IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
INSYS THERAPEUTICS, INC., *et al.*,	)	Case No. 19-11292 (JTD)
	)	(Jointly Administered)
Liquidating Debtors.	)	
	)	
	)	
WILLIAM H. HENRICH, in his capacity as LIQUIDATING TRUSTEE of the INSYS LIQUIDATION TRUST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 23-50484 (JTD)
	)	
XL SPECIALTY INSURANCE COMPANY,	)	
	)	
Defendant.	)	**Re: D.I. Nos. 22 & 24**

MEMORANDUM OPINION AND ORDER

This case involves a dispute over insurance coverage for certain litigation costs incurred by Insys Therapeutics, Inc. ("**Debtor**"). On January 5, 2024, XL Specialty Insurance Company ("**Defendant**") filed a Motion for Summary Judgment on the Prior and Pending Litigation Exception ("**Motion for Summary Judgment**") in the relevant insurance policy.[1] In response, William Henrich ("**Trustee**"), in his capacity as Liquidating Trustee of the Insys Liquidation Trust, filled a Cross-Motion for Summary Judgment on Prior and Pending Litigation Exclusion on February 5, 2024 ("**Cross-Motion for Summary Judgment**")[2]. The parties have fully briefed

[1] Motion for Summary Judgment, Adv. D.I. 22.
[2] Cross-Motion for Summary Judgment, Adv. D.I. 24.

this issue.[3] For the reasons explained below, the Motion for Summary Judgment is granted, and the Cross-Motion for Summary Judgment is denied.[4]

JURISDICTION & VENUE

The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. § 1409(a).

BACKGROUND

The Debtor is a pharmaceuticals company that voluntarily filed a petition for relief under chapter 11 of the Bankruptcy Code in June 2019.[5] Seven months later, Judge Gross confirmed the *Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors*,[6] which became effective shortly thereafter. The Trustee initiated this adversary proceeding in 2023, after the Defendant denied coverage for litigation costs incurred by the Debtor. The Trustee alleges that coverage is warranted under the insurance policy purchased by the Debtor ("**XL Policy**") and claims that the Defendant is in breach of contract by denying coverage.[7]

The dispute concerns the relationship between two separate actions filed against Insys. The first is a *qui tam* suit ("***Qui Tam* Action**") filed in 2012 under the Federal Claims Act (FCA), and the second is a shareholder derivative suit filed against the directors and officers of

[3] Notice of Completion of Briefing, Adv. D.I. 33.
[4] The parties requested oral argument on these Motions. Requests for Oral Argument, Adv. D.I. 31, 32. However, given the straightforwardness of the issue presented, I do not believe that oral argument is necessary.
[5] Chapter 11 Voluntary Petition, *In re Insys Therapeutics, Inc.*, No. 19-11292, D.I. 1.
[6] Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Chapter 11 Plan, *In re Insys Therapeutics, Inc.*, No. 19-11292, D.I. 1115; Second Amended Joint Chapter 11 Plan, *In re Insys Therapeutics, Inc.*, No. 19-11292, D.I. 1095.
[7] Complaint, Adv. D.I. 1, at 13-14.

Insys in the Delaware Court of Chancery in 2016 ("**D&O Action**"). Both of these actions challenge the same allegedly fraudulent schemes employed by the directors and officers of Insys to market addictive opioid products.[8] The parties specifically dispute whether the XL Policy's Pending and Prior Litigation ("**PPL**") exclusion precludes coverage for the D&O Action. In full, the PPL exclusion provides:

> In consideration of the premium charged, no coverage will be available under this Policy for claims based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or wrongful act, underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration which was brought prior to May 02, 2013.[9]

The Defendant asserts that the *Qui Tam* Action—which was filed before May 2, 2013—prevents coverage because it arises out of the same facts as the D&O Action. The Trustee argues that (1) the unique procedural characteristics of *qui tam* suits call for different treatment under the PPL exclusion, and (2) the word "brought" is ambiguous as used in the PPL exclusion. Both parties have moved for summary judgment.[10] For the reasons explained below, the Defendant's motion for summary judgment is granted, and the Trustee's cross-motion for summary judgment is denied.

