

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

AMQUIP CORPORATION, ET AL.	:	CIVIL ACTION
	:	
v.	:	No. 03-4411
	:	
ADMIRAL INSURANCE COMPANY	:	

MEMORANDUM AND ORDER

Savage, J.

March 31, 2005

Amquip Corporation (“Amquip”) and four of its employees brought this action seeking a declaration that, pursuant to a commercial general liability policy, the defendant Admiral Insurance Company (“Admiral”) had a duty to defend them in a lawsuit in the Ohio state court which has since been dismissed.¹ Admiral argues that all claims were excluded from coverage because there was no occurrence triggering its duty to defend, the underlying state court complaint did not allege a covered loss, and the alleged misconduct did not occur within the policy period.² The parties have filed cross-motions for summary judgment.

We conclude that Admiral has not met its burden of demonstrating that the insurance policy excused it from defending Amquip and its employees. Accordingly, Amquip’s motion for summary judgment will be granted, Admiral’s motion for summary judgment will be denied and Admiral shall be ordered to reimburse Amquip for the expenses it incurred in defending the Ohio state court action.

¹ Jurisdiction in this declaratory judgment action is predicated on the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.

² In its response to Amquip’s motion for summary judgment, Admiral withdrew its argument that the Maxim complaint did not allege conduct occurring during the policy period. *Def. Resp. and Mem. of Law in Opp. to Pl. Mot. for Summ. J.* at 14.

The Underlying Action

Amquip, Frank Bardonaro, Sr., Frank Bardonaro, Jr., Jeff Steigerwald and Jeffrey Hammons were named as defendants in a complaint filed by Maxim Crane Works (“Maxim”) in the Ohio state court.³ The complaint contained five causes of action: misappropriation of trade secrets, unfair competition, conversion, breach of duty of loyalty and tortious interference with contractual relations. Maxim alleged that Frank Bardonaro Jr. (“Bardonaro Jr.”) and the other individual defendants left Maxim’s employ in Ohio to work for Amquip, which had opened an office in the Dayton-Cincinnati area to compete with Maxim.⁴ The complaint avers that Bardonaro, on behalf of Amquip, misappropriated Maxim’s customer lists and enticed its employees to defect to Amquip by offering higher salaries and misrepresenting that Maxim was in “dire financial straits.”⁵ Maxim also claimed that Bardonaro and the other individual defendants damaged Maxim’s business and reputation, with Amquip’s knowledge, for the purpose of giving Amquip a competitive advantage in the Dayton-Cincinnati area.⁶

Admiral’s Denial of Amquip’s Claim

Amquip timely notified Admiral of the claim and sought a defense under the commercial general liability policy issued by Admiral.⁷ On October 14, 2002, Admiral

³ *Anthony Crane Rental, L.P. d/b/a Maxim Crane Works v. Amquip Crane Corp., et al.*, No. A0207475, Court of Common Pleas of Hamilton County, Ohio. (filed Sept. 26, 2002).

⁴ *Maxim Compl.* ¶ 5 (Amquip App., Ex. 6).

⁵ *Maxim Compl.* ¶¶ 4-6 (Amquip App., Ex. 6).

⁶ *Maxim Compl.* ¶¶ 37-38, 48, 43, 59, 65 (Amquip App., Ex. 6)

⁷ *Maxim Compl.* ¶ 27 (Amquip App., Ex. 6).

denied coverage.⁸ Admiral's Claims Superintendent, Scott Mansfield ("Mansfield"), after reading only the heading of each count and not its contents, decided that the complaint did not allege any claims of bodily injury, property damage, or personal and advertising injury that would instigate coverage.⁹ The final decision to deny coverage rested with Mansfield's supervisor, Jane Hill ("Hill").¹⁰ Relying solely on Mansfield's recommendation, Hill affirmed his decision without reviewing the complaint, policy or claims file herself.¹¹

After receiving the letter denying coverage, Amquip's CEO, Stephen Stunder ("Stunder"), contacted Mansfield and identified several parts of Maxim's complaint which he believed triggered coverage.¹² He specifically pointed to the averment which alleged that Bardonaro had represented to Maxim employees that Maxim was in financial trouble.¹³ In response, Mansfield reiterated his position that there was nothing in the complaint's language disparaging Maxim's business, goods, products or services that would invoke coverage under the policy.¹⁴ Hill again ratified Mansfield's decision without reviewing the claims file herself.¹⁵

Rejecting Stunder's invitation to meet with him, Mansfield suggested that he was too

⁸ *Letter from Mansfield to Amquip, October 12, 2002* (Amquip App., Ex. 12).

