby precluding coverage, and damages which accidentally arise out of a chain of unintended ... events").

The policies provide coverage for "personal and advertising injury," which is defined as "[o]ral or written publication of material that ... disparages a person's or organization's goods, products or services ... or infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" (Policy No. 612-42-97 at 11; Policy No. 612-49-59 at 14.) ;A

Both states have considered the term "disparagement" in the context of commercial general liability policies like the one at issue in this case. In those cases, both states interpret "disparagement" as a false or misleading statement. Sentex Systems, Inc. v. Hartford Accident & Indemnity Co., 882 F. Supp. 930, 944 (C.D. Cal. 1995), aff'd, 93 F.3d 578 (9th Cir. 1996); Atlantic Must. Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1035, 123 Cal. Rptr. 2d 256 (2002); Motorists Must. Ins. Co. v. Nat'l Dairy HerdImprovement Ass'n, 141 Ohio App. 3d 269, 750 N.E. 2d 1169, 1175 (Ohio 2001) (applying New York law).

The Court finds that California and New York apply the same law regarding the duty to defend. Therefore, the Court applies California law to UMG's claim for breach of the duty to defend. See Hurtado, 11 Cal. 3d at 580.

2. The TVT Lawsuit Does Not Allege an "Occurrence" Resulting in "Property Damage"

The policies provide coverage for an "occurrence" resulting in "property damage." The policies define "property damage" as "physical **[*15]** injury to tangible property, including all resulting loss of use of that property." (Policy No. 612-42-97 at 11; Policy No. 612-49-59 at 15.) The policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Policy No. 612-42-97 at 11; Policy No. 612-49-59 at 14.)

UMG argues that the TVT Lawsuit alleges that TVT lost tangible property, the CNC Album, as a result of UMG's conduct. (Not. 12-15.) In support, UMG cites two portions of TVT's complaint TVT alleges that MG wrongfully induced Ja Rule and Irv Gotti to withhold delivery of the CMC Album. (Amended Complaint ¶ 24.) TVT also alleges that, as a result of UMG's conduct, it lost a "unique asset." (Id. ¶ 40.) MG argues that a master recording, such as the CMC Album, constitutes tangible property. See Capitol Records, Inc., v. State Bd. of Equalization, 158 Cal. App. 3d 582, 596, 204 Cal. Rptr. 802 (1984) (master recordings are tangible property and therefore taxable); 6 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 30.03 (2005) (copyright protects master recordings). American does not contest UMG's characterization of the CMC Album as tangible property. Therefore, the Court finds that the allegations in the TVT Lawsuit concern the loss of tangible property.

The TVT Lawsuit **[*16]** alleges that UMG withheld the CMC Album "willingly and maliciously with an intent to damage TVT." (Id. ¶ 61.) The TVT Lawsuit alleges that MG, and not some additional, unexpected or unforeseen happening, caused the damage to TVT. See Merced, 213 Cal. App. 3d at 50. Therefore, UMG's actions do not constitute an "occurrence."

UMG argues that the TVT Lawsuit alleges that Cohen intentionally withheld the CNC Album in order to advance his own personal wealth. (Pl.'s Reply at 7; Pl.'s

Opp'n to Def.'s Mot. at 9.) UMG argues that Cohen's actions could have potentially resulted in accidental consequences. Therefore, MG argues, Cohen's actions constitute an "occurrence." In support, UMG cites TVT's allegations that, at the time that he withheld the album, Cohen had acknowledged that his contract was up for renegotiation and that the terms of his new contract was tied to Island's market share. Further, TVT alleges, Cohen had taken credit for 2 discovering Ja Rule, and therefore had concerns about Ja Rule's ongoing relationship with TVT. (Amended Complaint ¶ 4.)

In liberally construing the allegations, the Court finds that there is no potential coverage under the policies. Cohen's intentional withholding of the CMC Album had **[*17]** the direct and foreseeable consequence of causing damage to TVT, even if he only intended to advance his own career. The TVT Lawsuit does not allege that an additional, unexpected or unforeseen happening caused the damage. *Merced, 213 Cal. App. 3d at 50*. Therefore, Cohen performed a deliberate act that does not constitute an "occurrence." Accordingly, American did not have a duty to defend UMG in the TVT Lawsuit.

3. The TVT Lawsuit Does Not Allege "Personal and Advertising Injury"

The policies provide coverage for "personal and advertising injury," which is defined as "[o]ral or written publication of material that ... disparages a person's or organization's goods, products or services ... or infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" (Policy No. 612-42-97 at 11; Policy No. 612-49-59 at 14.) The policies define "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." (Policy No. 612-42-97 at 9; Policy No. 612-49-59 at 12.)

a. Disparagement

UMG argues that the TVT Lawsuit alleges that MG attempted to harm TVT's relationship with **[*18]** the artists through mis-characterizations regarding TVT. (Pl.'s Mot. 17.) Therefore, UMG argues, its actions constitute oral publication of material that disparages TVT's services. (Id. 17; Reply 14.) In support, MG cites TVT's allegations that UMG "wrongfully induced" Ja Rule and Irv Gotti to withhold delivery of the CMC Album to TVT. (Amended Complaint ¶ 24.) Further, TVT alleges that MG "further sought to interfere with and destroy the relationship between TVT and the Artists by, without limitation, continuously mischaracterizing to the Artists TVT's efforts to protect TVT's rights to put out the CMC Album." (Id.)