ANALYSIS

I. LEGAL STANDARD

A court must grant a motion for summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(a). The movant "bears the initial responsibility of informing the district

[8] *See* Memorandum of Law in Support of Motion for Summary Judgment, Adv. D.I. 23, at 12-16. The Trustee does not dispute that the two actions arise out of the same operative facts.
[9] XL Policy, Adv. D.I. 1-4.
[10] Motion for Summary Judgment, Adv. D.I. 22; Cross Motion for Summary Judgment, Adv. D.I. 24.

court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A disputed fact is 'material' if it would affect the outcome of the suit as determined by the substantive law." *Doe v. Luzerne County*, 660 F.3d 169, 175 (3d Cir. 2011) (quoting *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992)). In order to prevail, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (citing *DeLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949)).

It is well-established that insurance policies are contracts, and therefore subject to rules of contractual interpretation. *Con'l Ins. Co. v. Burr*, 706 A.2s 499, 500-01 (Del. 1998); *IDT Corp. v. U.S. Specialty Ins. Co.*, C.A. No. N18C-03-032, 2019 WL 413692, at *7 (Sup. Ct. Del. Jan. 31, 2019). Under Delaware law, "[c]lear and unambiguous language in an insurance contract should be given 'its ordinary and usual meaning,' and courts should refrain from creating ambiguity where none exists." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2s 781, 288 (Del. 2001) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)). In construing the language of an insurance contract, the court "must rely on a reading of all of the pertinent provisions of the policy as a whole, and not on any single passage in isolation." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2s 281, 287 (Del. 2001). If an actual ambiguity exists within the language of the insurance policy, the insurance policy "[m]ust be construed against the insurer, and in a manner which is more favorable to coverage." *Buntin v. Cont'l Ins. Co.*, 583 F.2d 1201, 1207 (3d Cir. 1978) (citations omitted); *see also id.* (where "there is more than one reasonable reading of a policy provision . . . that provision must be

construed against the insurance company which has drafted it"). The language of an insurance contract should also be interpreted "as providing broad coverage to align with the insured's reasonable expectations." *RSUI Indemnity Co. v.* Murdock, 248 A.3d 887, 906 (Del. 2021). The insurer bears the burden to prove that a coverage exclusion applies. *Am Legacy Found. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 640 F. Supp. 2d 524, 535 (D. Del. 2009) (citations omitted).

II. DISCUSSION

A. "Brought" Within the PPL Exclusion is Not Ambiguous

The Trustee attempts to portray the PPL exclusion as unclear by arguing that its use of the word "brought" is ambiguous.[11] The XL Policy does not define the word "brought," and the Trustee contends that "brought" in this context could reasonably be interpreted to mean both "filed and served on the defendant," which the *Qui Tam* Action was not.[12] The Trustee points to varying definitions of the word "brought" as evidence that the word has no "readily understandable meaning within the legal community."[13]

The Trustee relies on *Ralston Purina Co. v. Barge Juneau & Gulf Caribbean Marine Lines, Inc.*, 619 F.2d 374, 376 (5th Cir. 1980) for the proposition that "courts have held that a case is not 'brought' until it is both filed and served on the defendant."[14] In addition to the fact that *Ralston Purina Co.* existed outside of the realm of insurance contracts, the case cannot reasonably be read as the court "holding" that a case is not brought until it is served. Rather, the Fifth Circuit examined a bill of lading, which required that a suit "had to be brought within one year of delivery." *Id.* at 375. However, the bill of lading also specified that a "[s]uit shall not be

[11] Memorandum of Law in Support of Cross Motion for Summary Judgment, Adv. D.I. 25, at 7.
[12] *Id.* at 12.
[13] *Id.*
[14] *Id.*

deemed brought until jurisdiction shall have been obtained over the Carrier and/or the vessel by service of process or by an agreement to appear." *Id.* at 375 n.1. The court offered no opinion on the definition of "brought" because it was specifically defined in the bill of lading. Furthermore, the definition of "brought" within a single bill of lading cannot be used to cast doubt on the common understanding of "brought" across the entire legal community.