⁹ *Mansfield Dep.* at 69 (Amquip App. Ex. 9).

¹⁰ *Hill Dep.* at 30 (Amquip App., Ex. 10).

¹¹ *Hill Dep.* at 36-37 (Amquip App., Ex. 10).

¹² *E-mail from Stunder to Mansfield, October 23, 2002* (Amquip App., Ex. 13).

¹³ *Id.*

¹⁴ *Letter from Mansfield to Stunder, October 31, 2002* (Amquip App., Ex. 14).

¹⁵ *Hill Dep.* at 47, 49 (Amquip App., Ex. 10).

busy but would review the claim again if Stunder forwarded case law to support Amquip's position.¹⁶ Coverage counsel for Amquip then requested Mansfield to reconsider the claim.¹⁷ Mansfield ignored the request. Admiral never defended the Ohio action, which was eventually terminated without any payment.

On April 28, 2003, in what it characterizes as a strategic response to Maxim's Ohio state court action, Amquip initiated actions in the United States District Court for the Eastern District of Pennsylvania and the Philadelphia County Court of Common Pleas against Maxim's Board of Directors and several Maxim employees. The Amquip lawsuits alleged that Maxim tortiously interfered with contractual relationships between Amquip and other companies.

We must decide whether Admiral had a duty to defend Amquip against Maxim's Ohio state action. Before doing so, we must determine what state law controls.¹⁸

Choice of Law

Amquip, a Pennsylvania corporation with its principal place of business in Pennsylvania, entered into the insurance contract with Admiral, a Delaware corporation, at Amquip's office in Cateret, New Jersey.¹⁹ Amquip contends that Pennsylvania law applies. Admiral argues that either Pennsylvania or New Jersey law controls because Amquip resides in Pennsylvania and the contract was entered into in New Jersey.

¹⁶ *E-mail from Mansfield to Sciacca, February 3, 2003* (Amquip App., Ex. 16); *Letter from Mansfield to Amquip, March 13, 2003* (Amquip App., Ex. 17).

¹⁷ *Letter from Lytle to Mansfield, May 19, 2003* (Amquip App., Ex. 18).

¹⁸ The parties do not dispute that Admiral issued Amquip the policy effective from January 1, 2002 to January 1, 2003. The policy is an "occurrence" based policy.

¹⁹ *Compl. ¶¶ 1, 6; Commercial General Liability Coverage, "Common Policy Declarations"* (Amquip App., Ex. 5).

A federal court sitting in diversity must apply the forum state's choice of law rules. *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir. 1996) (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). Hence, we shall apply Pennsylvania law in considering the motions.

Pennsylvania applies a two-part analysis to resolve choice of law questions. First, the court must determine whether the conflict is real or false. Second, if there is a true conflict, the court must then decide which state has the greater interest in the application of its law. *LeJeune*, 85 F.3d at 1071 (citing *Cipolla v. Shaposka*, 267 A.2d 854, 855 (Pa. 1970)).

If after applying the respective law of each state to the same set of facts the result is the same, there is no conflict. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 839 n.20 (1985). In other words, there is a false conflict where the application of either state's law renders the same result. *Lacey v. Cessna Aircraft Co.*, 932 F.3d 170, 187 (3d Cir. 1991). A true conflict, on the other hand, exists when applying the law of the one state frustrates the intent of the other state's law. *Id.*

If a true conflict exists, a court must examine which state has the greater interest in the application of its law. This part of the analysis requires reviewing the contacts which each state has with the events giving rise to the litigation. *Lejeune*, 85 F.3d at 1071.

