

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

W.G. HALL, LLC,  
Plaintiff,  
v.  
ZURICH AMERICAN INSURANCE  
COMPANY,  
Defendant.

Case No. 17-cv-00646 NC

**ORDER GRANTING IN PART AND  
DENYING IN PART ZURICH’S  
MOTION FOR SUMMARY  
JUDGMENT; ORDER GRANTING  
IN PART AND DENYING IN PART  
WGH’S MOTION FOR SUMMARY  
JUDGMENT**

Re: Dkt. Nos. 29, 32

Plaintiff W.G. Hall, LLC (WGH), a staffing services company, settled a wage and hour class action lawsuit. Before and after settling the class action, WGH sought coverage from its professional liability insurer, Zurich American Insurance Company for the amount it would pay out in the settlement agreement. Zurich refused to reimburse WGH for the settlement amount on several grounds, and WGH sued Zurich for breach of contract and derivative claims.

In its motion, WGH seeks summary judgment on its claims for breach of contract and declaratory relief, as well as a judgment from the Court that none of five affirmative defenses raised by Zurich are applicable in this case. Zurich opposes WGH’s motion and seeks summary judgment on its behalf as to the entire case.

For the reasons stated below, the Court GRANTS IN PART and DENIES IN PART Zurich’s motion for summary judgment. WGH’s motion for partial summary judgment is

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1 also GRANTED IN PART and DENIED IN PART. The effect of this order is that Zurich  
2 is not obligated to cover WGH’s settlement in the underlying litigation.

3 **I. BACKGROUND**

4 Though the interpretation of the insurance policy in this case is hotly debated, the  
5 factual background of this case is largely not. On November 27, 2013, Zurich issued to  
6 WGH an insurance coverage package effective from December 1, 2013, through May 19,  
7 2015. Dkt. No. 29-1 at 12. That package contained Professional Liability coverage. *Id.*

8 WGH is a staffing services company, which hires and trains staffing services  
9 workers and furnishes them to its clients. Even when its employees are working directly  
10 for WGH’s clients, WGH remains the employer of record for its employees and provides  
11 payroll services for its clients for the work its employees perform. Dkt. No. 29 at 6. In  
12 2014 and 2015, Danny Isquierdo and Freddy Robledo filed putative class actions against  
13 WGH, which were later consolidated in July 2015 (*Isquierdo* and *Robledo* litigation). *Id.*  
14 at 210.

15 These lawsuits alleged California Labor Code and Industrial Welfare Commission  
16 Wage Order violations for failure to pay wages, and other related claims arising from the  
17 failure to pay, such as failure to reimburse and a claim under the California Unfair  
18 Competition Act. *Id.* at 210-36. The alleged actions giving rise to these claims were that  
19 WGH failed to compensate its employees “for internal orientations, client orientations,  
20 reporting and consultations, post-assignment termination meetings, client interviews,  
21 related travel and other work off the clock . . . .” *Id.* at 216. In addition, the plaintiffs  
22 claimed WGH did not pay them for the time they spent traveling to deliver their timesheets  
23 to its office, nor were they reimbursed for their mileage. *Id.* at 217. WGH notified Zurich  
24 of the lawsuits against it, but Zurich refused to assume coverage over the claims. *Id.* at  
25 332-37, 342-46, 351-55. WGH and the class reached a settlement, and the court  
26 preliminarily approved the class action settlement. *Id.* at 277. Both parties agree that  
27 WGH reach a settlement without Zurich’s consent.

28 WGH filed this case on February 6, 2017, alleging claims for (1) breach of contract,

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1 (2) breach of contract/duty to defend, (3) breach of the implied covenant of good faith and  
2 fair dealing, and (4) declaratory relief. Dkt. No. 1. WGH moved for summary judgment  
3 on May 25, 2017. Dkt. No. 29. Zurich filed a cross motion for summary judgment on  
4 June 23, 2017. Dkt. No. 32. Both parties consented to the jurisdiction of a magistrate  
5 judge under 28 U.S.C. § 636(c). Dkt. Nos. 8, 15.

6 **II. LEGAL STANDARD**

7 Summary judgment may be granted only when, drawing all inferences and  
8 resolving all doubts in favor of the nonmoving party, there is no genuine dispute as to any  
9 material fact. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014);  
10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under  
11 governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty*  
12 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if “the  
13 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*  
14 Bald assertions that genuine issues of material fact exist are insufficient. *Galen v. Cnty. of*  
15 *L.A.*, 477 F.3d 652, 658 (9th Cir. 2007).

