IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: ARROW DYNAMICS INC., Debtor.	Number 01-37975 JAB Chapter 7
GREAT AMERICAN FIDELITY INSURANCE COMPANY, f/k/a AMERICAN DYNASTY SURPLUS LINES INSURANCE, Plaintiff, v. ARROW DYNAMICS, INC., KATHY WALKER, PAUL WALKER, AND UNIVERSAL CITY PROPERTY MANAGEMENT COMPANY II, AND RANK ORLANDO II, INC. AS GENERAL PARTNERS OF UNIVERSAL CITY FLORIDA HOLDING COMPANY II, GENERAL PARTNERS OF UNIVERSAL CITY DEVELOPMENT PARTNERS, LP., d/b/a UNIVERSAL STUDIOS FLORIDA (the successor in interest to Universal City Property Management Company, a foreign corporation; and Rank Orlando, Inc., a foreign corporation, d/b/a Universal City Florida Partners, a Florida General partnerships, a/k/a Universal Studios Florida), Defendants.	Adversary Proceeding Number 02AP-2441

MEMORANDUM DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Before the Court are the parties' cross motions for summary judgment. The plaintiff, Great American Fidelity Insurance Company ("Great American" or "Plaintiff") filed this declaratory judgment action to resolve insurance coverage questions in connection with the bankruptcy of defendant Arrow Dynamics, Inc. ("Arrow" or "Debtor"). Great American is an insurance provider under a policy that provides coverage to Arrow, and seeks a declaratory judgment stating that no coverage is available to the defendants under the policy for claims brought against Arrow in certain state court litigation. Conversely, certain of the defendants seek declaratory judgment that the policy provides coverage for all claims they have asserted. The parties have submitted memoranda, exhibits and presented oral arguments. The Court has considered the uncontroverted facts and the arguments presented by counsel, and has conducted an independent review of applicable law. Based thereon, the Court rules as follows.

I. FACTS

Great American insured Arrow under a Commercial Products/Completed Operations Liability Policy (the "Policy"). The Policy has a $1 million dollar limit, and covers the period from April 22, 1997 to April 22, 1998. At the time the Policy was purchased, Arrow was concerned about cash flow and sought to lower premiums by purchasing insurance in excess to a large layer of self-insurance. Attached to the Policy is an endorsement entitled "Self-Insured Retention" (SIR). The SIR purports to limit the Policy to amounts in excess of $500,000 per occurrence, and $1,500,000 in the aggregate. Although the uncontroverted facts indicate the

contracting parties (Arrow and Great American) intended the SIR to apply to the Policy, the SIR itself states that it modifies the "Commercial General Liability Coverage Form" and not the "Products/Completed Operations Liability Coverage Form" to which it is attached. Uncontroverted evidence indicates Arrow intended to be self-insured up to $500,000, including defense costs, for each claim.

The SIR requires Arrow to contract with the law firm of Parsons Behle & Latimer (PB&L) as a claims service company to administer claims handling within the SIR until the conclusion of reported incidents and claims. It is uncontroverted that the course of dealing between Great American and Arrow was that Arrow would contact PB&L with regard to any claims in accordance with the SIR. Therefore, the parties treated the Policy as if the SIR applied to the Policy and Arrow actually handled all claims under the Policy in accord with the SIR.

Defendants Paul and Kathy Walker (the "Walkers") allege an accident occurred on August 14,1997 on a roller coaster manufactured by Arrow and operated by Universal Studios (Universal) in Florida, in which Kathy Walker was injured. Based on this accident, the Walkers filed suit against Universal in Florida state court on January 26, 2000 (the "Florida Action"). The original contracts between Arrow and Universal for design, construction and installation of the roller coaster required Arrow to defend and indemnify Universal and to obtain coverage naming Universal as an additional insured. Therefore, on May 23, 2001, Universal requested that Arrow provide defense and indemnity from any and all claims incurred in the Florida Action. Thereafter, PB&L participated in discovery related to the Florida Action. On August 7, 2001, the Walkers filed an Amended Complaint adding Arrow as a defendant. On August 20, 2001, Universal filed cross-claims against Arrow for breach of contract, common law indemnity, and

contractual indemnity. The parties in this adversary proceeding are the only named parties to the Florida Action. There have been allegations that other unnamed parties may be apportioned liability for alleged design defects on the roller coaster lap bar which is alleged to be the underlying cause of the Walkers' complaint, but no evidence has been presented regarding who these parties might be and what, if any, role they might play in the Florida Action. PB&L answered the Walkers' Complaint on Arrow's behalf on November 26, 2001.

