

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES FIRE INS. CO. : CIVIL ACTION  
: :  
v. : :  
: :  
ALLEN L. ROTHENBERG, ESQ., : :  
et al. : NO. 98-2275

M E M O R A N D U M

**Padova, J.** September, 1998

Plaintiff, United States Fire Insurance Company ("U.S. Fire"), brings this action for a declaratory judgment regarding an insurance policy Plaintiff sold to Defendant, Allen L. Rothenberg ("Rothenberg").<sup>1</sup> U.S. Fire seeks a declaration of Rothenberg's coverage under that policy with respect to an underlying action that a third party brought against Rothenberg in this Court, Perlberger v. Perlberger, Civ. A. No. 97-4105. U.S. Fire has filed a Motion for Summary Judgment, maintaining that, under the policy, it has no duty to defend or indemnify Rothenberg in the underlying action. In opposing the Motion, Rothenberg has filed a Countermotion for Partial Summary Judgment, contending that U.S. Fire has a duty to defend him. For reasons stated below, U.S. Fire's Motion for Summary Judgment will be denied and Rothenberg's Countermotion will be granted.

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<sup>1</sup> This suit was brought against Allen Rothenberg, who is the insured under the policy in question, but a number of others are listed as interested parties: namely, Norman Perlberger, Esq.; Messody T. Perlberger; Perlberger Law Associates, P.C.; G. Daniel Jones; Jones, Hayward & Lenzi, P.C.; and Amy S. Lundy Brennan, Esq. Of these, Allen L. Rothenberg, G. Daniel Jones, and Jones, Hayward & Lenzi have filed answers to the Complaint.

## **I. FACTUAL BACKGROUND**

On May 16, 1997, Messody T. Perlberger, filed a pro se complaint on behalf of herself and her minor children against Rothenberg and others, alleging they fraudulently hid assets of her former husband, Norman Perlberger, to which she was entitled. The suit included counts of fraud, conspiracy, RICO violations, violations of the First and Fourteenth Amendments, intentional infliction of emotional distress, and personal injury, among others. The question in the instant action is whether U.S. Fire has a duty to defend and, if necessary, to indemnify Rothenberg in that action. The answer to that question depends on the terms of the policy and the allegations in the complaint in the underlying case.

U.S. Fire, issued a comprehensive general liability policy of insurance, No. 518502657, to Rothenberg for the policy period December 4, 1996 to December 4, 1997. When Rothenberg was sued by Messody Perlberger, he looked to U.S. Fire to provide the defense. U.S. Fire declined to defend Rothenberg on the ground that the injuries alleged in Ms. Perlberger's complaint did not fall within the coverage provided by the policy and brought this action. Rothenberg concedes that the allegations in the underlying complaint do not fall under the policy's coverage for "personal injury" or "advertising injury," but he claims that allegations of "bodily injury" injury are covered. U.S. Fire's position is that all claims for bodily injury in the underlying suit come under one or more of the explicit exclusions in the

policy. The exclusions are for "'bodily injury' expected or intended from the point of view of the insured;" and "bodily injury . . . arising out of the rendering or failure to render any professional service, including but not limited to . . . legal services." (Ins. Policy, Deft.'s Resp. & Countermot. Ex. A ("Ins. Pol.")) In addition, U.S. Fire claims that, even if the alleged bodily injury does not fall within one of the exclusions, U.S. Fire should be released from its duty to defend Rothenberg in the underlying suit on grounds of public policy.

#### **A. The Insurance Policy**

The insurance policy that U.S. Fire issued to Rothenberg contained the following provisions:

##### **1. Insuring Agreement**

(a) We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result.

(Ins. Pol.) Excluded from this coverage is bodily injury or property damage that is expected or intended by the insured or arising from the provision of legal services:

##### **2. Exclusions**

This insurance does not apply to:

(a) "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

(o) This insurance does not apply to "bodily injury" or "property damage" arising out of the rendering or failure to render any professional service including, but not limited, to:

(1) Accounting, advertising, architectural, drafting, engineering, insurance or legal services; . . . .

(Id. (emphases added).)

## **B. Complaint in the Underlying Suit**

Because U.S. Fire's obligation to provide a defense in the underlying suit depends on the allegations in the complaint in that suit, that complaint must be examined in some detail. Some of the allegations are reproduced here:

Plaintiff Pro Se, Messody T. Perlberger, a Diabetic and Visually Impaired Mother, on her behalf and on behalf of her children, Karen and Laura, claims of the defendants a sum in excess of One Hundred Thousand (\$100,000.00) Dollars in damages upon a cause of action of which the following is a statement:

8. At all times applicable hereto, Plaintiffs had established rights under Laws and statutes of the United States of America and of the Commonwealth of Pennsylvania and entitled to a federally mandated and determined portion of Defendants Norman Perlberger and Perlberger Law Associates' income pursuant to the Federal Family Support Act of 1988 of the Social Security Act as amended, 42 U.S.C. section 601 et seq.

