NOT FOR PUBLICATION

F I L E D

UNITED STATES COURT OF APPEALS

OCT 08, 1998

FOR THE NINTH CIRCUIT

CATHY A.CATTERSON, CLERK
U.S. COURT OF APPEALS

BOEHRINGER MANNHEIM CORPORATION, an Indiana Corporation, and DePUY INC., an Indiana Corporation,	No. 97-55433
	D.C. No. CV 95-05041-KMW
Plaintiffs-Appellants,	
v.	M E M O R A N D U M[1]
ALLIANZ UNDERWRITERS INSURANCE COMPANY, a California Corporation,	
Defendant-Appellee.	

Appeal from the United States District Court
for the Central District of California
Kim McLane Wardlaw, District Judge, Presiding

Submitted[2] September 17, 1998
Pasadena, California

1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2 The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges.

Plaintiffs-Appellants Boehringer Mannheim Corp. and DePuy, Inc. (collectively, "BMC") and Defendant-Appellee Allianz Underwriters Insurance Co. are insured and insurer, respectively. BMC manufactures orthopaedic devices, including the acetabular cup system ("ACS"), an appliance used in hip-replacement surgeries. The ACS proved systematically defective, generating many claims against BMC. When a disagreement arose concerning which of two BMC-Allianz policies was to pay the ACS claims, BMC raised contract and tort claims against Allianz in district court.

The district court granted Allianz' summary judgment motion on BMC's claims for breach of contract and for breach of the covenant of good faith and fair dealing. The district court held a bench trial on BMC's remaining equitable claims for mistake, estoppel, and waiver. After the trial, the court ruled in favor of Allianz. BMC timely appeals both of these judgments.

We have jurisdiction pursuant to § 28 U.S.C. §§ 1291 and 1292. The parties are familiar with the factual and procedural history of this case and we will not refer to it hereafter except as necessary to explain our decision. For the reasons set forth below, we affirm.

STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. See Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir. 1997). To determine whether a genuine issue of material fact existed that would preclude summary judgment, we review the evidence in the light most favorable to the nonmoving party, in this case BMC. See id. Our review is limited to the record as it stood before the district court at the time it made each of its respective rulings. See Lippi v. City Bank, 955 F.2d 599, 604 (9th Cir. 1991).

ANALYSIS

1. BMC's Contract Claim

a. Ambiguity of the Trigger

BMC argues that the district court misread the 1989 and 1990 BMC-Allianz policies when it concluded they contained unambiguous first-claim triggers of coverage for all claims. The plain language of those policies compels us to reject BMC's argument. Both of the policies are captioned "Claims Made Commercial Umbrella." Under the batch clause, all claims arising from a similar product defect are treated as a single "loss." Under the insuring agreements, all "losses" trigger coverage as of the date that the first written claim is submitted to the insured. Because BMC received the first written ACS claim in December 1989, the 1989 policy was triggered for all of the losses that BMC thereafter lumped in the ACS batch. None of the other language cited by BMC creates a genuine issue of material fact as to the policies' ambiguity. We hold that the district court correctly determined that the 1989 and 1990 BMC-Allianz policies were unambiguous.

b. Admissibility of Extrinsic Evidence

BMC states correctly that California law required the district court to receive extrinsic evidence when determining whether the policies were ambiguous and to admit that evidence if, in light of all the evidence, the policy language was reasonably susceptible to its interpretation. See PG&E Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 40 (1968) (en banc). BMC argues that the district court should have received evidence that Allianz knew that the batch clause proposed by BMC came from a policy that contained an occurrence-reported trigger; evidence that the 1986, 1993, and 1994 BMC-Allianz policies contained different trigger language; and evidence of insurance industry practice contained in several declarations. Because none of this evidence makes the policies reasonably susceptible of the interpretation BMC urges, we hold that BMC's extrinsic evidence was irrelevant and thus, inadmissible. Therefore, we hold that any error was harmless.

First, BMC complains that the court refused to acknowledge extrinsic evidence showing that Allianz knew BMC had lifted the batch clause from an XL policy. This evidence was irrelevant because knowing the source of the batch clause does not make the 1989 and 1990 policies reasonably susceptible of BMC's assertion that it desired occurrence-reported triggers for these policies. In fact, this evidence does not even support the inference that Allianz thought BMC desired an occurrence-reported trigger. Because the XL batch clause contained a broader, more detailed definition of "batch" arguably more beneficial to the insured than that set forth in the old BMC-Allianz batch clause, and because BMC never gave Allianz a copy of the XL trigger clause, the more rational interpretation of this evidence is that BMC sought the XL batch clause for its broader language.

Second, BMC contends that the district court should have received into evidence the 1986, 1993, and 1994 BMC-Allianz policies. Those policies differed from the 1989 and 1990 policies in that they combined the batch clause with the first-claim trigger language, which was repeated in the insuring agreements. By way of contrast, the XL batch clause that BMC negotiated for the 1989 and 1990 policies contained no trigger language, although the insuring agreements still specified a first-claim trigger. Nevertheless, the language of the insuring agreements in all of the policies supports the district court's conclusion that the parties intended to retain the first-claim trigger. Because the 1986, 1993 and 1994 BMC-Allianz policies do not make the 1989 and 1990 policies reasonably susceptible of the inference that the parties ever abandoned a first-claim trigger, this extrinsic evidence was irrelevant.

Finally, BMC argues that the district court erred when it refused to receive several declarations that describe insurance industry practice. But these declarations do not make any language in the policies reasonably susceptible of the interpretation that BMC urges. The declaration of former New York State Insurance Superintendent Richard Stewart does not even establish industry practice in the relevant time period. Stewart, who submitted the declaration in 1996, repeatedly described features of "today's policies" and conspicuously did not state whether those features were prevalent when the parties drafted these policies in 1988-89, when the occurrence-reported trigger was new. The district court's failure to consider these declarations therefore was harmless.

For these reasons, we hold that BMC's extrinsic evidence was inadmissible to aid the district court in its interpretation of the 1989 and 1990 policies. Thus, the district court's failure to receive BMC's extrinsic evidence was harmless.

2. BMC's Tort Claim

The district court stated that, because BMC's contract claim lacked merit, its tort claim for breach of the covenant of good faith and fair dealing also must fail. This ruling was correct. Under California law, an action for breach of the covenant of good faith and fair dealing is no more valid than the underlying contract claim. See Carma Developers (Calif.), Inc. v. Marathon Development Calif. Inc., 2 Cal. 4th 342, 373-74 (1989). Because we have concluded that the district court correctly found BMC's contract claim to be meritless, we must also affirm the district court's summary disposition of BMC's tort claim in favor of Allianz.

3. BMC' Equitable Claims

After a bench trial, the district court concluded that BMC had not shown mistake, estoppel, or waiver. BMC argues that the court's evaluation of the evidence at trial was tainted by its erroneous conclusion that the policies were unambiguous. Because we have held that the district court correctly found the policies to be unambiguous, we reject this argument.

CONCLUSION

For the foregoing reasons, the district court's judgment is AFFIRMED.