Arrow filed its petition for relief under Chapter 11[1] in this Court on December 3, 2001, which stayed the Florida Action. Arrow was represented in the bankruptcy case by PB&L. On May 7, 2002, the Walkers and Universal (together, the "Claimants") filed a motion for relief from the automatic stay to pursue their state-law claims against Arrow. After resolving certain objections by the Unsecured Creditors Committee and Arrow, a hearing on the stay lift motion was stricken and a stipulated order was submitted approved by PB&L and the Unsecured Creditors Committee. The order, entered June 14, 2002 (June Order), granted relief from the automatic stay. In the June Order, the Claimants irrevocably waived, "except as required by law to preserve rights, if any, to recover from insurance policies, if any"[2] claims against Arrow and its estate and withdrew with prejudice any proof of claim they had filed in the case. The June Order also acknowledged that neither Arrow's bankruptcy estate nor Arrow would be required to pay or satisfy any deductible or self-insured retention, and the Claimants agreed that their commitment not to make a claim against the estate was effective whether or not any insurance polices provided coverage, whether or not any insurance payments were made, and whether or not any

---

1 The case was converted to one under Chapter 7 on August 7, 2003.

2 June Order at 2.

deductible or self-insured retention was paid or satisfied. Further, the June Order provided that failure to so pay would not be the basis for avoidance of the Claimant's waiver. Great American did not participate in the stay lift motion and was not served directly with pleadings related thereto, although PB&L, who acted as the claims service company to administer claims handling within the SIR, participated because they were also Arrow's counsel in the bankruptcy.

Following entry of the June Order, Universal obtained a default judgment in the Florida Action against Arrow on September 10, 2002. The default judgment was later vacated by order dated March 24, 2003. Great American then filed the within action for declaratory judgment on November 18, 2002. The record is unclear as to what actions have transpired in the Florida Action since the default judgment was vacated and what expenses Great American may have incurred, if any.

II. ANALYSIS

The parties' briefs have raised several issues related to the Policy and its coverage of claims raised in the Florida Action. The Court must determine the following issues: first, whether the June Order contains language that waives the Claimant's claims not only against the Debtor but also against the Policy, in which case no coverage should be allowed; second, whether or not the SIR attached to the Policy creates an ambiguity effecting coverage, specifically, whether or not the SIR is a part of the Policy; third, if the SIR is applicable, whether Arrow materially breached the terms of the Policy, voiding coverage; and finally, whether there exists contractual indemnity coverage in the Policy covering Universal's cross-claim in the Florida Action. As a preliminary matter, however, the Court must first determine the extent of

this Court's jurisdiction to resolve these matters, which is an issue not discussed in the any of the briefs submitted by the parties.

A. Jurisdiction

While jurisdiction under 28 U.S.C. § 1334(e) has been admitted by all parties in the pleadings,[3] the parties failed to plead whether or not this is a core proceeding under 28 U.S.C. § 157(b)(2) as required by Fed. R. Bankr P. 7008(a). Determining whether a proceeding is core or non-core is an issue that must be resolved by the court prior to rendering judgment.

> [A]t some point in the proceeding the bankruptcy judge is required to initially decide whether the proceeding is core or non-core in character. That decision will initially determine whether the bankruptcy judge enters the final order or judgment or whether the judge (absent the parties' consent) may only submit proposed findings and conclusions, and recommendations for *de novo* consideration by the district court.[4]

The bankruptcy judge must determine "on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or a proceeding that is otherwise related to a case under title 11."[5] No motion to determine whether this is a core proceeding has been presented to the Court. Upon inquiry of the parties at oral argument, Great American asserted that, because the Policy was an asset of the estate, the matter was a core proceeding. The Claimants, on the other hand, assert that the matter is at best related to this bankruptcy case. However, all parties stipulated in open court that, to the extent the Court

---

3 *See* Compl. ¶¶ 5-8, Arrow Answer ¶ 4, Walker/Universal Studios Answer ¶ 3.

4 *Rushton v. Traub* (*In re Nell*), 71 B.R. 305, 310 (D. Utah 1987).

5 28 U.S.C. § 157(b)(3).

determines this matter is related to this bankruptcy case, this Court may enter a final order pursuant to 28 U.S.C. § 157(c)(2).