16. Defendant Allen L. Rothenberg is an individual and an attorney . . . and an Employer of Defendant Norman Perlberger, with whom he owns/shares

over one thousand cases, and a resident of the Commonwealth of PA., and the parent of child/children living the standard and quality of life of children similarly situated, i.e. of professional parent(s) with substantial income.

20. Immediately upon Plaintiffs asserting their rights guaranteed them under State and Federal law, specifically their right to Petition, Defendant Norman Perlberger, an admitted forger (having forged a Judge's signature on an official document, Judge Green's, as well as that of an attorney) and perjurer (having lied about it under oath repeatedly, only recanting after extraordinary facts that included the deposition of the judge, federal judge now, whose signature he had forged), acting as his own attorney, wilfully engaged in a series of acts designed to threaten, harass, intimidate, terrorize, frustrate, obstruct and harm Plaintiffs in the exercise of their fundamental right to Petition, and, maliciously, used his position/expertise and his lack of Ethics, and the cooperation and participation of the other defendants, for the purpose of violating his federally mandated duty under the Social Security Act, the provisions of the Federal Family Support Act of 1988 as to Plaintiffs' rights, through conspiratorial acts with the other defendants, through a pattern of calculated repeated and prohibited acts, all resulting in severe harm and injury to Plaintiffs, and in severe violations and deprivations of their Civil Rights and their constitutionally protected property and liberty interests, and has continued and repeated his violations of Plaintiffs' Civil rights . . . [emphases in original].

30. Defendant Allen L. Rothenberg has, from about 1989 to the present, been an Employer of Defendant, Norman Perlberger, as well as co-owner with him of a substantial case load, and as such, is under federal mandate pursuant to the Federal Family Support Act of 1988 of the Social Security Act as to Plaintiffs' income and property and liberty interests.

31. Notwithstanding his duties under Federal and State laws, and his being documented with and Knowing, as a parent and a professional (an attorney) of the harm and injury plaintiffs were exposed to, and were suffering on less than twenty percent of their former income, deprived of their property and liberty interest, and any quality of life, documented with the compelling medical, emotional, financial facts of Plaintiffs' endangered welfare, Defendant Rothenberg did nothing to prevent the harm, fraud and deprivation of Plaintiffs' established rights, and in fact willfully and maliciously participated, cooperated and

assisted Defendants Norman Perlberger and Perlberger Law Associates in concealing Defendant Perlberger's true income, and in defrauding, depriving, Plaintiffs' rights to their income in violation of Federal Family Support Act of 1988 of the Social Security Act and their federally protected rights, privileges and immunities. Upon information and belief, Defendant Rothenberg's participation in sharing fees, "holding" substantial cases for Defendant, Perlberger also serves to impede other individuals as to Defendants Perlberger and Perlberger Law Associates, including but not limited to Diane J. Strausser.

32. As a direct result of the deliberate, unlawful, malicious and tortious conduct of the defendants, Plaintiffs have suffered a painful diminution of quality of life to an endangering injurious and harmful level, an inability to conduct life or maintain any stability/normality in their lives, anguish, anxiety, shock and trauma, impairment of life's enjoyment.

33. As a direct result of the deliberate, unlawful, malicious and tortious conduct of the defendants, Plaintiffs have suffered loss of self-esteem, shame, isolation and stigma in their community (in the wealthiest county in PA.), humiliation, loss of identity, feeling of not belonging.

34. As a direct result of the deliberate, unlawful, malicious and tortious conduct of the defendants, Plaintiffs have suffered loss of/absence of any financial security, loss of income and opportunity.

35. As a direct result of the deliberate, unlawful, malicious and tortious conduct of the defendants, Plaintiffs have suffered loss of health and/or exacerbation of health problems, chronic and permanent conditions.

36. As a direct result of the deliberate, unlawful, malicious and tortious conduct of the defendants, Plaintiffs' children, Karen and Laura have suffered ten years of lost childhood (Laura how 13 was 3 years old then), being 7(seven) and 3 (three) then, have suffered in their growth and development, in their diminished potential, by the unconscionable and outrageous circumstances they have been subjected to, in their mother's impaired health and absence of medical care and medicine, in their interrupted or absent medical care, in the endangering breakdown of their home in sharp contrasts with neighbors, anger and rage while Plaintiff-mother, on endanger overload of responsibilities of three children (sibling Jennifer L. Perlberger was 14, has for years and very injured in her untreated health problems and undue stress, has in the last

year suffered Gall Bladder disease and Emergency surgery/removal, and due to her challenged health and education is not party of (in the within complaint), suffered ten years of inability to maintain her life and health worsened irreparably by Defendants' tortious conduct, in her anguish at her childrens' circumstances and injury, and in her ability to maintain her balance as a parent.