The Trustee also points to "brought" being used in different contexts to indicate that it implicitly requires "some action [to be] taken with respect to the defendant."[15] For example, a criminal defendant may be "brought" into court,[16] or claims may be "brought" before a judge.[17] Certainly, words may have different meanings when they are accompanied by specific modifying text, but the PPL exclusion only refers to the point at which litigation is "brought." When used in the abstract, it is commonly understood that litigation is "brought" when a complaint is filed. Black's Law Dictionary defines "bring an action" as "institute legal proceedings," and it is common knowledge that federal legal proceedings—such as a *qui tam* suit under the False Claims Act—are instituted when the complaint is filed. *See* FED. R. CIV. PRO. 3 ("A civil action is commenced by filing a complaint with the court."); *Bring an Action*, BLACK'S LAW DICTIONARY (11th ed. 2019). Under Delaware law, insurance policies must be construed "in a common sense manner," *New Castle County. v. Nat'l Union Fire Ins. Co.*, 174 F.3d 338, 343 (3d Cir. 1999) (quoting *SI Mgmt. L.P. v. Wininger*, 707 A.2s 37, 42 (Del. 1998)), and words must be given their "usual, ordinary meaning." *O'Brien*, 785 A.2s at 287. Accordingly, I find that under the PPL exclusion, litigation is "brought" at the point in time when the complaint is filed with the court.

[15] Trustee's Reply in Support of Cross Motion for Summary Judgment, Adv. D.I. 30, at 4.
[16] *Id.*
[17] *Id.* at 3.

B. The Trustee Has Not Shown That *Qui Tam* Suits Should Be Treated Differently Under the XL Policy

In support of his cross-motion for summary judgment, the Trustee also argues that the unique procedural characteristics of the *Qui Tam* Action suggest that it should be treated differently under the language of the XL Policy.[18] Like many *qui tam* suits, the *Qui Tam* Action was filed under seal and was dismissed before it was served on the directors and officers of Insys.[19] At the time that Insys purchased the XL Policy, it was unaware that the *Qui Tam* Action had been filed.[20]

The Trustee points to *My Left Foot*[21] for the proposition that insurance policies should be read broadly to include coverage for *qui tam* actions filed under seal before the policy's cutoff date.[22] In *My Left Foot*, the court examined whether a sealed *qui tam* suit that was never served would be covered under the policy's "Billing Errors Endorsement." *Id.* at 1170. The Billing Errors Endorsement stated that coverage "does not apply to insured events which arise from any facts, circumstances, situations, events, transactions or causes of action which are underlying or alleged in litigation pending on or prior to the effective date." *Id.* at 1172. The court ultimately found that the *qui tam* suit filed before the policy's effective date was covered under the policy, citing to the "unique procedural stature of *qui tam* lawsuits under the False Claims Act." *Id.*

[18] Memorandum of Law in Support of Cross Motion for Summary Judgment, Adv. D.I. 25, at 7-9.
[19] *Id.* at 5.
[20] *Id.*
[21] *My Left Foot Children's Therapy, LLC v. Certain Underwriters' at Lloyd's London Subscribing to Pol'y No. Hah15-0632*, 207 F. Supp. 3d 1168 (D. Nev. 2016), *rev'd on other grounds*, 731 F. App'x 659 (9th Cir. 2018).
[22] Memorandum of Law in Support of Cross Motion for Summary Judgment, Adv. D.I. 25, at 5.

My Left Foot is distinguishable from the present facts. Unlike the XL Policy, the policy examined in *My Left Foot* case expressly provided coverage for *qui tam* lawsuits.[23] Consequently, the court decided that coverage was warranted for the *qui tam* lawsuit itself because "[i]t would be superfluous for the Endorsement to explicitly state that the date of service is the date of notice for purpose of coverage" under the policy. *Id.* The XL Policy does not expressly provide for certain kinds of coverage for *qui tam* actions, and it does not draw any distinction between *qui tam* lawsuits and other kinds of civil actions.