The discrete issue of this Court's interpretation of the June Order[6] may be a matter arising in a case under Title 11, although certainly other courts have concurrent jurisdiction to interpret this Court's order.[7] However, once that matter is decided, the Court concludes that the determination of the applicability of the insurance coverage to Claimants is not core, in that it is not a proceeding that is created by the Bankruptcy Code, nor is it a proceeding "arising in" a bankruptcy case. In analyzing the issue of whether a similar proceeding was core, one court has explained:

> It relates to this bankruptcy case only as a proceeding ancillary to the liquidation of prepetition claims of the debtor. It will affect the amount of funds available for distribution in the case but will not otherwise affect the case or the Debtors' relations with their creditors. It does not arise under the Bankruptcy Code but under prepetition insurance policies and the state law that governs their interpretation. Actions of this type need not and usually do not arise in bankruptcy; rather, they usually arise in conjunction with state court tort and business litigation.[8]

Although the issue of insurance coverage may not be a core matter, the parties also argue that the Court should determine that this proceeding is related to this case. This proceeding is

---

[6] *In re Terracor*, 86 B.R. 671, 677 (D. Utah 1988) (stating the bankruptcy "court always retains jurisdiction to review and interpret its own orders").

[7] *See In re Technology Outsource Solutions, LLC v. ENI Tech., Inc.*, 2003 WL 252141, *2, *5 (W.D.N.Y. Jan. 23, 2003) (holding that while a cause of action regarding a bankruptcy court's order approving sale of assets "could have a 'conceivable effect' on the bankruptcy proceeding" and although "[b]ankruptcy courts have inherent or ancillary jurisdiction to interpret and enforce their own orders," mandatory and discretionary abstention both indicated that state law issues predominated the action and the case was remanded to state court for adjudication).

[8] *Gray v. Executive Risk Indemnity, Inc. (In re Molten Metal Technology, Inc.)*, 271 B.R. 711, 714 (D. Mass. 2002).

related to this case if it could have been commenced in federal or state court independently of this case, but the outcome could conceivably have an effect on this estate.[9] Certainly the first test is met. The second test of whether the outcome could have an effect on this estate is more problematic. Great American, in essence, argues that should the Court determine that the Claimants are not covered by the Policy, the Policy limits may be available to satisfy other possible claimants, thus satisfying their claims without charge against the liquidated assets of the estate. After careful consideration, the Court concludes that the determination of the extent of the insurance coverage contained in the Policy is related to this case because it may increase or decrease the payment to creditors from assets of this estate. Since the parties consent, this Court may enter a final order in this related proceeding.

B. June Order

Great American argues that the language of the June Order operates as a waiver of claims against the Policy. It claims that its coverage obligations exist only if Arrow is legally responsible for damages to others. Great American further argues that Arrow cannot be legally responsible for damages to the Walkers and Universal Studios because they voluntarily released Arrow of liability in the June Order lifting the automatic stay.

The language of the Policy states that Great American promises to pay sums Arrow becomes "legally obligated" to pay for damages to which the insurance applies. The plain reading of the policy indicates Arrow must first become legally obligated to pay damages before the Policy provides coverage. Great American claims it is "a fundamental precept of insurance

---

[9] *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997) (articulating test for "related to" jurisdiction in bankruptcy).

coverage" that an insured must first be liable before the insurer can be liable under a policy.[10] Assuming, without so ruling, that that "fundamental precept" is accurate,[11] Great American contends that the June Order granting relief from the automatic stay to the Walkers and Universal contains contradictory language which both grants an irrevocable waiver of claims against Arrow and carves out an exception to the waiver to "preserve rights . . . to recover from insurance policies."[12] Therefore, argues Great American, it is not legally obligated to pay because any claims against it have been waived.

Neither party has given the Court any guidance in interpreting waivers of this kind but instead resort to arguing over the intent of the parties at the time the waiver was executed. The Court concludes that it is unnecessary to determine the parties intent in drafting the June Order because it is clear from the language of the June Order that the Claimants only waived claims, except as required by law to preserve rights, if any, to recover from insurance policies, if any. To ignore the reservation language in the June Order would be inappropriate, and render the purpose of the June Order contradictory. What would be the purpose in lifting the stay to continue with the Florida Action if the Claimants had waived any basis for the claims? Rather, the June Order indicates that the Claimants simply determined not to seek recovery from the estate, a small concession in an estate with many claims and few assets, but instead sought to pursue the

---

[10] Pl.'s Mem. Supp. Summ. J. at 9.

