

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

ALLSTATE INSURANCE COMPANY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 02-1250
	:	
SABRINA LOMBARDI, et al.,	:	
Defendants.	:	

MEMORANDUM

LEGROME D. DAVIS, J.

JULY ____, 2003

Plaintiff Allstate Insurance Company (“Allstate”) initiated this declaratory judgment action by filing a complaint on March 12, 2002. In its complaint, Allstate seeks a declaration that it is not obligated either to defend or to indemnify its insureds, Raymond E. Picard and Katherine Picard (husband and wife), or their son, Michael Picard, in a state court action filed against them by Sabrina Lombardi. Michael Picard (“Michael”), Raymond and Katherine Picard (“Michael’s parents”) and Sabrina Lombardi (“Lombardi”) are named as Defendants in the instant action.

Presently before the Court is the Motion for Summary Judgment filed by Allstate on January 14, 2003 (“Allstate Motion”), a response thereto filed by Lombardi on January 28, 2003 (“Lombardi Response”), a response thereto filed by Michael and his parents on February 7, 2003 (“Picard Response”), a Cross Motion for Summary Judgment filed by Lombardi on January 28, 2003 (“Lombardi Cross Motion”), and supplemental briefs filed by all parties in accordance with this Court’s Order entered June 6, 2003.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In December, 2000, Lombardi filed a complaint in the Court of Common Pleas for Philadelphia County. See Allstate Motion, Ex. E. As explained in further detail below, the factual allegations and legal claims set forth in that complaint are crucial to the determination as to whether Allstate has a duty to defend and indemnify Michael or Michael’s parents in the underlying state court action. The complaint in the state court action alleges the following facts: that in the weeks prior to September 10, 1998, Michael “displayed clear evidence of severe depression, euphoria, paranoia and psychosis”; that Michael lived with his parents; that Michael’s parents knew or should have known that he had displayed evidence of psychosis and that he “posed a foreseeable threat to the public”; that despite such knowledge, Michael’s parents failed to have Michael “evaluated and treated by trained professionals”; and that, on September 10, 1998, without provocation, Michael “savagely attacked, assaulted and battered” Lombardi, inflicting “severe and permanent injuries.” See id. at ¶¶ 1-21. The complaint in the underlying action further sets forth the following legal claims: a claim for assault and battery against Michael (Count I); a claim for negligence against Michael (Count II)¹; and a claim for negligence against Michael’s parents (Count III).²

¹ The negligence claim against Michael alleges that Michael acted carelessly, negligently and/or recklessly by, *inter alia*: failing to seek treatment for his mental condition; failing to take medication to control his violent behavior; failing to seek counseling; and failing to avoid drinking alcohol or taking illegal drugs. See Allstate Motion, Ex. E at ¶¶ 26-29.

² The complaint in the underlying action also includes a claim for negligence against West Chester State University, the school Michael was attending at the time. That claim is not involved in the instant declaratory judgment action.

While the underlying state court action was pending, Allstate filed the instant declaratory judgment action on March 12, 2002. The complaint in the instant action alleges (and Defendants do not appear to dispute): that Michael’s father, Raymond Picard, purchased a homeowner’s liability insurance policy from Allstate in March, 1990 (the “Policy”); that the Policy was in effect on the date in question (September 10, 1998, the date that Michael attacked Lombardi³); and that the Policy provided Family Liability Protection. See Complaint (Docket Entry No. 1) at ¶¶ 9-11. Allstate’s complaint seeks a declaration by the Court that Allstate has no duty to defend or indemnify Michael or his parents in the underlying state court action. See id. at ¶¶ 27-31.

As noted, both Allstate and Lombardi have filed Motions for Summary Judgment. In its Motion, Allstate requests that the Court conclude as a matter of law *only* that it is not obligated to defend or indemnify Michael in the underlying state court action – Allstate does not seek summary judgment at this juncture on the issue of whether it has a duty to defend or indemnify Michael’s parents in the underlying action. In her Cross Motion for Summary Judgment, Lombardi requests that the Court conclude as a matter of law that Allstate *is* obligated to defend and indemnify Michael in the underlying action.⁴

³ It is undisputed that in February, 2000, Michael entered a plea of guilty to two counts of aggravated assault based upon the attack on Lombardi. See Allstate Motion, Ex. B.

⁴ A fair reading of Lombardi’s Cross Motion for Summary Judgment, and Lombardi’s Supplemental Memorandum of Law (“Lombardi Supp. Memo”) indicates that Lombardi, like Allstate, seeks a partial summary judgment ruling only as to the issue of whether Allstate is obligated to defend and indemnify Michael. See Lombardi Supp. Memo at 4 (summarizing the issue as whether “Allstate must be required to afford Picard with coverage.”)