While *My Left Foot* has no bearing on this issue, other courts have held that *qui tam* lawsuits previously filed under seal were not subject to coverage under policies with provisions similar to the PPL exclusion. In *AmerisourceBergen Corp. v. Ace American Ins. Co.*, the policy excluded coverage for any claim:

> alleging, based on, arising out of, or attributable to any prior or pending litigation, claims, demands, arbitration, administrative or regulatory proceeding or investigation filed or commenced on or before the earlier of the effective date of this policy or the effective date of any policy issued by [the insurer] of which this policy is a continuous renewal or a replacement, or alleging or derived from the same or substantially the same fact, circumstance or situation underlying or alleged therein.

100 A.3d 283, 288 (Penn. Sup. Ct. 2014). This policy "preclude[d] coverage for litigation filed on or commenced before May 1, 2007." *Id.* at 288. A *qui tam* action was filed under seal in 2006, which the defendant was not made aware of until 2008. *Id.* at 286. The court determined that the policy did not cover the *qui tam* action because it had commenced at the time the complaint was filed, before the cutoff date of May 1, 2007. *Id.* at 288-289.

[23] *My Left Foot* Policy, Adv. D.I. 29-1.

The Eleventh Circuit decided a similar issue in *HR Acquisition I Corp. v. Twin City Fire Ins. Co.*, 547 F.3d 1309 (11th Cir. 2008). There, the policy provided that the insured would not be liable to make a payment in connection with any claim that was:

> based upon, arising from, or in any way related to any demand, suit, or other proceeding against any Insured which was pending on or existed prior to the applicable Prior Litigation Date specified by endorsement to this Policy, or the same or substantially the same facts, circumstances or allegations which are the subject of or the basis for such demand, suit, or other proceeding.

Id. at 1312. The "Prior Litigation Date" was December 17, 1997. *Id.* The court found a factual nexus between a *qui tam* action filed on December 15, 1997, and a subsequent shareholder derivative suit filed in 2002. *Id.* at 1311, 1314-15. Like this case, the *qui tam* suit was never served on the defendants who subsequently sought insurance coverage for the later-filed shareholder derivative suit. *Id.* at 1312. This policy did not define the terms "pending," "exist," or "against," but the Eleventh Circuit nevertheless decided that the shareholder derivative suit was not covered because "a person of ordinary intelligence would reasonably consider a lawsuit 'against' a person or entity to be 'pending' or to 'exist' when it names that person or entity as a defendant and is properly filed with a court." *Id.* at 1317. Similarly, it is reasonable to believe that a similar person of ordinary intelligence would consider the *Qui Tam* Action to be "brought" when it was properly filed.

Neither the arguments advanced by the Trustee, nor the relevant case law, indicate that the *Qui Tam* Action in this case should be treated any differently than other civil actions.

C. The XL Policy Excludes Coverage for the D&O Action

The language of the PPL exclusion precludes coverage for the D&O Action. The language of the PPL exclusion is broad, denying coverage for all claims "in any way involving any fact, circumstance, situation, transaction, event or wrongful act, underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration . . .

brought prior to May 02, 2013."[24] The parties do not dispute that the *Qui Tam* Action was filed before the PPL exclusion's May 2, 2013, cutoff date,[25] that the two cases share a significant factual overlap, that the D&O Action qualifies as a "claim," or that the *Qui Tam* Action qualifies as "prior litigation." Nothing in the XL Policy indicates that the defendant's notice is required to trigger the exclusion, and so it must be enforced according to its terms. The law weighs in favor of excluding coverage in this specific case, and there is no genuine issue of material fact suggesting otherwise.

IT IS HEREBY ORDERED,

1. The Defendant's Motion for Summary Judgment is GRANTED;

2. The Trustee's Cross-Motion for Summary Judgment is DENIED.

Dated: May 29, 2024

JOHN T. DORSEY, U.S.B.J.

[24] XL Policy, Adv. D.I. 1-4, at 19.
[25] Memorandum of Law in Support of Motion for Summary Judgment, Adv. D.I. 23, at 10-11.