Although New Jersey and Pennsylvania differ with respect to the manner of determining which state law should apply, the principles of contract interpretation are identical in both states. Compare *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284 (3d Cir. 2004), and *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255 (N.J. 1992), with *Cont'l Cas. Ins. Co. v. County of Chester*, 244 F. Supp. 2d 403 (E.D. Pa. 2003). Because the

outcome would be the same regardless of whether we applied Pennsylvania or New Jersey law, there is no real conflict. Therefore, we need not decide the choice of law issue. See, e.g., *Lucker*, 23 F.3d at 813.²⁰

Legal Standard

The interpretation of an insurance contract is a question of law for the court to decide. *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997) (citing *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983)). “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.” *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 657 A.2d 1252, 1255 (Pa. Super. 1995).

A court must give effect to the plain language of the insurance contract read in its entirety. *Reliance*, 121 F.3d at 901 (citing *Standard Venetian Blind*, 469 A.2d at 566). When the language of an insurance policy is ambiguous, the provision must be construed in favor of the insured. *Reliance*, 121 F.3d at 900-01 (citing *Standard Venetian Blind*, 469 A.2d at 566). Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning. *Bowersox v. Progressive Cas. Ins. Co.*, 781 A.2d 1236, 1239 (Pa. Super. 2001) (citing *Hutchison v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1985)). However, the language of an insurance policy should not be stretched beyond its plain meaning to create an ambiguity. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*,

²⁰ The plaintiff argues that Pennsylvania law controls while the defendant concedes that the legal standard under Pennsylvania and New Jersey law are identical. Therefore, because the plaintiff cites exclusively to Pennsylvania law, we shall cite to Pennsylvania law.

735 A.2d 100, 106 (Pa. 1999).

The insured has the initial burden of establishing coverage under an insurance policy. *Butterfield v. Giuntoli*, 670 A.2d 646, 651-52 (Pa. Super. 1995). 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. *Mistick, Inc. v. Northwestern Nat. Cas. Co.*, 806 A.2d 39, 42 (Pa. Super. 2002). The insurer can sustain its burden only by establishing the exclusion's applicability by uncontradicted facts in the record. See *Butterfield*, 670 A.2d at 651-52; *Miller v. Boston Ins. Co.*, 218 A.2d 275, 277 (Pa. 1966). Policy exclusions are strictly construed against the insurer. *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 n.3 (3d Cir. 1998) (citing *Standard Venetian Blind*, 469 A.2d at 566).

Duty to Defend

An insurance carrier's duty to defend is distinct from its duty to provide coverage. It is interpreted more broadly than the duty to indemnify. *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649, 651 (Pa. Super. 1994). An insurer may have a duty to defend even though it may have no duty to indemnify. *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 746 (3d Cir. 1999). A duty to indemnify does not arise until the insured is found liable for a covered claim. *Id.*

An insurer is obligated to defend the insured against any suit arising under the policy "even if the suit is groundless, false, or fraudulent." *Britamco*, 636 A.2d at 651 (quoting *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 188 A.2d 320, 321 (Pa. 1963)). Consequently, whenever a complaint filed against the insured could potentially come within the policy's coverage, the insurer's duty to defend is triggered. *Phico Ins. Co. v. Presbyterian Med.*

Servs. Corp., 663 A.2d 753, 755 (Pa. Super. 1995). If a single claim in a multiple claim complaint is potentially covered, the duty to defend attaches until the underlying plaintiff can no longer recover on a covered claim. *Frog, Switch & Mfg. Co.*, 193 F.3d at 746. Because the duty to defend is broader than the duty to indemnify, the complaint must be construed liberally, the factual allegations must be accepted as true, and all doubts as to coverage resolved in favor of the insured. *Roman Mosaic & Tile Co. v. Aetna Cas. & Sur. Co.*, 704 A.2d 665, 669 (Pa. Super. 1997).