II. LEGAL STANDARD

Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Under Pennsylvania law, the interpretation of insurance contracts is a question of law for the courts to decide. See Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997) (citing Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983)).⁵ “Whether a particular loss is within the coverage of an insurance policy is such a question of law and may be decided on a motion for summary judgment in a declaratory judgment action.” Bowers by Brown v. Estate of Feathers, 671 A.2d 695, 696 (Pa. Super. 1995) (quoting State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co., 657 A.2d 1252, 1255 (Pa. Super. 1995)).

“An insurer’s duty to defend . . . arises whenever an underlying complaint may ‘potentially’ come within the insurance coverage.” Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 746 (3d Cir. 1999).

The obligation of an insurer to defend an action is fixed solely by the allegations in the underlying complaint. If the factual allegations of the complaint, taken as true, state a claim to which the policy potentially applies, the insurer must defend.

Visiting Nurse Ass’n of Greater Philadelphia v. St. Paul Fire and Marine Ins. Co., 65 F.3d 1097, 1100 (3d Cir. 1995) (citations omitted). “Furthermore, if a single claim in a multicclaim lawsuit is potentially covered, the insurer must defend all claims until there is no possibility that the underlying plaintiff could recover on a covered claim.” Frog, Switch & Mfg. Co., 193 F.3d at 746.

⁵ The parties agree that Pennsylvania law applies to this diversity action.

Thus, in resolving whether an insurer is obligated to defend an action, the court must (1) interpret the language of the insurance policy, and (2) review the allegations in the underlying complaint. See Allstate Ins. Co. v. Brown, 834 F.Supp. 854, 857 (E.D. Pa. 1993). As to the first of these two tasks:

In interpreting an insurance policy, the court must ascertain the intent of the parties as manifested by the language of the policy. Where the language of the policy is clear and unambiguous, it must be given its plain and ordinary meaning. Where a provision of the policy is ambiguous, it must be construed in favor of the insured. However, a court should read policy provisions to avoid ambiguities and not torture the language to create them.

Id. (citations omitted). As to the applicable burdens of proof, the insured has the initial burden to establish coverage under an insurance policy. Continental Casualty Co. v. County of Chester, 244 F.Supp.2d 403, 407 (E.D. Pa. 2003). “On the other hand, when the insurer relies on a policy exclusion as the basis for denying coverage, it bears the burden of proving that the exclusion applies.” Id.

“The duty to indemnify is more limited than an insurer’s duty to defend, and ‘arises only when the insured is determined to be liable for damages within the coverage of the policy.’” Sphere Drake, P.L.C. v. 101 Variety, Inc., 35 F.Supp.2d 421, 427 (E.D. Pa. 1999) (citation omitted). Thus, if a court in a declaratory judgment action determines that the insurance company has no duty to defend its insured in the underlying action, it is appropriate for the court to also rule that the insurer has no duty to indemnify. See id. at 428. However, where it is determined that the insurer does have a duty to defend, and where the liability of the insured in the underlying action has not yet been determined, the issue of indemnification cannot be

addressed or resolved by the declaratory judgment court. See id. at 430-31; see also Nationwide Mut. Fire Ins. Co. v. McNulty, 1997 WL 805165, at *5 & n.2 (E.D. Pa. 1997).

III. ANALYSIS

The Policy defines “Insured Person” as any relative who is also a resident of the household, see Allstate Motion, Ex. D, and Allstate does not dispute that Michael qualifies as an “Insured Person” under the Policy. In Section II, entitled “Family Liability and Guest Medical Protection,” the Policy further provides as follows:

Subject to the terms, conditions, and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage *arising from an occurrence* to which this policy applies, and is covered by this part of the policy.

Id. The Policy defines “Occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage.” Id. The Policy also contains the following Exclusionary Clause:

We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:

- a) such insured person lacks the mental capacity to govern his or her conduct;

Id.

In their briefs, the parties focus primarily upon the language contained in the Exclusionary Clause. Michael and his parents argue that the language contained in the Exclusionary Clause (excluding coverage for bodily injury “intended” by an insured) has previously been held to be ambiguous as a matter of law, citing United Services Auto. Ass’n v.