[11] The only case cited in support of this "fundamental precept" is a 1975 Utah Supreme Court case determining an insurance company had no obligation to pay damages where the insured was never served and no judgment for damages had been rendered. This case has never been cited in Utah to support the Plaintiff's proposition and an independent review of Utah insurance law has resulted in a surprising lack of caselaw supporting this "fundamental precept."

[12] June Order at 2.

proceeds of the Policy. The Court will not interpret the June Order to simultaneously obtain relief from the stay to proceed with litigation and at the same time waive all prospects of recovery from the Policy. Therefore, the Court determines that the June Order does not prohibit the Claimants from recovering insurance proceeds from the Policy.

C. The Ambiguous Insurance Policy

The parties have submitted several briefs asking this Court to determine that the Policy is ambiguous because the SIR states that it modifies the "Commercial General Liability Coverage Form" and not the "Products/Completed Operations Liability Coverage Form" to which it is attached, and to apply contradictory standards for analyzing ambiguous insurance contracts. In addition, the parties have alternatively argued that a mistake, either unilateral or mutual, has occurred that affects the determination of insurance coverage.

The definition of ambiguity utilized by the courts of the State of Utah has varied somewhat. In interpreting an insurance contract, the Utah Supreme Court has taken a wholeistic approach by asking "would the meaning [of the language of the insurance contract] be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in the light of existing circumstances, including the purpose of the policy."[13] The Utah Supreme Court has further stated that:

> A contract may be ambiguous because it is unclear or omits terms, or. . . if the terms used to express the intention of the parties may be understood to have two or more plausible meanings. However, policy terms are not necessarily

---

[13] *LDS Hospital v. Capitol Life Ins. Co.*, 765 P.2d 857, 858-59 (Utah 1988), quoting *Auto Lease Co. v. Central Mutual Ins. Co.*, 325 P.2d 264, 266 (Utah 1958).

> ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests.[14]

The Utah Supreme Court has also explained that "[a]n ambiguity exists in a contract term or provision 'if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.'"[15]

The undisputed facts have shown that the SIR attached as an endorsement to the Policy claims to modify the "Commercial General Liability Coverage Form." However, the Policy is one for Products/Completed Operations Liability rather than Commercial General Liability. Other endorsements to the Policy not at issue here likewise incorrectly reference a Commercial General Liability Coverage form. Therefore, the inconsistency is not one of omitted language, or one that ascribes two plausible meanings to the same words. Rather, it is that reference in the SIR is made to a different document to that which it is attached. Although there is an argument that can be made that the Policy simply did not embody the intentions of both parties to the contract,[16] the Court determines that the facial deficiencies of the inconsistent reference in the SIR to Commercial General Liability Coverage Form and not Products/Complete Operations Liability Coverage Form simply renders the Policy unclear as to whether the SIR applies to the Policy, and therefore ambiguous.

---

[14] *Alf v. State Farm Fire and Casualty Co.*, 850 P.2d 1272, 1274-75 (Utah 1993) (internal citations omitted).

[15] *WebBank v. American General Annuity Serv. Corp.*, 54 P.3d 1139, 1145 (Utah 2002) (internal quotations omitted). *See also United States Fid. & Guar. Co. v. Sandt*, 854 P.2d 519, 523 (Utah 1993) (an ambiguity in a contract may arise (1) because of vague or ambiguous language in a particular provision or (2) because two or more contract provisions, when read together, give rise to different or inconsistent meanings, even though each provision is clear when read alone).

[16] *Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985) (defining a mutual mistake as one where "the instrument does not embody the intentions of both parties to the contract").

Ordinarily, under Utah law, if an insurance policy is ambiguous it is strictly construed against the insurance company and liberally in favor of the insured so as to promote and not defeat the purposes of insurance.[17] Further, if an insurance contract has inconsistent provisions that can be construed either to provide or preclude coverage, the contract should be construed in favor of coverage.[18] As explained by the Utah Supreme Court, this is because insurance policies are adhesion contracts drafted by the insurance companies for the benefit of the insurance company, and offered on a take-it-or-leave-it basis.[19] This general rule applies when exclusions to the insurance contract operate to limit insurance coverage.