37. As a direct result of the deliberate, unlawful malicious and tortious conduct of the Defendants, Plaintiffs have suffered and have been permanently and irreparably injured in every aspect of their lives, medical, emotional, spiritual, social, economic.

43. Defendants' specific fraudulent actions and conduct were intended to cause harm, loss and injury to Plaintiffs and did cause such, and are the direct cause of Plaintiffs' injuries and causes for relief, in that they were reckless and carried out with callousness and indifference to their predictable consequences, resulting in great irremediable harm to Plaintiffs.

49. Defendants' actions were reckless and carried out with callousness and deliberate indifference to their predictable consequences, and violative of Plaintiffs' Constitutional rights, and resulted in Plaintiffs' deprivation of their constitutional rights, to their income and property and liberty interests, as well as in great and irreparable harm to Plaintiffs' lives, health, person and property, including but not limited to diminished potential, loss of childhood for some Ten years, interrupted growth and development.

69. Defendants knew that emotional distress would be a likely result of their conduct, and that they created a risk of causing emotional distress, illness and bodily harm, and in fact did cause such.

70. At all times relevant here, Defendants knew of Plaintiffs emotional and physical difficulties including but not limited to Laura's ADHD, Karen's despondency and obsessive compulsive disorder, Mother's Macular Degeneration, Vision Impairment, Diabetes, etc... but willfully and maliciously exacerbated and or caused conditions by not allowing Plaintiffs any ability to have stability and to normalize their lives, to maintain her balance as a parent and nurture and care for the children and their difficulties as well as to suffer and anguish, on overload by the outrageous violations and emotional fallout and physical consequences (extreme pain due to Jennifer's

years of untreated gastric problems and stress resulting in Emergency Gall Bladder surgery in 1996).

74. As a direct result of the unlawful and tortious actions of Defendants, Plaintiffs suffered severe emotional distress with serious physical symptoms and consequences and will continue to suffer in the future and endure extreme losses and deprivations in their lives, health and property.

75. The emotional distress suffered by Plaintiffs was severe and intentionally inflicted by Defendants, in reckless disregard of the emotional and physical consequences to Plaintiffs.

77. Defendants' actions and malicious and tortious conduct have caused severe physical harm and injury to Plaintiffs.

78. Defendants knew the risks, danger and jeopardy they were exposing Plaintiffs to, Mother in vulnerable health and Karen and Laura in her exclusive care, for years of their growth and development, some ten years.

79. Due to Defendants' unlawful, malicious and tortious actions and conduct, Plaintiffs have been deprived of economic security, income and property and liberty, life's enjoyment, suffered physical difficulties, loss of health, chronic illness and will continue to do so for a long time.

(Underlying Complaint, Deft.'s Resp. Ex. B. ("Und. Compl."))

(footnote omitted).)

## **II. LEGAL STANDARDS**

### **A. Summary Judgment**

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is

sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is "material" only if it might affect the outcome of the case. Id. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

## **B. Insurance Contracts**

The parties agree that Pennsylvania law applies to the insurance contract at issue. Under Pennsylvania law, the court must read the policy as a whole and construe it according to the

plain meaning of its terms. Safeguard Scientifics, Inc. v. Liberty Mutual Ins. Co., 766 F. Supp. 324, 328 (E.D. Pa. 1991). "[A]ny ambiguity in the language of the document is to be read in a light most strongly supporting the insured." Mohn v. American Casualty Co., 326 A.2d 346, 351 (Pa. 1974). A term is ambiguous only if reasonable people, considering it in the context of the policy as a whole, would differ as to its meaning. United Services Auto. Ass'n v. Elitzky, 517 A.2d 982, 986 (Pa. Super. Ct. 1986).

### **C. Duty to Defend**

The question whether a loss is covered by an insurance policy and, in cases such as this, whether an insurer has a duty to defend its insured, is a question of law which may be decided by this Court. See Donegal Mut. Ins. Co. v. Ferrara, 552 A.2d 699, 700 (Pa. Super. Ct. 1989). The United States Court of Appeals for the Third Circuit ("Third Circuit") has stated the Pennsylvania law on the duty of an insurer to defend as follows:

Pennsylvania law on the question of an insurer's duty to defend its insured is well settled. In consideration for premiums paid, the insurer contractually obligates itself to defend its insured. The obligation arises whenever allegations against the insured state a claim to which the policy potentially applies, even if the allegations are "groundless, false or fraudulent."