Elitzky, 517 A.2d 982, 987 (Pa. Super. 1986), *appeal denied*, 528 A.2d 957 (Pa. 1987).⁶ They also argue that the Exclusionary Clause in the Policy does not apply because the evidence establishes that the assault occurred while Michael was suffering from “profound psychotic delusions.” Picard Response at 8. Similarly, Lombardi argues that the evidence clearly establishes that Michael did not act intentionally when he assaulted Lombardi, and, therefore, that the Court should conclude that the assault does not fall within the Exclusionary Clause. Memorandum of Law in Support of Defendant, Sabrina Lombardi’s Motion for Summary Judgment (“Lombardi Memo”) at 3-10.⁷ Allstate likewise focuses primarily upon the Exclusionary Clause, arguing that the injuries suffered by Lombardi as a result of Michael’s assault do fall within the scope of the Exclusionary Clause, and that Allstate therefore does not have a duty to defend Michael in the underlying action. Allstate’s Memorandum of Law in Support of Summary Judgment (“Allstate Memo”) at 4-5.

However, for purposes of determining the limited question of whether Allstate has a duty to defend Michael in the underlying action, the Court concludes that it need not reach an analysis of the Exclusionary Clause. This is because, according to the allegations in the complaint in the

⁶ The holding in Elitzky continues to be the law in Pennsylvania. See Aetna Life and Cas. Co. v. Barthelemy, 33 F.3d 189, 191 (3d Cir. 1994).

⁷ All of the parties have offered, and have requested that the Court consider, various pieces of evidence. For example, in support of her argument that Michael did not act intentionally when he assaulted her (and, therefore, that the Court should conclude that the assault does not fall within the Exclusionary Clause of the Policy), Lombardi has submitted a medical evaluation by Dr. James L. Schaller, M.D. See Lombardi Cross Motion, Ex. D. However, as noted above, the issue is whether “the factual allegations of the complaint, taken as true, state a claim to which the policy potentially applies.” Visiting Nurse Ass’n, 65 F.3d at 1100. Thus, the analysis must be based solely upon a review of the allegations in the complaint in the underlying action, and does not entail a consideration of additional evidence offered by the parties.

underlying action, the bodily injuries suffered by Lombardi did not arise from an “occurrence” as that term is defined in the Policy. The Court reaches this conclusion based upon the holding and reasoning in Nationwide Mut. Fire Ins. Co. of Columbus v. Pipher, 140 F.3d 222 (3d Cir. 1998).

In Pipher, the insured, who owned a multi-unit dwelling, had removed the doors to a second-floor apartment in order to install carpeting, and had allegedly failed to reinstall the doors. The insured then hired a painter who killed a tenant residing in the second-floor apartment. The decedent’s husband filed a state survival action for wrongful death against the insured, alleging that the insured engaged in various negligent acts (such as failing to reinstall the doors and hiring the painter, who was apparently known to be dangerous) which made possible the assault and murder. Nationwide then filed a declaratory judgment action in federal court seeking a declaration that it had no duty to defend and indemnify the insured. The policy provided the insured with liability coverage for all damages “due to an occurrence,” and defined “occurrence” as bodily injury resulting from an “accident.” Nationwide argued that the decedent’s death was caused by an intentional assault and murder committed by a third party, and thus her death was not an insured “occurrence” as defined in the policy. Id. at 223-24.

The Court summarized the issue as “whether bodily injury or death, directly caused by the intentional act of a third party but also attributable to the negligence of the policyholder-insured, constitutes an ‘occurrence,’ and thus obligates an insurer to defend, and potentially indemnify, its insured for the insured’s alleged negligence.” Id. at 223. Noting the “absence of any Pennsylvania Supreme Court precedent directly on point,” the Court held that, where an underlying complaint alleges that bodily injury or death, directly caused by the intentional act of a third party, is also attributable to the negligence of the insured, “the test of whether the injury or

damage is caused by an accident must be determined from the perspective of the insured and not from the viewpoint of the person who committed the injurious act.” Id. at 226.

The rule seems to be well-settled in other jurisdictions that it is the intentional conduct of the insured which precludes coverage, not the acts of third parties. Although a third party may have intentionally injured or killed the plaintiff, the death or injury may still be deemed to be an accident under the terms of the policy.