Great American argues, however, that because this was a commercial rather than a consumer policy, and that because the uncontroverted evidence indicates the SIR was a bargained for provision, the general rule should not apply. The distinction drawn between commercial and consumer policies is not particularly convincing. The general premise that commercial entities have sufficient bargaining power so that an insurance contract is not drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to the weaker party, is not supported by any evidence in the record. More compelling is the argument that those provisions in an insurance contract that are bargained for – such as the SIR in this instance, or the amount of a deductible as would be more common in a consumer case – should be interpreted according to the intent of the parties, and not according to the general rule to interpret the insurance contract

---

[17] *See Sandt*, 854 P.2d at 522. *See also Home Savings and Loan v. Aetna Casualty and Surety Company*, 817 P.2d 341, 347-78 (Utah Ct. App. 1991).

[18] *See Sandt*, 854 P.2d at 523.

[19] *Id.*

against the insurance company. Support for this position is found in both *Sandt* and *Home Savings*. *Sandt* states that "the terms of a typical insurance policy are not negotiated by the insurer and the insured."[20] *Home Savings and Loan* states that "where an insurance contract is concerned, ambiguous provisions are usually construed against the insurer without resort to extrinsic evidence, because insurance contracts are ordinarily standard forms, whose language is not negotiated by the parties."[21] *Home Savings and Loan* further states that "while specific evidence regarding Home's and Aetna's intentions here might persuade us to do otherwise, the absence of such evidence leaves us with the basic rule of construing the bond, where unclear, in Home's favor."[22] Taking these cases into consideration, this Court concludes that when negotiated terms are in dispute and there is uncontroverted evidence of the parties intent, reference to the intent of the parties is appropriate.[23] This reference does not run afoul of Utah Code Ann. § 31A-22-202 because inquiry into the intent of Arrow and Great American at the time the Policy was initiated does not retroactively abrogate the terms of the Policy to the detriment of a third-party claimant, it simply clarifies the parties' intent at the time of issuance.

The uncontroverted facts indicate that Arrow bargained for the lower rates that flowed from the layer of self-insurance referenced in the SIR. Therefore, while acknowledging the

---

20 *Id.*

21 *Home Savings and Loan*, 817 P.2d at 347.

22 *Id.* at 348 n.5.

23 *American Insurance Co. v. Freeport Cold Storage, Inc.*, 703 F.Supp. 1475, 1481 n.5 (D. Utah 1987) (a court is required to look to the agreement as a whole and invariably also to the intention and understanding of the parties when interpreting an ambiguous contract). *See also LDS Hospital*, 765 P.2d at 858 ("[A] cardinal rule in construing the contract is to give effect to the intentions of the parties and, if possible, these intentions should be gleaned from an examination of the text of the contract itself.").

general rule that an ambiguous consumer insurance contract should be strictly interpreted against the insurer and in favor of coverage, this Court determines that in this case, reference should be made to the intent of the parties in agreeing to the contractual terms of the Policy. Because it is uncontroverted that Arrow and Great American both intended the SIR to apply to the Policy, and for Arrow to be self-insured to the amounts set forth in the SIR, the Court determines that the SIR is applicable to modify the general terms of the Policy.

D. Arrow's Alleged Breach of the Policy

Great American argues that Arrow breached a material Policy term by its failure to satisfy the SIR and therefore the Policy coverage is void. Those provisions of the Policy allegedly breached are first, Arrow's obligation to satisfy the first $500,000 of any judgment or settlement and to defend itself up to that amount, and to actually pay the amounts covered by the SIR before Great American's indemnity obligation is triggered, and second, the duty to provide notice of the Claimants' efforts to obtain relief from the automatic stay.

Great American's argument regarding the failure to defend and pay presumes that Arrow or this estate will do nothing in the Florida Action in the future as a result of its bankruptcy filing and conversion to chapter 7. However, Arrow did file an answer to Walkers' complaint prepetition and PB&L, in some capacity, participated in discovery. There is no evidence before the Court as to what has taken place in the Florida Action, other than that Universal's default judgment has been set aside. There is no evidence before the court as to what action Arrow was required to take in the Florida Action that it has not taken in order to defend the litigation. Since there is no such evidence, it is premature for this Court to determine that a breach has occurred that would render the Policy ineffective.