Applying these principles to this case, we examine the insurance policy and the allegations of the complaint. The facts are not in dispute.²¹ Thus, our task is to decide whether the insurer had a duty to defend under the policy as a matter of law.

Scope of Coverage

The commercial general liability coverage policy issued to Amquip provides that Admiral “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘personal advertising injury’ to which this insurance applies.”²² It further assures that it “will have the right and duty to defend any ‘suit’ seeking those damages.”²³ Coverage extends to employees for personal and advertising injury caused by the employees within the scope of their employment or while performing duties related to the

²¹ In its appendix of exhibits to their motion for summary judgment, the plaintiffs submitted a statement of undisputed facts. (Amquip App., Ex. 1). In its response, although it disputes the plaintiffs’ characterization of some facts, the defendant does not dispute any of the controlling facts. *Mot. Summ. J. of Admiral Ins. Co.* Ex. H.

²² *Commercial General Liability Coverage*, § I(1)(a) (Amquip App., Ex. 5).

²³ *Id.*

insured's business.²⁴

Personal and advertising injury is defined as:²⁵

[I]njury, including consequential "bodily injury", arising out of one or more of the following offenses:

. . .

- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services

Personal and Advertising Injury Liability

Admiral contends that personal and advertising injury liability coverage does not apply to Amquip's claims because the underlying complaint did not state a cause of action for defamation or disparagement. Amquip, on the other hand, argues that Maxim's allegation that Amquip's employee had disparaged Maxim's financial status in his campaign to lure employees to Amquip and to steal Maxim's customers and trade secrets amounts to disparagement of Maxim's business.

Specifically, the complaint alleges:

- Amquip solicited and misappropriated Maxim's trade secrets, customer lists, a proprietary safety manual, and a proprietary personal protective equipment manual.²⁶
- Amquip solicited Maxim employees to illegally divert customer inquiries and business from Maxim to Amquip, and agreed to pay or paid bribes, kickbacks and/or commissions to Maxim employees in return.²⁷

²⁴ *Commercial General Liability Coverage*, § II(2)(a) (Amquip App., Ex. 5).

²⁵ *Commercial General Liability Coverage*, § V(14) (Amquip App., Ex. 5).

²⁶ *Maxim Compl.* ¶ 3 (Amquip App., Ex. 6).

²⁷ *Maxim Compl.* ¶ 4 (Amquip App., Ex. 6).

- Bardonaro Jr., contrary to representations he made to Maxim, remained in the Dayton and Cincinnati area and assisted in the opening of an office for Amquip directly in competition with Maxim. He further utilized those misrepresentations to misappropriate information and to entice employees of Maxim to leave Maxim with offers of increased salaries and suggestions that Maxim was in dire financial straits.²⁸
- Frank Bardonaro, Sr. (“Bardonaro Sr.”), contrary to representations he made to Maxim that he was retiring, accepted employment with Amquip in the Dayton and Cincinnati area and utilized this misrepresentation to prepare and misappropriate a list consisting of names of Maxim’s employees, customers, and contacts that he compiled while employed by Maxim.²⁹
- Bardonaro Jr. lured more than a dozen employees of Maxim to Amquip. Bardonaro Jr.’s actions were undertaken with the intent to cripple an integral part of Maxim’s business organization. Bardonaro Jr. began to conduct these activities while still employed by Maxim.³⁰
- Bardonaro Jr. continued his misappropriation of trade secrets of Maxim after joining Amquip. After departing Maxim, he acquired information about Maxim’s sales efforts and encouraged Maxim employees who were about to leave Maxim to join Amquip to bring with them Maxim’s trade secrets.³¹
- Bardonaro Sr. misappropriated trade secrets of Maxim including addresses and phone numbers of customers and other business contacts that he acquired while employed at Maxim.³²
- Jeff Steigerwald misappropriated trade secrets of Maxim including bidding information and bidding quotes that he submitted while at Maxim. During his last days at Maxim, he submitted unjustifiably high price quotes to one or more customers on behalf of Maxim. Then,

²⁸ *Maxim Compl.* ¶ 5 (Amquip App., Ex. 6).

