

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 07-01095-CJC(RNBx)

Date: November 18, 2009

Title: ILLINOIS UNION INSURANCE CO. v. BROOKSTREET SECURITIES CORP. ET AL.

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PRESENT:

**HONORABLE CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE**

Michelle Urie  
Deputy Clerk

N/A  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

None Present

None Present

**PROCEEDINGS: (IN CHAMBERS) ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [filed 09/30/09]**

Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15. Accordingly, the hearing set for November 23, 2009 at 3:30 p.m. is hereby vacated and off calendar.

This case arises from several disputes between Brookstreet Securities Corporation (“Brookstreet”), a California financial services company, and dozens of its investor clients. Plaintiff Illinois Union Insurance Company (“Illinois Union”) provided professional liability insurance with \$3 million in coverage to Brookstreet and its employees, officers and directors. (“First Amended Compl. (“FAC”) ¶¶ 137-138.) Illinois Union brought this action for interpleader and posted a \$3 million bond with the Clerk of the Court. (FAC ¶ 2.) Illinois Union seeks a declaration that Defendants are not entitled to any rights, benefits, or recovery under the insurance policy. Specifically, Illinois Union moves for summary judgment as to Defendant-Claimants Ann Courtney Taylor and Susan Taylor Vanderhamm, as Co-Personal Representatives of the Will of the Estate of Betty Jean Taylor (hereafter “Ms. Taylor”). For the following reasons, Illinois Union’s motion for summary judgment is DENIED.

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**Background**

**A. The Policy**

Illinois Union provided Brookstreet with a Securities Broker-Dealer Professional Liability Insurance Policy (“the Policy”) covering the period from November 8, 2006 to November 8, 2007. Insuring Agreement A provides:

The Insurer shall pay on behalf of the Insured Broker-Dealer, Loss which the Insured Broker-Dealer becomes legally obligated to pay by reason of any Claim first made against the Insured Broker-Dealer during the Policy Period . . . and reported in writing to the Insurer during the Policy Period, . . . in accordance with the terms of this Policy, for any Wrongful Acts taking place after the Retroactive Date but before the expiration of the Policy.

(Illinois Union UF ¶ 32.) A “Claim” is, *inter alia*, “[a]n arbitration proceeding.” (Decl. A. Aizley, Ex. A at 9.) “Loss” means “the damages [or] judgments . . . which the Insured become legally obligated to pay on account of any Claim first made against any Insured during the Policy Period . . . for Wrongful Acts for which coverage applies.” (Decl. A. Aizley, Ex. A at 10.) The “Retroactive Date” is “the date stated in Item 7. of the Declarations,” and Item 7 identifies the “Retroactive Date” as “9/10/2002.” (Decl. A. Aizley, Ex. A at 11, ) “Wrongful Act” is defined as “any actual or alleged negligent act, error or omission by the Insured Broker-Dealer and/or the Insured Registered Representatives in connection with the rendering of Professional Services.” (Decl. A. Aizley, Ex. A at 11.) “Interrelated Wrongful Acts” means “all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes.” (Decl. A. Aizley, Ex. A at 10.)

Section IV.B. of the Policy excludes coverage for “Loss on account of any Claim made against any Insured” which is “[b]ased upon, arising out of, or attributable in any way to any Wrongful Act or Interrelated Wrongful Act first occurring before the applicable Retroactive Date, [September 10, 2002], set forth in Item 7 of the Declarations of [the] Policy, even when the Wrongful Act or Interrelated Wrongful Act continued after

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the Retroactive Date set forth in Item 7. of the Declarations.” (Decl. Arthur Aizley, Ex. A at 11.)

**B. Ms. Taylor’s Account**

Ms. Taylor’s husband died in 1992, which left her with a multi-million dollar investment portfolio. (Taylor’s Statement of Uncontroverted Facts (“UF”) at ¶ 1.) In 1996, Ms. Taylor opened an investment account with Mr. Simmons, who acted as her broker. (Taylor UF at ¶ 2.) Over the next ten years, Mr. Simmons changed from investment firm to investment firm but kept Ms. Taylor’s account. (Taylor UF ¶ 5.) In June 2000, Mr. Simmons became a broker at Brookstreet. (Taylor UF ¶ 5.) At that time, Ms. Taylor opened a Brookstreet account and Mr. Simmons continued as her broker. (Taylor UF ¶ 5.) In June 2006, Ms. Taylor closed her account with Mr. Simmons. (Taylor UF ¶ 6.)

In April of 2007, Ms. Taylor commenced a NASD/FINRA Arbitration proceeding against Mr. Simmons, NPC<sup>1</sup> and Brookstreet. (Taylor UF ¶ 6.) Ms. Taylor alleged that Mr. Simmons had a pattern of churning, making unauthorized trades, buying and selling high risk stocks, and failing to advise Ms. Taylor of her investment losses. (Illinois Union UF ¶ 20.) Ms. Taylor alleged that by 2006, she had only \$250,000 left from the approximately \$2 million she had invested with Simmons in 1996. (Illinois Union UF ¶ 22.) Ms. Taylor’s claim was reported to Illinois Union on May 14, 2007. (Illinois Union UF ¶¶ 42, 44.) By letter dated June 5, 2007, Illinois Union accepted Brookstreet’s defense in the Taylor matter under a reservation of rights to deny coverage for any claim arising out of an Interrelated Wrongful Act first occurring before the September 10, 2002 retroactive date. (Decl. Aizley, Ex. I at 74, 77.)