Id. Thus, the Court held that, from the perspective of the insured apartment owner, the death of the decedent was “unexpected, entirely fortuitous, and, therefore, an accident.” Id.⁸

Here, as noted above, the Policy defines “Occurrence” as “an accident . . . resulting in bodily injury or property damage.” Allstate Motion, Ex. D. Pursuant to the holding in Pipher, the question of whether the assault upon Lombardi may be deemed an “occurrence” (*i.e.*, an “accident”) under the Policy, such that Allstate might have a duty to defend Michael on the claims against him in the underlying action, must be determined from the perspective of Michael, the insured party at issue in this motion for summary judgment.⁹ The complaint in the underlying action alleges that Michael, without provocation, “wantonly, recklessly and with malicious intent to injure plaintiff, and with an absolute disregard for the health, safety and welfare of plaintiff,” “savagely attacked, assaulted and battered” Lombardi. Allstate Motion, Ex. E at ¶¶ 23-25. Thus,

⁸ The Court also noted that the policy contained a provision excluding coverage for bodily injury “expected or intended by the insured,” and held that this exclusionary clause, “included in standard-form comprehensive general liability policies since the mid-1960s, is not simply another definition of accident. Instead, its express purpose is to clarify the vantage point from which the fortuity of the occurrence should be viewed: the insured’s, and not that of the person who is injured or the insurer.” Id. at 226-27.

⁹ Whether the assault may have been an accident from the perspective of *Michael’s parents*, also insureds under the Policy, is a question for another day, as the instant motions seek summary judgment only as to Allstate’s duty to defend Michael in the underlying action.

according to the allegations in the complaint in the underlying action (which must form the sole basis for this Court’s analysis, Visiting Nurse Ass’n, 65 F.3d at 1100), it is apparent that the assault upon Lombardi was intentional from Michael’s perspective.¹⁰ As a result, the assault cannot constitute an “occurrence” under the Policy.¹¹

In summary, the Court concludes that Michael, the insured party in question, has failed to satisfy his initial burden of establishing coverage under the Policy. See Continental Casualty Co., 244 F.Supp.2d at 407. Pursuant to the holding and reasoning in Pipher, Michael’s assault upon Lombardi does not constitute an “occurrence” under the Policy because, from Michael’s perspective, the assault and the injuries resulting therefrom were intentional and not accidental.

¹⁰ Even if it were proper for the Court to consider evidence outside of the allegations in the underlying complaint, and even if the evidence submitted by the parties persuaded the Court that Michael’s psychotic state at the time of the assault was such that he did not have the capacity to govern his own conduct in accordance with reason, see e.g. Globe American Cas. Co. v. Lyons, 641 P.2d 251, 254 (Ariz. App. 1981), the Court would nonetheless conclude that Allstate does not have a duty to defend Michael in the underlying action. This is because the Exclusionary Clause in the Policy expressly excludes “bodily injury . . . intended by . . . any insured person . . . *even if . . . such insured person lacks the mental capacity to govern his or her conduct.*” Allstate Motion, Ex. D. In other words, the Policy explicitly contemplates precisely the kind of intentional acts, undertaken while in a psychotic state, which, according to Defendants, occurred here, and the Policy expressly excludes from coverage injuries resulting from such acts. See Allstate Ins. Co. v. Brown, 834 F.Supp. at 857 (“In interpreting an insurance policy, the court must ascertain the intent of the parties as manifested by the language of the policy. Where the language of the policy is clear and unambiguous, it must be given its plain and ordinary meaning.”).

¹¹ Pipher is also instructive in clarifying that, where it is alleged that injuries were caused both indirectly by the prior negligent acts of the insured, and directly by the intentional acts of the attacker, whether the injuries arose from an “occurrence” (*i.e.*, an accident) depends upon whether the *direct cause* of the injuries (*i.e.*, the assault) and the harm resulting therefrom were intended from the perspective of the insured, not whether the *indirect cause* of the injuries (*i.e.*, the insured’s alleged negligent acts) were intentional from the perspective of the insured. See Pipher, 140 F.3d at 226. Thus, the issue here is whether, from Michael’s perspective, *the assault upon Lombardi* was intentional, not whether, from Michael’s perspective, his alleged acts of negligence (such as failing to seek treatment or counseling) were intentional.

Thus, Allstate does not have a duty to defend Michael in the underlying state court action in which Lombardi seeks compensation for injuries arising from the assault. Further, because the Court holds that Allstate does not have a duty to defend Michael, the Court also holds that Allstate does not have a duty to indemnify Michael. See Sphere Drake, P.L.C., 35 F.Supp.2d at 428. An Order follows.

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	:	
SABRINA LOMBARDI, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this day of July, 2003, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the Motion for Summary Judgment filed by Plaintiff Allstate Insurance Company (“Allstate”) on January 14, 2003 (**Docket Entry No. 12**) is GRANTED and the Cross Motion for Summary Judgment filed by Defendant Sabrina Lombardi on January 28, 2003 (**Docket Entry No. 13**) is DENIED. It is further ORDERED that Allstate does not have a duty to defend or indemnify Defendant Michael Picard in the underlying state court action. The Clerk of Court is directed to designate these two motions as no longer pending for statistical purposes.

BY THE COURT:

Legrome D. Davis