²⁹ *Maxim Compl.* ¶ 6 (Amquip App., Ex. 6).

³⁰ *Maxim Compl.* ¶ 19 (Amquip App., Ex. 6).

³¹ *Maxim Compl.* ¶ 21 (Amquip App., Ex. 6).

³² *Maxim Compl.* ¶ 22 (Amquip App., Ex. 6).

shortly after starting work for Amquip, he called the same customers and quoted lower prices to them on behalf of Amquip.³³

In summary, the Maxim complaint alleged that Bardonaro Jr. and his accomplices disparaged Maxim's financial position, misappropriated trade secrets and customer lists, sabotaged Maxim's customer relations and persuaded several Maxim employees to defect to Amquip for the purpose of crippling Maxim to gain a competitive advantage. These allegations mirror the language of the Ohio statute defining deceptive trade practices: the disparagement of "the goods, services or business of another by false representation of fact." OHIO. REV. CODE ANN. § 4165.02(A)(10). Ohio also recognizes the tort of unfair competition, which includes unfair commercial practices such as the circulation of false rumors designed to harm the business of another. *Cannon Group, Inc. v. Better Bags, Inc.*, 250 F. Supp. 2d 893, 904 (S.D. Ohio. 2003) (quoting *Water Mgmt. Inc. v. Stayanchi*, 472 N.E.2d 715, 717 (Ohio 1984)).

In examining the Maxim complaint, we are mindful that Ohio is a notice pleading jurisdiction. A plaintiff need not plead the legal theory of recovery under Ohio notice pleading and is not confined to any particular theory of a claim and can rely on the facts developed by the evidence to establish a right to relief. *Leichliter v. Nat'l City Bank of Columbus*, 729 N.E.2d 1285, 1288-89 (Ohio Ct. App. 1999) (citing OHIO R. CIV. P. 8(A)). Hence, in the Ohio action, Maxim was not required to include in its complaint specific facts and details supporting its claims.

Applying the liberal rules of notice pleading, we conclude that the conduct alleged by Maxim could, if proven, make out causes of action for deceptive trade practices and

³³ *Maxim Compl.* ¶ 23 (Amquip App., Ex. 6).

commercial disparagement. Maxim's failure to use "magic words" in citing the elements of defamation and disparagement does not relieve Admiral of its duty to defend. The substance of Maxim's claims are covered by the policy. *Id.*³⁴

The allegations in the Maxim complaint fall within the ambit of advertising injury as defined in the policy, the language of which tracks Ohio statutory and common law. The complaint averred that Amquip, through its employees, made false or misleading statements for the purpose of luring customers from Maxim to Amquip. It also alleged that Bardonaro Jr. and Steigerwald enticed Maxim customers to Amquip by disparaging Maxim's financial condition. Amquip's alleged efforts to undermine Maxim in communications to Maxim employees and customers are classic examples of unfair trade practice and commercial disparagement. In short, the alleged misrepresentations slandered Maxim's business.

In determining whether Admiral had a duty to defend its insured, the benefit of all doubts must be resolved in favor of Amquip. *Unionamerica Ins. Co., Ltd. v. J.B. Johnson*, 806 A.2d 431, 433 (Pa. Super. 2002). Applying this standard, we find that Maxim's allegations that Bardonaro and his co-defendants disparaged Maxim's financial condition and enticed customers to shun Maxim in favor of Amquip stated a claim for advertising injury, as defined in the policy and under Ohio law.