American Contract Bridge League v. Nationwide Mut. Fire Ins. Co., 752 F.2d 71, 75 (3d Cir. 1985) (emphasis in original) (quoting Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320,

321 (Pa. 1963). If even some of the allegations in the complaint fall within the terms of coverage, the insurer is obliged to defend the entire action against the insured. Safeguard Scientifics, 766 F. Supp. at 329. "If a claim falls outside the scope of the policy because of an exclusion in the policy, it is the insurer's burden to demonstrate that the exclusion applies." Little v. MGIC Indem. Corp., 649 F. Supp. 1460, 1466 (W.D. Pa. 1986), aff'd, 836 F.2d 789 (3d Cir. 1987). An insured "is not excused from its duty to defend until it becomes apparent that there are no circumstances under which the insurer would be responsible." Viola v. Fireman's Fund Ins. Co., 965 F. Supp. 654, 664 (E.D. Pa. 1997) (internal quotations and citation omitted). In determining whether the complaint states a claim against the insured to which the policy potentially applies, the court takes the allegations of the complaint as controlling. Pacific Indemnity Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985).

The insurer is not required to defend the claim when it is apparent from the face of the complaint that none of the allegations potentially falls within the coverage of the policy. In cases in which the complaint alleges both conduct that potentially comes under the policy and conduct that does not, the insurer must defend the entire action.

Bracciale v. Nationwide Mut. Fire Ins. Co., No. 92-7190, 1993 WL 323594, at \*5 (E.D. Pa. Aug. 20, 1993); see also Cadwallader v. New Amsterdam Casualty Co., 152 A.2d 484, 489 (Pa. 1959).

#### **D. Duty to Indemnify**

Obligations to defend are wider than obligations to indemnify. The duty to defend carries with it the conditional obligation to indemnify until it becomes clear that there can be no recovery under the policy. Pacific Indemnity Co. v. Linn, 766 F.2d 754, 766 (3d Cir. 1985).

### III. DISCUSSION

The underlying complaint alleges that Defendant Rothenberg participated in a scheme to defraud Messody Perlberger and her two children of income by hiding Norman Perlberger's financial assets. The plaintiffs in the underlying suit allege that Rothenberg knew of the harm and injury to the plaintiffs, yet he not only did nothing to prevent it, he "willfully and maliciously participated, cooperated and assisted" in concealing Norman Perlberger's true income, thereby defrauding the plaintiffs of their right to income. (Und. Compl. ¶ 31.)

U.S. Fire contends that the allegations in the underlying complaint are excluded by the policy

because they contain allegations of fraud and fraudulent misrepresentation. The insurance applies only to bodily injury or property damage caused by an "occurrence" defined by the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Pennsylvania Supreme Court has held that intentional acts are not policy occurrences because intentional acts are not accidents. Gene & Harvey Builders, Inc. v. Pennsylvania Manufacturers' Ass'n. Insurance Co., 512 Pa. 490, 517 A.2d 910 (1986). Therefore, there is no coverage under the policy for the intentional acts of fraud and/or fraudulent misrepresentation which are incorporated into each and every counts [sic] of the underlying complaint.

(Pl.'s Mem. in Supp. at 20 (record citation omitted).) In addition, U.S. Fire argues that the alleged conduct comes within the exclusion for bodily injury or property damages that is "expected or intended from the standpoint of the insured."

U.S. Fire also makes a public policy argument. It states that Pennsylvania courts do not require an insurer to defend an insured for his own intentional torts or criminal acts, Germantown Ins. Co. v. Martin, 595 A.2d 1172 (Pa. Super. Ct. 1991), and contends that the underlying complaint

clearly alleges that the insured committed fraud, conspiracy, violated RICO statutes, violated the Federal Family Support Act of 1988, violated the First and Fourteenth Amendments and caused Emotional distress while acting with fraudulent intent. The insurer should not be required to defend any of the allegations in the underlying complaint because insurance coverage for such intentional acts is violative of public policy.

(Pl.'s Mem. in Supp. at 24-25.)

Unquestionably, there are claims in the underlying complaint that the policy does not cover. Rothenberg does not dispute that; however, he argues that the complaint also alleges conduct that potentially falls within the scope of the policy, and that U.S. Fire must therefore defend him as to the entire action. The policy covers bodily injury to third parties, and there are certainly allegations of "bodily injury" in the underlying complaint. Rothenberg points out the following examples:

"loss of health and/or exacerbation of health problems" ([Compl.] ¶35), "impaired health and absence of medical care and medicine" (¶36), "irreparable harm to

Plaintiffs' lives, health..." (§49), "emotional distress, illness and bodily harm" (§69), "Laura's ADHD, Karen's dependency and obsessive compulsive disorder, Mother's Macular Degeneration, Vision Impairment, Diabetes, etc." (§70), "Emergency Gall Bladder Surgery" (§70), "severe pain and suffering, depression and anxiety" (§73), "severe emotional distress with serious physical symptoms" (§74), and "physical difficulties, loss of health, chronic illness." (§79).