Prior to the arbitration hearing, Mr. Simmons and NPC settled their claims with Ms. Taylor. (Taylor UF ¶ 8.) In May of 2008, a FINRA Dispute Resolution Award was issued against Brookstreet in the amount of \$1.3 million in compensatory damages, and \$100,000 in attorneys’ fees. (Illinois Union UF ¶ 7.) On July 10, 2008, Ms. Taylor obtained a final judgment against Brookstreet in state court affirming the arbitration award in its entirety, and awarding interest and certain additional costs and fees. (Illinois Union UF ¶ 9.) To date, Brookstreet has paid nothing toward satisfying the judgment. (Decl. Aizley, Ex. N at 207.)

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<sup>1</sup> Simmons worked at NPC from December 1998-May 2000. (Taylor UF ¶ 4.)

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**Legal Standard**

Summary judgment is proper if the evidence before the Court “show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A factual issue is “genuine” when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the non-movant’s favor, and an issue is “material” when its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of demonstrating either that there are no genuine material issues or that the opposing party lacks sufficient evidence to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 325; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Once this burden has been met, the party resisting the motion “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The court does not make credibility determinations, nor does it weigh conflicting evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992).

**Analysis**

Illinois Union argues that Ms. Taylor’s claim against Brookstreet is not covered because it arises out of an “Interrelated Wrongful Act” that commenced prior to September 10, 2002. In essence, Illinois Union’s theory is that since Ms. Taylor’s arbitration claim was predicated on Simmons’ conduct as an NPC employee before 2000 and as a Brookstreet employee commencing in 2000, Simmons’ pre- and post-September 10, 2002 conduct constituted a single, non-covered Interrelated Wrongful Act. Ms. Taylor argues that she sought damages from Brookstreet based on Brookstreet’s and Mr. Simmons’ multiple breaches of contract, fiduciary duty, and gross negligence. (Decl. Aizley, Ex. P at 218-20.) To support this assertion, Ms. Taylor cites to her Amended Statement of Claim for Arbitration, in which she alleged that Mr. Simmons “failed to exercise reasonable care in the management of [her] account by failing to secure suitable investments, needlessly churning her account, buying and selling inappropriate products, making unauthorized trades and failing to manage Taylor’s account based on her age and station in life.” (Decl. A. Aizley, Ex. P at 219.) She also alleged that Mr. Simmons

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“failed to inform Taylor of her options, failed to disclose the nature of her investments, and specifically failed to disclose pertinent facts to her about his trading activity.” (Decl. A. Aizley, Ex. P at 219.) Ms. Taylor asserts that each of Mr. Simmons’ improper acts was a separate Wrongful Act that subjected him to liability, and each time Brookstreet failed to supervise him, it also committed a new and discrete Wrongful Act. (Opp. Mot. Summary Judgment at 7-8.)

The Policy’s definition of “Loss” contemplates that a “Claim” might allege several “Wrongful Acts,” even where the “Claim” is brought in a single arbitration proceeding. (Decl. Aizley, Ex. A at 10.) Accordingly, Ms. Taylor’s arbitration claim is not converted to an “Interrelated Wrongful Act” merely by virtue of the fact that she filed her claims in a single arbitration proceeding. Ms. Taylor alleged that from June 2000 to July 2006, Mr. Simmons continued to churn her account, make unauthorized trades, and buy and sell high risk stocks. (Decl. A. Aizley, Ex. P. at 217.) She alleged that this activity caused her account to suffer an 83.41% reversal. (Decl. A. Aizley, Ex. P. at 217.) Ms. Taylor has also presented evidence that between 2002 and 2006, her portfolio should have increased. (Taylor Ex. 2.) Instead, her holdings in 2006 were less than they were in 2002. (Taylor Ex. 1.) The Court does not discount the possibility that Mr. Simmons’ actions may have constituted an Interrelated Wrongful Act within the definition of the Policy, however, there are genuine issues of material fact as to whether the alleged Wrongful Acts occurring after September 10, 2002 were in fact “Interrelated” with Wrongful Acts occurring before that date. *See Ryan v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 2008 WL 901476, at \*5 (D. Conn. March 31, 2008). A reasonable jury could conclude that each time that Mr. Simmons made an unauthorized trade, churned Ms. Taylor’s account, or bought and sold high risk stocks, he committed separate and discrete Wrongful Acts that were not “Interrelated.”

**Conclusion**

For the foregoing reasons, Illinois Union’s motion for summary judgment as to the Taylor Estate is DENIED.

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