16 The moving party bears the burden of identifying those portions of the pleadings,  
17 discovery, and affidavits that demonstrate the absence of a genuine issue of material fact.  
18 *Celotex*, 477 U.S. at 323. Once the moving party meets its initial burden, the nonmoving  
19 party must go beyond the pleadings, and, by its own affidavits or discovery, set forth  
20 specific facts showing that a genuine issue of fact exists for trial. Fed. R. Civ. P. 56(c);  
21 *Barthelemy v. Air Lines Pilots Ass’n*, 897 F.2d 999, 1004 (9th Cir. 1990) (citing *Steckl v.*  
22 *Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). All justifiable inferences, however,  
23 must be drawn in the light most favorable to the nonmoving party. *Tolan*, 134 S. Ct. at  
24 1863 (citing *Liberty Lobby*, 477 U.S. at 255).

25 **III. DISCUSSION**

26 The issues raised in both motions are (1) was there a “wrongful act” within the  
27 meaning of the policy; (2) whether the insured v. insured exclusion applies; (3) whether  
28 Zurich waived its right to object to WGH’s settlement of the underlying litigation; (4)

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1 whether the contract exclusion applies; and (5) whether the settlement constitutes damages.  
2 In addition, Zurich argues that as to the legal issues, there is no dispute of material fact,  
3 necessitating a grant of summary judgment.

4 **A. Insurance Contract Interpretation Under California Law**

5 Insurance policies are contracts. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807,  
6 822 (1990). The “mutual intention” of the parties at the time of contract formation governs  
7 the contract’s interpretation. *Id.* at 821. The parties’ intentions are inferred from the “clear  
8 and explicit” meaning of these provisions. *Id.* at 822. The provisions are interpreted in  
9 their “ordinary and popular” sense unless the terms are used in a “technical sense or a  
10 special meaning is given to them by usage.” *Id.* A policy provision is considered  
11 ambiguous when it is capable of more than one interpretation. *Waller v. Truck Ins. Exch.,*  
12 *Inc.*, 11 Cal. 4th 1, 18 (1995). When ambiguity in policy language or term arises, courts  
13 must resolve that ambiguity in favor of the insured. *United Nat. Ins. Co. v. Spectrum*  
14 *Worldwide Inc.*, 555 F.3d 772, 777 (9th Cir. 2009). The language of a contract must be  
15 interpreted as a whole, which means ambiguities cannot be found in the abstract. *Waller*,  
16 11 Cal. 4th at 18. “Courts will not strain to create an ambiguity where none exists.” *Id.* at  
17 18-19.

18 “[T]he burden is on the insured to bring the claim within the basic scope of  
19 coverage, and (unlike exclusions) courts will not indulge in a forced construction of the  
20 policy’s insuring clause to bring a claim within the policy’s coverage.” *Collin v. Am.*  
21 *Empire Ins. Co.*, 21 Cal. App. 4th 787, 803 (1994); *see also Waller*, 11 Cal. 4th at 16. As  
22 for policy exclusions, they are strictly construed against the insurer, and exceptions to  
23 exclusions are broadly construed in favor of the insured. *E.M.M.I. Inc. v. Zurich Am. Ins.*  
24 *Co.*, 32 Cal. 4th 465, 471 (2004) (citing cases). The burden falls upon the insurer “to  
25 phrase exceptions and exclusions in clear and unmistakable language.” *MacKinnon v.*  
26 *Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003) (quotation marks omitted). An exclusion  
27 precludes coverage only if it is “conspicuous, plain and clear.” *Id.* (quoting *State Farm*  
28 *Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 201-02 (1973)).

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**B. The Disputed Policy Text**

The insurance policy at issue here provides the following: “We will pay those sums that the insured becomes legally obligated to pay as ‘damages’ because of any ‘claim’ arising from a ‘wrongful act’ to which this insurance applies. The ‘wrongful act’ must take place: a. During the policy period; and b. In the ‘coverage territory.’” Dkt. No. 29-1 at 88. The terms in the coverage provision are defined as follows:

- C. “Claim” means a:
  - 1. Written demand for money resulting from a “wrongful act”; or
  - 2. “Suit” resulting from a “wrongful act.”