Exclusions

Admiral asserts that various policy exclusions relieve it from its duty to defend

³⁴ Federal courts applying Ohio law have stressed that the interaction between the duty to defend and notice pleading requires an insurer to defend a claim if the claim is "potentially or *arguably* within the policy coverage." *Weiss v. St. Paul Fire & Marine Ins. Co.*, 283 F.3d 790, 796 (6th Cir. 2002) (quoting *City of Willoughby Hills v. Cincinnati Ins. Co.*, 459 N.E.2d 555, 558 (Ohio 1984)).

against alleged personal and advertising injury.³⁵ The first exclusion relied upon by Admiral precludes coverage for injury “caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and cause ‘personal and advertising injury.’”³⁶ The other exclusion invoked bars coverage for any injury “arising out of oral or written publication of material, if done at the direction of the insured, with knowledge of its falsity.”³⁷

In considering whether the exclusions apply, we keep in mind that Maxim was not required to fully develop the facts supporting each of its claims in its complaint and could develop facts in the litigation to make out its claims. We must also strictly construe the policy language against the insurer. *Selko*, 139 F.3d at 152 n.3 (citing *Standard Venetian Blind*, 469 A.2d at 566).

Despite its burden of establishing that the exclusions apply, Admiral fails to identify uncontradicted facts in the record which establish that either exclusion applies. See *Butterfield*, 670 A.2d at 651-52; *Miller*, 218 at 277. Admiral relies on the “with knowledge” language in each exclusion. Admiral asserts, without citing a single fact, that Maxim’s complaint alleges that Amquip employees, at the direction of Amquip, *intended* to harm

³⁵ In a brief two sentence argument, Admiral asserts that the exclusion barring coverage for personal and advertising injury arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights, precludes coverage in this case. *Commercial General Liability Coverage*, §I(B)(2)(I) (Amquip App., Ex. 5). Admiral argues that Count I of the Maxim complaint alleges that Amquip and its employees misappropriated Maxim’s trade secrets, which falls within the scope of the exclusion. We need not address this argument because we have determined that Admiral had a duty to defend Amquip against Maxim’s allegations that Amquip disparaged Maxim’s financial condition and enticed customers to shun Maxim in favor of Amquip. Once Admiral’s duty to defend was triggered, it was bound to defend Amquip until Maxim was no longer able to recover on a covered claim.

³⁶ *Commercial General Liability Coverage*, § I(B)(2)(a) (Amquip App., Ex. 5).

³⁷ *Commercial General Liability Coverage*, § I(B)(2)(b) (Amquip App., Ex. 5).

Maxim's business and does not allege that Amquip or its employees were negligent, careless or reckless.³⁸ If intentional conduct were proven, coverage would have been barred. However, if the evidence developed during the course of the litigation would have established that some or all of the conduct was unintentional, reckless or merely negligent, the exclusions would not have applied. Consequently, Admiral may or may not ultimately have had a duty to indemnify Amquip.³⁹ In the meantime, it had a duty to defend its insured.

Admiral misstates what Maxim's complaint actually alleges. In several paragraphs in the complaint, Maxim alleges that Amquip and its employees acted with "reckless indifference to Maxim's interests."⁴⁰ Therefore, because none of the exclusions were applicable at that stage of the litigation, Admiral was bound to defend Amquip in the Maxim action until Maxim was no longer able to recover on a covered claim. See *Frog, Switch & Mfg. Co.*, 193 F.3d at 746.⁴¹

Damages

Amquip seeks reimbursement for all expenses and costs it was required to spend in defending Maxim because Admiral had refused to do so. It includes the cost of instituting and litigating federal and state actions against Maxim's Board of Directors

³⁸ *Mot. for Summ. J. of Def. Admiral Ins. Co.* at 42.

³⁹ Subsequent to the initiation of this action, the Ohio action was terminated without any payment. Therefore, Count II of Amquip's complaint seeking indemnification must be dismissed as moot.

⁴⁰ *Maxim Compl.* ¶ 48, 59, 65 (Amquip App., Ex. 6).

⁴¹ Amquip and Admiral devote many pages of their motions arguing whether the Maxim complaint was an occurrence triggering coverage under the "Property Damage" section of the policy. Because we find that Admiral had a duty to defend Amquip against the "Personal and Advertising Injury" counts of the complaint, we need not decide whether there was an occurrence triggering coverage for alleged property damage.

brought in Pennsylvania.