(Deft.'s Mem. at 12.) Some of the illness were pre-existing, but were allegedly exacerbated by the defendants' wrongful actions. Rothenberg argues that at least some of this bodily injury is potentially covered by the policy and does not fall under either of the two exclusions at issue: "expected or intended" consequences and "arising out of the rendering or failure to render . . . legal services."

**A. "Expected or Intended from the Standpoint of the Insured"**

The policy excludes bodily injury or property damages "expected or intended from the standpoint of the insured," but does not define "expected or intended." The Court must therefore look to the case law.

The Third Circuit has noted that in adjudicating general liability insurance cases, Pennsylvania courts follow the Pennsylvania Superior Court decision in United Services Automobile Association v. Elitzky, 517 A.2d 982 (Pa. Super. Ct. 1986). Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457, 460 (3d Cir. 1993). The Wiley court stated, "Applying well-settled standards of insurance contract interpretation, the Elitzky court

first determined that, as used in the standard intended harm exclusion, "'intentional and expected are synonymous.'" Id. (quoting Elitzky, 517 A.2d at 991). The Third Circuit went on to discuss the narrow interpretation of the exclusion under Pennsylvania law. It quoted Elitzky as stating:

We hold that an intended harm exclusionary clause in an insurance contract is ambiguous as a matter of law and must be construed against the insurer. We hold that such a clause excludes only injury and damage of the same general type which the insured intended to cause. An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result.

Wiley, 995 F.2d at 460 (quoting Elitzky, 512 A.2d at 989). The Wiley court concluded that, in Pennsylvania, "it is not sufficient that the insured intended his actions; rather, for the resulting injury to be excluded from coverage, the insured must have specifically intended to cause harm." Id. The element of subjective intent must be present. Id.

The Elitzky court took some pains to distinguish intentional conduct from recklessness conduct. A person acts intentionally when he desires to cause the consequences of his act or believes that those consequences are "substantially certain" to result from it. Elitzky, 517 A.2d at 989; see also Restatement (Second) of Torts § 8A (1965). Elitzky quoted the Restatement (Second) of Torts, which states that "[a]s the probability that the consequences will follow [the insured's acts] decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere

recklessness." Restatement (Second) of Torts § 8A cmt b, quoted in Elitzky, 517 A.2d at 989. Recklessness is defined in § 500 of the Restatement, which has been adopted by Pennsylvania courts. Id. (citing Stubbs v. Frazo, 454 A.2d 119, 120 (Pa. Super. Ct. 1982)). The section provides:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Elitzky, 517 A.2d at 989-990 (quoting Restatement (Second) of Torts § 500). Recklessness as thus defined does not come within the policy exclusion for "expected and intended" injury. Therefore, if the physical harm alleged in the underlying complaint is all intended or expected, as those terms are defined in Pennsylvania law, then U.S. Fire need not defend Rothenberg. If, on the other hand, some of the harm is allegedly inflicted recklessly, rather than intentionally, then U.S. Fire must provide its insured with a defense.

Count VI of the underlying complaint alleges the tort of intentional infliction of emotional distress. The elements of that tort are: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe. Bruffett v. Warner Communications, Inc., 692 F.2d 910, 914 (3d Cir. 1982); see also Hoy v. Angelone, 691 A.2d 476, 482 (Pa.

Super. Ct. 1997). In addition, to trigger coverage by the policy, the plaintiff in the underlying case must allege that some physical injury resulted. The underlying complaint in this case alleges physical injury that is the result of both intentional and reckless conduct.

Some of the allegations in the underlying complaint do seem to allege that the defendants specifically intended physical harm; for example, paragraph 70:

At all times relevant here, Defendants knew of Plaintiffs' emotional and physical difficulties including but not limited to Laura's ADHD, Karen's despondency and obsessive compulsive disorder, Mother's Macular Degeneration, Vision Impairment, Diabetes, etc... but willfully and maliciously exacerbated and or caused conditions by not allowing Plaintiffs any ability to have stability and to normalize their lives, to maintain her balance as a parent and nurture and care for the children and their difficulties as well as to suffer and anguish, on overload by the outrageous violations and emotional fallout and physical consequences (extreme pain due to Jennifer's years of untreated gastric problems and stress resulting in Emergency Gall Bladder surgery in 1996).