F. “Damages” means the monetary portion of any judgment, award or settlement, provided such settlement is negotiated with our assistance and approval. “Damages” do not include:

- 2. Personal profit or advantage to which the insured is not legally entitled;
- 3. Criminal or civil fines, penalties (statutory or otherwise), fees or sanctions . . . .

I. “Employee” includes but is not limited to a ‘leased worker’ and a “staffing services worker”.

Q. “Staffing services” means services provided by a staffing company to their clients including but not limited to:

- 7. Services performed for a client company to supply that client with a “staffing services worker.”

R. “Staffing services worker” means a person who is furnished by you to your client to perform the duties to which you have agreed.

V. “Wrongful act” means any actual or alleged act, error, or omission, misstatement, or misleading statement in the course of providing “staffing services” to your clients by you or by any person for whose acts you are legally responsible.

*Id.* at 95-98. In relevant part, the policy provides the following exclusions:

This insurance shall not apply to any “claim”, based upon or arising out of, in whole or in part:

A. Any action made by or on behalf of another insured, in any capacity.

I. Any liability assumed by an insured under any contract or agreement, unless such liability would have attached to the insured by law in the absence of such contract or agreement.

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1 *Id.* at 90, 91.<sup>1</sup>

2 **C. Construction of “Wrongful Act”**

3 In both motions, the parties dispute whether the allegations in the underlying class  
4 action litigation fall under the policy’s coverage of “wrongful acts.” The meaning of  
5 “wrongful act” is key in this case because if there is no “wrongful act” within the meaning  
6 of the policy, Zurich is not required to provide coverage.

7 **1. No “Wrongful Act” As Defined in the Policy Was Committed.**

8 WGH argues that the plain meaning of “wrongful act” requires that the Court find  
9 that coverage is due. Under the policy, “wrongful act” means “any actual or alleged act,  
10 error, or omission, misstatement, or misleading statement in the course of providing  
11 ‘staffing services’ to your clients by you or by any person for whose acts you are legally  
12 responsible.” Dkt. No. 29-1 at 98. WGH asserts that the claims in the underlying  
13 litigation relating to unpaid wages constitute “wrongful acts.” Dkt. No. 29 at 13.

14 Zurich counters that neither the claims in the underlying litigation nor the settlement  
15 is covered “because the obligation to pay the claimants’ wages preexisted and is  
16 independent of any ‘wrongful act’ by WGH.” Dkt. No. 32 at 8. At first blush, it appears  
17 that WGH’s argument is the more meritorious. After all, failure to pay wages would be  
18 considered by any layperson an error or omission. Nonetheless, the law on this point  
19 favors Zurich.

20 “[A]n insured’s alleged or actual refusal to make a payment under a contract does  
21 not give rise to a loss caused by a wrongful act.” *August Entertainment, Inc. v.*  
22 *Philadelphia Indemnity Ins. Co.*, 146 Cal. App. 4th 565, 578 (2007); *accord Health Net,*  
23 *Inc. v. RLI Ins. Co.*, 206 Cal. App. 4th 232, 253 (2012). In *Health Net*, for example, the  
24 insurer Health Net was required to pay benefits under the insureds’ plans. The court found  
25 that because Health Net was “contractually obligated to pay its participants and  
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27 \_\_\_\_\_  
28 <sup>1</sup> The policy contains an “Additional Insured Endorsement With Insured Versus Insured  
Exception,” which is not relevant here because the endorsement merely makes two  
exceptions to the exclusions which are not at issue here. Dkt. No. 29-1 at 99.

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1 beneficiaries the full benefits to which they were entitled under their health plans,” Health  
2 Net’s costs in paying these benefits could not be passed on to its insurer “simply because  
3 [it] may have committed a wrongful act in its failure to pay them.” *Health Net*, 206 Cal.  
4 App. 4th at 253.

5 So too here. WGH was required to pay employees’ wages. WGH has never  
6 claimed that no employment contract existed between itself and the plaintiffs in the  
7 underlying litigation, and indeed concedes that at least oral contracts existed with the  
8 plaintiffs. Dkt. No. 29 at 19 (“There are no allegations that WGH assumed liability for  
9 these specific obligations *in its general oral employment contracts with class members.*”  
10 (emphasis added)). The claims under the Labor Code and Industrial Welfare Commission  
11 Orders would not exist but for an employment contract. The plaintiffs in the underlying  
12 litigation alleged that WGH failed to pay wages. This alleged failure is not insurable  
13 through the Zurich policy.<sup>2</sup> WGH has not met its burden to show it was entitled to  
14 coverage. *Collin*, 21 Cal. App. 4th at 803. Thus, the Court GRANTS Zurich’s motion for  
15 summary judgment on the first (breach of contract, second (breach of contract/duty to  
16 defend), and fourth (declaratory relief) claims for relief.