In determining damages for breach of a duty to defend under an insurance contract, we apply normal contract principles. *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 188 A.2d 320, 322 (Pa. 1963). A breaching insurer must pay the costs the insured incurred in defending the underlying action, including obtaining substitute counsel. *Kiewit Eastern Co. v. L & R Const. Co.*, 44 F.3d 1194, 1205 (3d Cir. 1995); *Am. States Ins. Co. v. State Auto Ins. Co.*, 721 A.2d 56, 64 (Pa. Super. 1998) (citing *Gedeon*, 188 A.2d 320). Therefore, Admiral must reimburse Amquip for the expenses Amquip incurred in defending the Maxim complaint.

Amquip argues that it is also entitled to reimbursement for the expenses incurred in prosecuting the separate actions in the federal and state courts in Pennsylvania because those claims were inextricably intertwined with the Maxim litigation. Amquip suggests that the filing of these separate actions “were intended to, and did, bring pressure to bear on Maxim and its decision makers to dismiss their lawsuit against Amquip.” *Pl. Mot. for Summ. J.* at 19. Amquip characterized the filing of these actions as a “strategy” and a “defensive measure” designed to force Maxim to settle the Ohio state court litigation.

The cases cited by Amquip do not support its contention that the *separate* lawsuits filed in different jurisdictions are inextricably intertwined with the Maxim complaint. Although the pursuit of counterclaims may be a necessary litigation defense that is intertwined with the defense of the underlying complaint, Amquip did not file counterclaims in the Maxim action. Rather, Amquip filed new and separate actions in other courts. Indeed, the cases cited by Amquip involved counterclaims raised in the same proceeding. See *TIG Ins. Co. v. Nobel Learning Cmtys.*, No. Civ.A. 01-4708, 2002 WL 1340332, at *14-

15 (E.D. Pa. June 18, 2002) (Giles, J.); *Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co.*, 766 F. Supp. 324, 333-34 (E.D. Pa. 1991) (Katz, J.) (rev'd on other grounds).

Instead of asserting counterclaims against Maxim in the Ohio state court, Amquip made a strategic decision to institute separate civil actions in federal and state courts in Pennsylvania. If courts were to consider the costs an insured incurred by instituting its own action for the purpose of bringing pressure on the other party under the guise of a litigation defense, it would encourage and endorse multiplicity of litigation. This is much different than requiring the insurer to reimburse the insured for the cost of prosecuting counterclaims raised in the same action.

We are unable to determine from the facts presented whether Amquip incurred costs common to both the defense of the Ohio action and the prosecution of the Pennsylvania actions. Therefore, the damages calculation must await trial.

Conclusion

Applying the standards for insurance contract interpretation and resolving all doubts in favor of the insured, we find that the allegations in the Maxim complaint potentially constituted “personal and advertising injury” as defined in the policy. Therefore, Admiral had a duty to defend Amquip in the Maxim action and must reimburse Amquip for litigation expenses and the costs incurred by Amquip in defending the Ohio action.

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

AMQUIP CORPORATION, ET AL.	:	CIVIL ACTION
	:	
v.	:	No. 03-4411
	:	
ADMIRAL INSURANCE COMPANY	:	

ORDER

AND NOW, this 31st day of March, 2005, upon consideration of the Plaintiffs' Motion for Partial Summary Judgment (Document No. 8), the defendant's response, the Motion for Summary Judgment of Defendant Admiral Insurance Company (Document No. 10) and the plaintiffs' response, it is **ORDERED** as follows:

1. The defendant's motion for summary judgment is **DENIED**;
2. The plaintiffs' motion for partial summary judgment is **GRANTED**;
3. It is **DECLARED** that Admiral Insurance Company had a duty to defend Amquip Corporation and its employees in the underlying Ohio state court action;
4. **Count II** of the complaint is **DISMISSED**;
5. **JUDGMENT IS ENTERED** in favor of the plaintiffs and against the defendant on **Count I** of the complaint; and,
6. **JUDGMENT IS ENTERED** in favor of the plaintiffs and against the defendant on **Count III** of the complaint as to liability only.

/s/
TIMOTHY J. SAVAGE, J.