In *Atlantic Mutual Insurance Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1035, 123 Cal. Rptr. 2d 256 (2002)*, a case cited by MG, the underlying complaint alleged that the insured made false statements about the underlying plaintiff's goods. *Id. at 1035*. Accordingly, the court held that the complaint alleged disparagement of the plaintiff's goods. Id. In contrast, the TVT Lawsuit does not allege that MG made false statements about TVT's services. See *Sentex, 882 F. Supp. at 944* (no duty to defend where the underlying complaint fails to allege false statements about the underlying plaintiff's goods, services or products). Rather, the TVT Lawsuit alleges that MG mischaracterized TVT's efforts to protect its rights to **[*19]** release the CMC Album. Therefore, the allegations do not potentially constitute "personal injury," and American did not have a duty to defend UMG in the TVT Lawsuit.

b. Copyright Infringement

UMG argues that the TVT Lawsuit alleges that the Irv Gotti CD promoted the release of the CMC Album. Therefore, UMG argues, its actions constitute infringement of TVT's copyright in its advertisement. (Pl.'s Mot. 18-20.) In support, UMG cites the TVT's allegations that, while the artists worked on the CNC Album, Island requested TVT's permission to use certain of TVT's copyrighted recordings for an Island DVD entitled, "Irv Gotti Presents: The Inc." (Amended Complaint ¶ 18.) In addition, Island allegedly included other of TVT's copyrighted recordings on its CD entitled "Irv Gotti Presents: The Inc.," without requesting permission from TVT. (Id.) TVT further alleges that the Irv Gotti CD announced the arrival of the CMC Album. (Id. ¶ 3.) The TVT Lawsuit does not allege that MG used the CD to advertise its own products. Rather, TVT alleges that UMG used the CD to advertise the release of the TVT album. Therefore, the release of the CD does not constitute infringement of TVT's copyrights in an advertisement **[*20]** for UMG's products. Accordingly, American did not have a duty to defend UMG in the TVT Lawsuit.

C. Claim for Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing

UMG argues that American disclaimed coverage "for the purpose of consciously withholding from MG the rights and benefits to which UMG is entitled under the [policies]." (Compl. ¶ 53.) UMG seeks punitive damages

with regards to its breach of covenant ("bad faith") claim. (Id. at 18 ¶ 5.) American argues that it is entitled to summary judgment because UMG cannot maintain this claim under New York or California law. (Def.'s Not. 21-25.)

1. Choice of Law for Claim for Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing

New York does not recognize an independent cause of action for bad faith denial of insurance coverage. *USAlliance Fed. Credit Union v. CUMIS Ins. Soc'y, Inc., 346 F. Supp. 2d 468, 470 (S.D.N.Y. 2004)*. Under California law, a party can maintain a cause of action for bad faith denial of insurance coverage; however, a party cannot maintain the claim where there is no coverage of any kind under the insurance contract. *Am. Med. Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 244 F.3d 715, 719 (9th Cir. 2001)* citing *Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 18, 44 Cal. Rptr. 2d 370, 900 P.2d 619 (1995)*. Therefore, the Court must apply the governmental interest approach to determine which state law applies to this claim.

UMG is based in California. In upholding claims **[*21]** for bad faith denial of coverage, California courts have articulated an interest in imposing liability on insurers that fail to act fairly and in good faith in discharging their contractual responsibilities. See *Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 573-74, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973)*. California has an interest in applying its law to this claim in order to deter bad faith practices by insurance companies that do business with corporations in California.

American is based in New York. In precluding claims for bad faith denial of coverage, New York courts have articulated an interest in limiting insurers' liability. See *N.Y. Univ. v. Cant's Ins. Co., 87 N.Y.2d 308, 319-20, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995)* (a cause of action for breach of the implied covenant of good faith and fair dealing is "duplicative" of a cause of action for breach of contract). New York has an interest in applying its law to this claim in order to limit American's liability.

New York's interest would be somewhat impaired if the Court applied California law. Under California law American could be held liable for alleged bad faith practices. However, California's interest would be significantly impaired if the Court applied New York law. UMG is based in California. Under New York law, UMG can not maintain its claim. This would frustrate California's goal of imposing liability **[*22]** on insurers that do business in California. Therefore, the Court applies California law to this claim.

2. Policies Do Not Provide Coverage to Allegations in TVT Lawsuit

The Court finds that the policies do not cover the allegations in the TVT Lawsuit. Accordingly, American did not breach its duty to defend UMG in the TVT Lawsuit. Under California law, UMG cannot maintain its bad faith claim against American. *Waller, 11 Cal. 4th at 18*.

IV. Conclusion

Based on the foregoing reasons, the Court denies UMG's motion for partial summary judgment and grants American's motion for summary judgment.

IT IS SO ORDERED.

Dated: 4-20-06

/s/ Dean D. Pregerson

DEAN D. PREGERSON

United States District Judge

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