17 In addition, in its motion for summary judgment, Zurich argues that WGH’s third  
18 claim for bad faith/breach of the implied covenant of good faith and fair dealing claim fails  
19 because no coverage is due under the policy. Dkt. No. 32 at 18. The Court agrees. Zurich  
20 cannot, as a matter of law, be held liable for bad faith if it was not obligated to cover the  
21

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22 <sup>2</sup> The parties dispute whether the acts at issue in the underlying litigation relate to staffing  
23 services performed for WGH’s clients. The Court agrees with WGH that the acts relate to  
24 staffing services performed for clients. The definition of “wrongful act” states that the  
25 wrongful acts must be committed “in the course of providing ‘staffing services’ to your  
26 clients . . . .” Dkt. No. 29-1 at 98. “Staffing services” are, among other things, “[s]ervices  
27 performed on behalf of your client by a ‘staffing services worker’ . . . .” *Id.* at 97. A  
28 “staffing services worker” is a person furnished by WGH to the client to “perform the  
duties to which” WGH agreed. *Id.* When read together, the policy language is broad in  
coverage, and the phrase suggesting the acts in the underlying litigation should be covered  
is “in the course of.” Broadly construed, the plaintiffs’ unpaid training sessions and drives  
to deliver timesheets for time worked for WGH’s clients should be considered work they  
performed “in the course of” providing “staffing services” to WGH’s clients. This finding  
is secondary, however, because absent a “wrongful act,” there can be no coverage.

1 underlying litigation in the first place. *Waller*, 11 Cal. 4th at 36. The Court also  
2 GRANTS Zurich’s motion for summary judgment as to the third claim.

3 Though the Court GRANTS Zurich’s motion for summary judgment on all of the  
4 claims, the Court also address the parties’ other arguments in their cross motions.

5 **D. The Insured v. Insured Exclusion Does Not Preclude Coverage.**

6 The parties dispute whether the following exclusion bars coverage: “This insurance  
7 shall not apply to any ‘claim’, based upon or arising out of, in whole or in part: A. Any  
8 action made by or on behalf of another insured, in any capacity.” Dkt. No. 29-1 at 90.  
9 One of the definitions of an insured is “your ‘employees.’” *Id.* There are other types of  
10 individuals that are considered “insureds,” but this is the only one that matters here.  
11 Importantly, at no time does the policy state that “former employees” are insureds. It is  
12 Zurich’s failure to include “former employees” as insureds that WGH cites to in arguing  
13 that the exclusion does not apply here, as both Robledo and Isquierdo are former WGH  
14 employees. Dkt. No. 29 at 15.

15 WGH strengthens its argument that former employees are not covered by the  
16 exclusion by citing to the definition of “Wrongful Employment Act,” in which the policy  
17 explicitly distinguished between former and current employees: “W. ‘Wrongful  
18 employment act’ means: Your ‘employee’s’, former ‘employee’s’, or an employment  
19 applicant’s allegation of: a. ‘Discrimination’ by an insured . . . .” Dkt. No. 29-1 at 98. Per  
20 WGH, this requires that the Court find that former employees were not excluded from  
21 coverage, because to do otherwise would render the word “former” surplusage in the  
22 policy. Dkt. No. 29 at 15-16.

23 Among other things, Zurich argues that the exclusion does apply because the policy  
24 was written on an occurrence basis, meaning that “the policy only covers those wrongful  
25 acts that occur during the policy period, regardless of when the claim was made.” Dkt. No.  
26 32 at 14. WGH agrees that the policy is an occurrence-based policy, but asserts that this  
27 fact does nothing to change the definition of an insured because the definition of insured is  
28 unambiguous and Zurich cannot now escape what its own policy says. The Court

1 considers the policy language ambiguous because the policy *is* occurrence-based, but the  
 2 text of the policy suggests the exclusion only applies to claims made by “employees,” not  
 3 former “employees.” WGH’s argument as to the text of the policy makes sense, but so  
 4 does Zurich’s argument regarding the context of the policy. This ambiguity must by law  
 5 be resolved in the insured’s favor where the insurer did not make exclusions clear.  
 6 *MacKinnon*, 31 Cal. 4th at 648. This exclusion is inapplicable here.