(Und. Compl. ¶ 70.)<sup>2</sup>

Elsewhere, the underlying complaint speaks of physical harm that resulted from the defendants' intentional actions, but it is not clear that the plaintiffs mean to allege that the intention of those actions was physical harm. For example, the plaintiffs allege in paragraph 37:

As a direct result of the deliberate, unlawful malicious and tortious conduct of the defendants,

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<sup>2</sup>The construction of this sentence renders its meaning somewhat unclear, but it appears to mean that the defendants in the underlying suit intended to cause physical injury.

Plaintiffs have suffered and have been permanently and irreparably injured in every aspect of their lives, medical, emotional, spiritual, social, economic.

(Und. Compl. ¶ 37.) This allegation may be taken to mean that the intended effect of the conduct was financial and not physical. Intended financial harm is alleged in Paragraph 31, which states that Rothenberg "willfully and maliciously participated, cooperated and assisted Defendants Norman Perlberger and Perlberger Law Associates in concealing Defendant Perlberger's true income, and in defrauding, depriving, Plaintiffs' rights to their income . . . ." (Und. Compl. ¶ 31.) If Rothenberg intended financial injury, and bodily injury was an unintended result, then the bodily injury would not fall under the exclusion because it could not be considered "the same general type [of injury] which the insured intended to cause."<sup>3</sup> Elitzky, 512 A.2d at 989.

Still elsewhere, the complaint alleges that the defendants acted knowing of the risk of physical harm, rather than intending it. For example, the plaintiffs allege in paragraph 69:

Defendants knew that emotional distress would be a likely result of their conduct, and that they created a risk of causing emotional distress, illness and bodily harm, and in fact did cause such.

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<sup>3</sup>Cf. State Farm Fire and Cas. Co. v. Levine, 566 A.2d 318 (Pa. Super. Ct. 1989)(where insured who angrily struck victim in face with great force crushed bones of his cheek and caused permanent damage, injury was of "same general type" even though magnitude of injury was greater than intended).

(Und. Compl. ¶ 69.) This falls short of alleging that the defendants were "substantially certain" that bodily injury would result, as is required for an "expected or intended" injury exclusion. Elitzky, 517 A.2d at 989.

Given the claims and factual allegations in the underlying complaint, Rothenberg could be found to be liable for intentional infliction of emotional distress with physical injury because he acted with reckless disregard for the safety of Messody Perlberger and her children, knowing that there was an unreasonable risk of physical injury, rather than because he intended to cause physical harm or knew with substantial certainty that it would result. Under Elitzky, such conduct would not come within the "expected or intended" exclusion and U.S. Fire would have to provide Rothenberg with a defense.

In Elitzky, a judge brought the underlying suit against the Elitzkys for allegedly sending libelous letters about him to the attorney general, the district attorney, and others. The judge alleged malicious defamation and intentional infliction of emotional distress. The Elitzkys' insurer brought a declaratory judgment action as to its duty to defend the Elitzkys. The underlying complaint claimed libel and alleged that the Elitzkys "published the false and groundless charges against plaintiff . . . with no legitimate purpose, but rather with the purpose of intentionally inflicting emotional distress upon plaintiff." Id. at 984. The court held that the judge "may recover for intentional infliction of emotional distress even if the Elitzkys

did not have the specific intent to cause him such distress as long as they acted recklessly," and concluded that the insurer had to provide the Elitzkys with a defense.<sup>4</sup> Id. at 990. The court noted that the judge had not alleged recklessness under the count for intentional infliction of emotional distress, but noted that he "[might] amend his complaint at a later time. Therefore, Judge Bruno's complaint clearly comprehends injuries which may not be excluded from coverage by the intended injury clause." Id.

U.S. Fire tries to distinguish the instant case from Elitzky, stating that "there is no situation where Messody T. Perlberger would recover for recklessness. All of the conduct alleged on the part of the Defendants was intentional and every count of the Complaint alleges intentional acts." (Pl.'s Reply Mem. at 11.) Although each count does allege intentional acts, as noted above, there are also a number of allegations to the effect that the defendants acted recklessly rather than with the specific intention to inflict bodily injury.

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<sup>4</sup>U.S. Fire tries to distinguish Elitzky by stating that the court "recognized that the standard for recklessness in a libel cause is different from its usual definition." (Pl.'s Reply Mem. at 11 (citing Elitzky, 512 A.2d at 990.) In fact, the court stated that "some cases suggest that the standard for recklessness for purposes of a libel case is slightly different from the usual definition cited above." Id. However, it went on to state that, "[e]ven if recklessness is defined in this manner, the Elitzkys should still be covered. Id. This suggests that the definition of recklessness the Elitzky court was applying for libel was the "usual definition cited above."