Great American also complains that it was not included in the notice of the Claimant's lift of stay motion, and that such failure of notice breaches the Policy terms. Notice of the stay lift motion and hearing was served on PB&L, who served as Arrow's court appointed counsel, as well as the claims administrator under the Policy. Assuming, arguendo, that service on PB&L did not serve as notice to Great American, it is difficult to see how they have been prejudiced by such failure.[24] Had Great American received timely notice of the motion to lift stay, it would have made the same argument at that time that it makes in the current motion for summary judgment. One way or the other, any issues Great American has are being addressed. Although Great American asserts it has incurred costs or has suffered some type of litigation exposure as a result of the delay, those alleged damages have not been articulated with any specificity nor have they been itemized in any manner. Under these circumstances, the Court will not find that any deficiency on Arrow's part in notifying Great American of the motion to lift the stay constitutes a breach of the Policy that voids coverage.

E. Coverage for Universal Studios' Claim

In the Florida Action, the Walkers first sued Universal, then amended the complaint to include Arrow. Universal filed cross-claims against Arrow for breach of contract, common law indemnity, and contractual indemnity. Great American asserts that there is no applicable contractual indemnity coverage in the Policy that covers Universal's claim. This is so, it argues, because various agreements between Arrow and Universal providing indemnification are not "insured agreements" within the exclusions in the Policy. These agreements, Great American

---

[24] Utah Code Ann. § 31A-21-312(2) states failure to give notice or file proof of loss as required by Subsection (1)(b) does not bar recovery under the policy if the insurer fails to show it was prejudiced by the failure.

argues, provide that Arrow is not required to indemnify Universal for Universal's negligence, but only to the extent Universal has to pay for Arrow's negligence.

The Policy, at Section I provides that Great American will pay sums Arrow becomes legally obligated to pay as damages because of bodily injury. Certain exclusions, however, apply. Section I, (2)(b) of the Policy indicates that the coverage does **not** apply to:

> b. Contractual Liability
>
> "Bodily Injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does ***not*** apply to liability for damages:
>
> (1) assumed in a contract or agreement that is an "***insured contract***" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
>
> (2) that the insured would have in the absence of the contract or agreement.[25]

The term "insured contract" is defined in the Policy at Section V - Definitions (7)(f) as:

> [T]hat part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) ***under which you assume the tort liability of another party*** to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.[26]

Great American argues that in the various agreements between Arrow and Universal, Arrow did not assume Universal's tort liability as is required under the contract definition of an insured contract, but rather only agreed to be responsible for Arrow's own negligence. Thus, to

---

[25] Def.'s Mem. Supp. Summ. J. Ex. C (emphasis added).

[26] *Id.*(emphasis added).

the extent that this Court is being asked to determine whether or not there is coverage under the Policy for Universal's liability, the plain language of the Policy expressly defines an insured contract to include only those contracts which include an assumption of "tort liability of another party."[27]

In addition, Universal argues that there are agreements which fall within the exception to the exception to the Policy, including a Design Agreement dated March 16, 1988 (Design Agreement) and an agreement dated December 8, 1988 (1988 Agreement), both between Arrow and Universal. Article 12, Indemnification, of the Design Agreement states:

> Arrow hereby agrees to indemnify, defend and hold Owner [Universal] . . . free and harmless from any and all claims, damages, liabilities, losses, costs and expenses . . . ***for negligent acts of Arrows or its subcontractors*** arising out of or relating to performance under this Agreement. The aforesaid indemnification shall apply as to all of the aforementioned claims, demands and causes of action except for those instances where Owner is also determined to be negligent, in which event Arrow's indemnification of Owner shall be reduced by the percentage of fault attributed to Owner by a court of competent jurisdictions.[28]

Article 10.6, Indemnification and Risk of Loss, of the 1988 Agreement states:

> Provider [Arrow] shall defend (if requested by Owner), indemnify and hold Owner [Universal] . . . harmless from and against any and all claims, suits, judgments, damages, losses and expenses . . . of any nature whatsoever arising directly or indirectly out of or resulting either in whole or in part, from any wrongful or negligent act or omission ***of Provider, any Subcontractor or Sub-subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable***.
>
> In the event it is determined that any loss for which Provider is obligated under this Section to provide indemnification is caused in part by the person or organization to be indemnified, the amount of the recovery by the person or organization to be indemnified shall be reduced by an amount equal to the

---

[27] *Id.*

[28] Def.'s Mem. Supp. Summ. J. Ex. A at 9 (emphasis added).

percentage of fault so attributable to said person or organization to be indemnified.[29]

The Design Agreement and the 1988 Agreement obliges Arrow to indemnify Universal for *Arrow's* negligent acts, but says nothing about indemnifying Universal for Universal's negligent acts. Therefore there is no indemnity coverage under the Policy for Universal's negligent acts.