7 **E. The Facts Presented Do Not Show That Zurich “Waived” Its Right to Object**  
 8 **to the Settlement.**

9 The parties dispute whether Zurich waived its right to object to the settlement. The  
 10 Court is persuaded that *if* Zurich refused to assume WGH’s defense in the underlying  
 11 litigation, Zurich “waived” its right to object to the settlement in the underlying litigation.  
 12 *Diamond Heights Homeowners Assn. v. Nat’l Am. Ins. Co.*, 227 Cal. App. 3d 563, 581  
 13 (1991); *Risely v. Interinsurance Exch. of Auto. Club*, 183 Cal. App. 4th 196, 210 (2010).  
 14 Though the Court recognizes that many California courts have not agreed with *Diamond*  
 15 *Heights*, the Court notes that many courts *have* agreed with it, and that the Ninth Circuit  
 16 earlier this year found no evidence that the California Supreme Court would not follow  
 17 *Diamond Heights*’ reasoning. *Teleflex Med. Inc. v. Nat’l Union Fire Ins. Co. of*  
 18 *Pittsburgh, PA*, 851 F.3d 976, 982-86 (9th Cir. 2017).<sup>3</sup>

19 However, the applicability of the *Diamond Heights* rule is questionable here. There  
 20 is a dispute between the parties regarding whether Zurich can be said to have “waived” its  
 21 right to object to the settlement because it provided a defense in the underlying litigation.  
 22 Dkt. No. 32 at 19. Similarly, Zurich argues that there is no evidence WGH ever even  
 23 sought its approval of the settlement. *Id.* WGH concedes that Zurich provided “limited  
 24 defense fees,” but that the defense was under a different coverage part. Dkt. No. 34 at 19.

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 26 <sup>3</sup> The Court notes that the *Diamond Heights* decision dealt with an excess insurer. Yet the  
 27 reasoning in *Diamond Heights*, as recognized by *Teleflex*, relies strongly on the fact that  
 28 the insurer had breached its duties under the policy by failing to fulfill its obligations to the  
 insured. 851 F.3d at 985 (“notwithstanding the court’s use of the word “waiver” in  
*Diamond Heights*, the rule is not so much about the waiver of an insurer’s contractual right  
 than it is about an insurer’s breach of a contractual obligation.”).

1 On the other hand, Zurich argues that no discovery has been completed regarding the  
 2 defense provided by Zurich in the underlying litigation. Dkt. No. 35-1 at 2 (Bertschi  
 3 Decl.). These factual disputes necessitate a finding that summary judgment is not  
 4 appropriate on the issue of whether Zurich waived its right to consent. Given that the  
 5 Court is finding that no coverage was due in the first place due to a lack of a “wrongful  
 6 act,” this finding is, in any event, secondary.

7 **F. The Contract Exclusion Bars Coverage.**

8 The policy states that Zurich need not cover “any ‘claim’, based upon or arising out  
 9 of, in whole or in part: I. Any liability assumed by an insured under any contract or  
 10 agreement, unless such liability would have attached to the insured by law in the absence  
 11 of such contract or agreement.” Dkt. No. 29-1 at 91. WGH argues that this exclusion does  
 12 not apply because the Labor Code and IWC Wage Order claims attached to WGH by law,  
 13 regardless of any contract. Dkt. No. 29 at 19. Zurich counters that none of the claims  
 14 against WGH would exist absent an employment contract, so the exclusion applies.