U.S. Fire also tries to distinguish Elitzky by focusing on counts in the underlying complaint that could, by their nature, allege only intentional conduct. It points out that the underlying complaint alleges that Rothenberg willfully participated in fraud and that each count incorporates the allegations of fraud and intentional conduct by the defendants, including Rothenberg. It states that, unlike in Elitzky, it cannot be said that the defendants could have been "reckless" in allegedly defrauding and scheming to defraud Plaintiffs." (Pl.'s Reply Mem. at 11-12.) As discussed above, while the underlying complaint does not allege that Rothenberg recklessly defrauded the plaintiffs, certain paragraphs in the complaint can be taken to allege that the defendants did not have the specific intent to inflict emotional distress or physical injury, but that those injuries resulted from other intentional acts on the part of the defendants. The bodily injuries could have resulted because of the defendants' reckless disregard for the plaintiffs' safety in carrying out their alleged intention to defraud the plaintiffs. The underlying complaint therefore alleges claims that are not excluded by the "expected or intended" claims and potentially fall within the scope of the policy's coverage.

U.S. Fire cites several other cases in which courts have concluded that the insurer had no duty to defend, but in those cases, either the underlying complaint alleged only intentional acts as that term is defined by Pennsylvania case law or the policy contained its own definition of intentional acts

that was broader than the one set out in Elitzky. In the instant case, the policy provided no definition of "expected or intended acts," the underlying complaint alleged that at least some of the bodily harm was inflicted recklessly, and Elitzky concluded that recklessness did not come within the "expected or intended" exclusion in the insurance policy. See Fed. Ins. Co. v. Potamkin, 961 F. Supp. 109 (E.D. Pa. 1997) (where plaintiff amended her complaint to include a claim for negligence, but changed none of the facts, which alleged threats to kill, attempts to run her down with a car, false accusations that she had abused defendant in the course of psychotherapy, and harassing phone calls, the complaint still failed to state a claim under the policy, which excluded criminal recklessness by Pennsylvania case law); Viola v. Fireman's Fund Ins. Co., 965 F. Supp. 654, 664 (E.D. Pa. 1997) (insurer had no duty to defend where plaintiff in underlying case alleged that defendant "struck him from behind, without warning, crushing most of the bones in the right side of his face, and leaving him momentarily unconscious" and struck him in the face again and kicked him in the legs and stomach while he was lying on the floor unconscious); Aetna Casualty and Surety Co. v. Roe, 650 A.2d 94 (Pa. Super Ct. 1994) (intent to harm children inferred in sexual molestation cases); Wiley v. State Farm Fire and Casualty Co., 995 F.2d 457 (3d Cir. 1993) (same); Donegal Mut. Ins. Co. v. Ferrara, 552 A.2d 699 (Pa. Super. Ct. 1989) (insurer not required to defend where it was clear from face of complaint that, where

insured kicked plaintiff in the groin twice in 45 minutes, she acted knowing that damage to plaintiff's genitalia was substantially certain to result); Humphreys v. Niagra Fire Ins. Co., 590 A.2d 1267 (Pa. Super. Ct. 1991) (allegations on face of federal criminal complaint charging RICO and Sherman antitrust violations came under exclusion for intentionally fraudulent acts in professional liability policy). All these cases are distinguished from the instant case in which the complaint alleges that emotional distress and physical injury could have been inflicted recklessly and the policy had no definition excluding recklessly inflicted injury from coverage.

#### **B. Public Policy Considerations**

U.S. Fire argues that requiring it to defend Rothenberg would violate public policy. The underlying complaint alleges that the insured committed fraud, conspiracy, and violated RICO and other federal laws. U.S. Fire cites Germantown Ins. Co. v. Martin, 595 A.2d 1172 (Pa. Super. Ct. 1991) and Esmond v. Liscio, 224 A.2d 793 (Pa. Super. Ct. 1966) in claiming that the Pennsylvania courts would not require the insurer to defend in such a case. In Martin, a man went on a shooting spree, intending to kill the family of his former fiancée's boyfriend. He entered their house, killing two family members and gravely wounding a border whose presence and identity were unknown to him at the time. When the wounded border sued the insured gunman, the court concluded that the insured's actions fell within the

exclusion for intended harm. It reasoned that the injury was of the same general type as that intended, that the intent transferred from the intended victims to the border, and that the injury therefore came within the exclusion. Id. at 1175. Martin is unlike the instant case, in which the physical injury is not of the same general type as the intended financial injury.