The Design Agreement and the 1988 Agreement also provide that Arrow will indemnify Universal not only for Arrow's own negligent acts, they also provide that Arrow will indemnify Universal for the negligent acts of any subcontractor or sub-subcontractor. Universal's contention is that the state of Florida still follows the doctrine of "joint and several liability" and is a pure comparative negligence state wherein a plaintiff can elect to recover the entire judgment from one of several joint tortfeasors even though that particular tortfeasor has only a small percentage of fault.[30] Universal further contends that, under Florida law, "non parties may be placed on the verdict form and have fault attributed to them."[31] Even though no subcontractor or sub-subcontractor is named in the Florida Action, Universal argues that under Florida law Universal could be liable for fault attributed to entities that are not parties to the lawsuit.[32] Plaintiff has pointed out a number of discrepancies and contradictions in Universal's analysis of Florida state law and brings up a further issue of whether the current amended statute on Florida

---

29 Def.'s Mem. Supp. Summ. J. Ex. B at 22 (emphasis added).

30 *See* Def.'s Mem. Supp. Summ J. at 13.

31 *Id.*

32 *See Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993).

comparative fault/contribution law is applicable or whether some past version subject to different interpretations than that which Universal has put forward should be applied.[33]

It appears Arrow may have assumed the tort liability of another party within the definition of an insured contract under the Policy. However, the Florida Action does not involve any claims against a subcontractor or sub-subcontractor. The only parties to the Florida Action of which this Court is aware are those named in this adversary proceeding. While there have been some allegations in the briefs regarding the possibility of liability being apportioned to the designers or constructors of an allegedly defective lap bar on the Universal ride designed and constructed by Arrow,[34] there are no facts in evidence that indicate apportionment of liability to unnamed subcontractors or sub-subcontractors is a real possibility.

The parties are asking this Court to enter an advisory opinion based on a hypothetical scenario involving a complex issue of Florida statutory interpretation that may or may not play out in the Florida Action. "The ripeness doctrine 'prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . .'"[35] A declaratory judgment on insurance coverage is by its very nature pre-emptive in its attempt to resolve liability issues prior to further litigation. However, this final question of liability of coverage for subcontractors or sub-subcontractors is too void of facts and involves too many

---

[33] *See* Pl.'s Reply Mem. Supp. Summ. J. at 17.

[34] Def.'s Mem. Supp. Summ. J. at 12.

[35] *L.R.S.C. Co. v. Rickel Home Centers, Inc. (In re Rickel Home Centers, Inc.)*, 209 F.3d 291, 307 (3d Cir. 2000) quoting *Abbott Lab v. Gardner*, 387 U.S. 136, 148 (1967).

questions of Florida state law that would be best resolved by the Florida courts when the issues actually arise, if they ever do in fact ripen.

III. CONCLUSION

For the reasons set forth above, the Court determines that:

1. the Claimants did not waive claims in the June Order in a manner that would prevent coverage for the Claimant's under the Policy;
2. the Self-Insured Retention Endorsement is applicable to the Policy;
3. there is no default on Arrow's part that voids coverage under the Policy;
4. there is no coverage under the Policy for Universal's claim for contractual indemnification for Universal's negligence; and
5. the issue of whether or not there is contractual liability under the Policy for Arrow's assumption of liability of other parties not yet involved in the Florida Action is premature and unripe.

DATED this 20th of January, 2004.

Judge Judith A. Boulden
United States Bankruptcy Judge

ooo000ooo

SERVICE LIST

Service of the forgoing **MEMORANDUM DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT** should be made by the Bankruptcy Noticing Center upon the following:

David E. Leta
Snell & Wilmer
15 West South Temple
Suite 1200
Salt Lake City, UT 84101-1547

Anna W. Drake
215 South State Street
Suite 500
Salt Lake City, UT 84111

J. Thomas Beckett
Parsons Behle & Latimer
201 South Main Street
Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898

Brent Anderson
Kyle Seedorf
Snell & Wilmer
1200 Seventeenth Street, Suite 1900
Denver, CO 80202

James A. Wilkinson
Dean, Ringers, Morgan & Lawton
201 East Pine Street
P.O. Box 2928
Orlando, FL 32802

Roger G. Segal, Trustee
525 East 100 South
Suite 500
Salt Lake City, UT 84102