15 Zurich offers *Medill v. Westport Ins. Corp.* to support its argument. 143 Cal. App.  
 16 4th 819 (2006). In *Medill*, the relevant dispute revolved not around an exclusion, but  
 17 whether the claims fell within the policy’s coverage provision. *Id.* at 829. The court found  
 18 the claims did not because the underlying litigation in that case arose out of a breach of  
 19 contract (failure to perform contractual obligation to repay bonds), even if none of the  
 20 causes of action were for “breach of contract.” *Id.* The relevant policy language in *Medill*  
 21 defined the word “loss,” and stated that “loss” would not include “Damages ‘arising out  
 22 of’ breach of any contract . . . .” *Id.* In examining what was excluded from “loss,” the  
 23 court there found:

24 California courts have consistently given a broad interpretation  
 25 to the terms ‘arising out of’ or ‘arising from’ in various kinds of  
 26 insurance provisions. It is settled that this language does not  
 27 import any particular standard of causation or theory of liability  
 28 into an insurance policy. Rather, it broadly links a factual  
 situation with the event creating liability, and connotes only a  
 minimal causal connection or incidental relationship. *Such*  
*language requires the court to examine the conduct underlying*

1                   the . . . lawsuit, instead of the legal theories attached to the  
2                   conduct.

3                   *Id.* at 830 (quoting *Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal. App. 4th 321, 328  
4                   (1999) and *Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.*, 42  
5                   Cal. App. 4th 121, 127 n.4 (1996)) (emphasis added) (internal quotation marks and  
6                   brackets omitted). As a result, the *Medill* court concluded that the liability of the  
7                   defendants in the underlying litigation “would not exist without the contracts,” and that  
8                   ‘[a]ll of the allegations against the [defendants] arise out of duties and obligations [the  
9                   defendants] assumed under the bond contracts.’ *Id.*

10                   WGH relies on an order on a summary judgment motion out of this courthouse,  
11                   *Ironshore Specialty Ins. Co. v. 23andMe, Inc.*, to support its argument. No. 14-cv-03286  
12                   BLF, 2016 WL 3951660 (N.D. Cal. July 22, 2016). However, the reasoning in *Ironshore*  
13                   does not apply here because the policy language in this case is materially different than  
14                   that in *Ironshore*. In *Ironshore*, the policy language provided that the exclusion applied to  
15                   “Your assumption of liability or obligations in a contract or agreement. This exclusion  
16                   does not apply to liability or obligations: a. that you would have in the absence of the  
17                   contract or agreement[.]” 2016 WL 3951660, at \*3.

18                   The exclusion here applies to “Any liability assumed by an insured under *any*  
19                   contract or agreement, unless such liability would have attached to the insured by law in  
20                   the absence of such contract or agreement.” Dkt. No. 29-1 at 91 (emphasis added). In  
21                   *Ironshore*, Judge Beth Freeman clearly distinguished between the language in *Medill* and  
22                   the language in front of the court there, which did not include the word “any” anywhere in  
23                   the exclusion language. *Ironshore*, 2016 WL 3951660, at \*4. The court in *Ironshore* then  
24                   went on to analyze the rest of the exclusion language in that clause, and ultimately denied  
25                   the insurer’s motion for summary judgment on the basis of the contract exclusion clause.  
26                   *Id.* at \*4-\*7. This further analysis is not warranted here.

27                   Here, the Court finds Zurich has the more persuasive argument, and that *Medill* is  
28                   on point. In the policy, the phrase “arising out of” connotes a broad definition for the type  
of contract that will be excluded from coverage, as does the extension of the contract

1 exclusion to “[a]ny liability assumed by an insured under any contract . . . .” Dkt. No. 29-1  
 2 at 91. This case is different than *Medill* in that *Medill* dealt with the scope of the coverage  
 3 provision, and this case deals with the scope of an exclusion to coverage. The upshot of  
 4 this difference is that the burden is on *Zurich* and not WGH to show its interpretation of  
 5 the exclusion is correct. *MacKinnon*, 31 Cal. 4th at 648. The Court finds *Zurich*’s  
 6 argument more persuasive, even with the burden resting on *Zurich*. *E.M.M.I.*, 32 Cal. 4th  
 7 at 471. Absent an employment contract between the class plaintiffs and WGH, this case  
 8 would not exist.

9 Lastly, the parties also dispute whether the exception to the exclusion applies here.  
 10 The exception excepts from the exclusion such liability that “would have attached to the  
 11 insured by law in the absence of such contract or agreement.” *Id.* As summarized above,  
 12 WGH argues the exception applies because adherence to the Labor Code and IWC Wage  
 13 Orders are required by law, regardless of any contract. While that contention is true, it is  
 14 also true that the alleged Labor Code and IWC Wage Order violations would not exist  
 15 absent an employment contract. These claims arise directly from the employment  
 16 relationship. WGH’s argument is unavailing. Thus, the Court finds the contract exclusion  
 17 applies, and GRANTS *Zurich*’s motion for summary judgment on this issue as well.