In Esmond v. Liscio, the insured's son, who was covered under the policy, admitted that he had opened the door of the car in which he was riding for the purpose of hitting a man who became the plaintiff in the underlying suit. The insurance policy stated that "assault and battery shall be deemed an accident (and hence covered by the policy) unless committed by or at the direction of the Named insured." Esmond, 224 A.2d at 798. In finding that the injury was excluded under the policy, the court stated that "the public policy forbidding indemnification to one who personally commits an assault would seem to apply with equal force, whether the tortfeasor is the named or additional insured." Id. This case does not discuss public policy with regard to indemnifying insureds who commit wrongs other than assault, but another Pennsylvania case does.

The Pennsylvania Supreme Court, in Eisenman v. Hornberger, 264 A.2d 673 (Pa. 1970), held that, even where the intended harm was a crime, if the unintended harm was of a different type from the intended harm, the insurer had to cover the damage caused by the unintended harm. In that case, Hornberger and a friend broke into the home of the Eisenmans, who

were out of town, to steal some liquor. While in the house, they lit matches to find their way around. As each match burned down, it was dropped. One match head lodged next to a chair cushion and, after smoldering for hours, started a fire which completely destroyed the house and its contents. Hornberger was covered under his father's policy, which excluded "property damage caused intentionally by or at the direction of the Insured." Id. at 674. The insurer contended that it would be against public policy to allow recovery on the insurance contract since the property damage occurred as a result of acts performed by the insured in the course of committing a crime. The Pennsylvania Supreme Court was not persuaded:

We note initially that the insurance contract itself does not contain a "violation of law" clause. [The insurer] is thus placed in the position of asserting that we should rewrite the policy to provide for a contingency which it could have provided for itself. However, under the facts of this case, we are not confronted with any overriding public policy which would preclude recovery. There is no evidence whatsoever that the policy was procured in contemplation of the crime. Nor can the insurance policy be said to have promoted the unlawful act. Moreover, it seems equally implausible that denying coverage would serve as a crime deterrent. Finally, the insurance policy in no way saves the insured from the consequences of his criminal act.

Id. at 675. In view of this statement by the Pennsylvania Supreme Court, this Court cannot conclude that U.S. Fire is excused from defending Rothenberg on grounds of public policy.

**C. "Arising out of the rendering or failure to render . . . legal services."**

In its Motion, U.S. Fire states that in the event the underlying complaint alleges claims for bodily injury or property damage, the claims are not covered due to the exclusion for such injury "arising out of the rendering or failure to render any professional services including, but not limited to, legal services." (Pl.'s Mot. at ¶ 23.) The underlying complaint alleges that Rothenberg participated in defrauding the plaintiffs by sharing fees and "holding" substantial cases for Norman Perlberger, presumably so certain money is not counted as part of the assets of Norman Perlberger and Perlberger Law Associates. (Und. Compl at ¶ 31.) This has to do with administrative matters, with the way the caseload and fees are recorded, and not with the rendering or failure to render legal services. Therefore, the exclusion does not apply.

#### **IV. CONCLUSIONS**

For the reasons discussed in the foregoing, the Court concludes that U.S. Fire has the duty to defend Rothenberg in the underlying lawsuit and will therefore grant Rothenberg's Countermotion for Partial Summary Judgment. The Court will deny U.S. Fire's Motion for Summary Judgment as to U.S. Fire's request for a declaratory judgment that it has no duty to defend Rothenberg in the underlying suit, but the issue of indemnity will have to await further developments. At this point, the Court cannot enter judgment as to the U.S. Fire's request for a declaratory judgment that it has no duty to indemnify Rothenberg

in the underlying suit because we do not know whether the plaintiffs in that suit will prevail on any or all of their claims against Rothenberg.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES FIRE INS. CO. : CIVIL ACTION  
: :  
v. : :  
: :  
ALLEN ROTHENBERG, ESQ., : :  
et al. : NO. 98-2275

O R D E R

**AND NOW**, this day of September, 1998, upon consideration of Plaintiff's Motion for Summary Judgment (Doc. No. 9), Defendant's Response and Countermotion for Partial Summary Judgment (Doc. No. 14), Plaintiff's Reply and Response (Doc. No. 15), and all the submissions thereto, it is **HEREBY ORDERED** that:

1. Plaintiff's Motion for Summary Judgment is **DENIED** insofar as Plaintiff seeks a declaration that it has no duty to defend Allen L. Rothenberg in the underlying suit;
2. Defendant's Countermotion for Partial Summary Judgment as to Plaintiff's duty to defend Allen L. Rothenberg in the underlying suit is **GRANTED**;
3. This action is **STAYED** insofar as Plaintiff seeks a declaration that it has no duty to indemnify Allen L. Rothenberg with regard to the claims set forth in the underlying suit; and
4. The Clerk is hereby directed to place this action in **SUSPENSE**.

BY THE COURT:

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JOHN R. PADOVA, J.