18 **G. The Settlement Does Not Constitute “Damages.”**

19 The parties dispute whether the settlement constitutes “damages” under the policy.  
 20 The policy provides that *Zurich* “will pay those sums that the insured becomes legally  
 21 obligated to pay as ‘damages’ because of any ‘claim’ arising from a ‘wrongful act’ to  
 22 which this insurance applies.” Dkt. No. 29-1 at 88. “Damages” are “the monetary portion  
 23 of any judgment, award or settlement, provided such settlement is negotiated with our  
 24 assistance and approval. “Damages” do not include: . . . 2. Personal profit or advantage to  
 25 which the insured is not legally entitled; [and] 3. Criminal or civil fines, penalties  
 26 (statutory or otherwise), fees or sanctions . . . .” *Id.* at 96.

27 WGH asserts the settlement entered into with the *Robledo* and *Isquierdo* class  
 28 constitutes coverable “damages.” Dkt. No. 29 at 19. WGH also argues that even if the

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1 settlement does not constitute damages, but rather wages and penalties, this would create a  
2 conflict in the policy language, which must be resolved in WGH’s favor. *Id.* at 20. Zurich  
3 disagrees, arguing that the settlement constitutes wages, interest, and civil penalties, which  
4 are excluded as damages in its definition. Dkt. No. 32 at 12.

5 WGH admitted no liability in the underlying litigation. However, the plain  
6 language of the settlement agreement demonstrates that the manner in which the settlement  
7 proceeds were allocated precludes the settlement being considered “damages” under the  
8 policy. The settlement agreement provides: “the Parties have determined that all  
9 settlement payments to an Eligible Class Member will be designated as payment for and  
10 allocated as follows: (1) 40% wages; (2) 20% interest; and (3) 40% civil penalties for each  
11 settlement payment installment.” Dkt. No. 29-1 at 268 (settlement agreement in the  
12 underlying litigation). Contrary to WGH’s argument, the Court finds no evidence from the  
13 plain text of the settlement agreement that the allocation of the settlement into these  
14 different buckets was for tax reasons alone. Thus, the 80% of the settlement constituting  
15 wages and civil penalties fall squarely into what is excluded from the definition of  
16 “damages” in the policy. As for the interest owed, the Court also finds it is excluded from  
17 “damages.” It would make very little sense for the Court to consider wages and civil  
18 penalties as excluded from the definition of “damages” only to find that the interest  
19 incurred as a result of the unpaid wages *was* considered damages.

20 Second, the parties dispute whether the policy language is ambiguous. The Court  
21 does not find the policy language ambiguous, and finds that WGH’s interpretation of how  
22 such a purported ambiguity should be reconciled is strained. Dkt. No. 34 at 16; *Waller*, 11  
23 Cal. 4th at 18-19 (“Courts will not strain to create an ambiguity where none exists.”). As  
24 relevant here, the policy provides that settlements are covered as damages unless the  
25 purported damages are for personal profit or advantage which the insured is not legally  
26 entitled to or criminal or civil fines, penalties, fees, or sanctions. The Court finds this is  
27 the only reasonable interpretation of the disputed language.

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United States District Court  
Northern District of California

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**H. The Court Need Not Reach the Other Arguments In Zurich’s Motion.**

Zurich’s last argument is that there remain numerous factual questions to be resolved by trial, and so summary judgment against it would be inappropriate if the Court was inclined to deny its motion as to the coverage issues. Dkt. No. 32 at 18-20. Given that the Court has found summary judgment in Zurich’s favor merited on the coverage issue, the Court declines from reaching the factual issues.

**IV. CONCLUSION**

For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART Zurich’s motion for summary judgment. The Court grants summary judgment to Zurich as to each claim in WGH’s complaint. WGH’s motion for partial summary judgment is DENIED except as to the insured v. insured exclusion. The insured v. insured exclusion to coverage is inapplicable in this case. Yet because this issue has no bearing on the question of coverage, this finding has no effect on the overall outcome of this case. Zurich is not obligated to cover WGH’s settlement in the underlying litigation because the claims against WGH and the settlement do not fall within the basic coverage provision of the policy. The clerk of the court will enter judgment accordingly.

**IT IS SO ORDERED.**

Dated: August 31, 2017

  
NATHANAEL M. COUSINS  
United States Magistrate Judge