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

ASSURANCE COMPANY OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	04-3172
	:	
v.	:	
	:	
LEE H. ROSENAU and ALAN J. DION and FREDERICK E. SMITH and CHARLES P. MENSZAK and DOUGLAS G. AARON, and LEE H. ROSENAU and ALAN J. DION and FREDERICK E. SMITH and CHARLES P. MENSZAK and DOUGLAS G. AARON t/a DION, ROSENAU, SMITH, MENSZAK & AARON, f/k/a DION, ROSENAU & SMITH,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J. **April 14, 2005**

Plaintiff, Assurance Company of America, brings this action pursuant to 28 U.S.C. § 2201 seeking a declaratory judgment that it is not obligated to defend or indemnify Defendants Dion, Rosenau, Smith, Menszak & Aaron in Cavoto v. State Farm Ins. Co., a civil action pending in the Court of Common Pleas of Philadelphia County. Presently before this Court are the parties' cross-motions for summary judgment. For the reasons which follow, Plaintiff's motion for summary judgment shall be granted, and Defendants' motion shall be denied.

Facts

This case has its origins in Robert J. Cavoto, Jr., et al v.

State Farm Ins. Co., et al, No. 03-2620, a civil action before the Court of Common Pleas of Philadelphia County. In that action, Dr. Cavoto, a chiropractor, raises claims of civil conspiracy and abuse of process against Defendants Lee H. Rosenau, Alan J. Dion, Frederick E. Smith, Charles P. Menszak, Douglas G. Aaron, and their Philadelphia law firm, Dion, Rosenau, Smith, Menszak & Aaron ("Dion Rosenau"). Dr. Cavoto claims that Dion Rosenau abused the legal process as a pretext to investigate Dr. Cavoto and his chiropractic clinics, and that, as a result, "[Dr. Cavoto's] business practices were made part of the public record and thus became available to [his] business competitors."

Specifically, Dr. Cavoto objects to Dion Rosenau's conduct during a deposition held in connection with an unrelated personal injury action brought by a chiropractic patient. Dion Rosenau, representing State Farm Insurance Company, deposed an employee of Fishbone Advertising, a company which provides marketing services to Dr. Cavoto's chiropractic clinics. Dr. Cavoto's complaint alleges that the questions asked at deposition were "aimed at attempting to learn the business practices" of Dr. Cavoto, his clinics, and Fishbone Advertising, and that "none" of these questions were relevant to the case at hand or reasonably calculated to lead to the discovery of admissible evidence. Dr. Cavoto seeks damages in excess of $50,000 for Dion Rosenau's allegedly improper use of the legal process and wrongful

incursion into his private life and business.

Dion Rosenau's general liability insurer, Plaintiff Assurance Company of America ("Assurance"), provides coverage for certain civil proceedings arising out of personal and advertising injury. The Assurance Policy defines "personal and advertising injury" as injury caused by a variety of offenses, including "misappropriation of advertising ideas or style of doing business." Dion Rosenau contends that Assurance has a duty to defend and indemnify them against Dr. Cavoto's abuse of process claim, because the injury alleged by Dr. Cavoto relates to Dion Rosenau's misappropriation of his advertising ideas and business style.[1] In bringing this declaratory judgment action, Assurance denies that Dion Rosenau's conduct, as described in Dr. Cavoto's complaint, amounts to misappropriation giving rise to personal or advertising injury under the Assurance Policy.

Standard of Review

The interpretation of an insurance policy, including whether a particular loss is within the policy's coverage, is a question of law and may be decided on a motion for summary judgment in a

[1] The Assurance Policy also establishes that personal or advertising injury may arise in the context of "malicious prosecution" claims. Dion Rosenau initially argued that Assurance had a duty to defend them against Dr. Cavoto's abuse of process claim pursuant to the "malicious prosecution" clause, but has since abandoned this position.

declaratory judgment action. Fireman's Fund Ins. Co. v. Empire Fire & Marine Ins. Co., 155 F. Supp. 2d 429, 431 (E.D. Pa. 2001). A court may properly grant a motion for summary judgment only where all of the evidence before it demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-32 (1986). The parties in this action agree that there is no genuine issue of material fact relating to the Assurance Policy. The parties also agree that the Assurance Policy is governed by Pennsylvania law. See Travelers Indem. Co. v. Fantozzi, 825 F. Supp. 80, 84 (E.D. Pa. 1993) (under Pennsylvania choice of law rules, an insurance contract is governed by the law of the state in which it is delivered).

Under Pennsylvania law, an insurer's duty to defend arises "whenever the complaint filed by the injured party may potentially come within the policy's coverage." Pacific Indem. Co. v. Linn, 766 F.2d 754, 760 (3rd Cir. 1985).[2] In determining

[2] Defendants Dion Rosenau urges this Court to look beyond the four corners of Dr. Cavoto's complaint for the purposes of this determination, citing Safeguard Scientifics, Inc. v. Liberty Mutual Ins. Co., 766 F. Supp. 324, 330 (E.D. Pa. 1991). However, later cases have clearly established that the obligation to defend is determined solely by the allegations within the complaint itself. See I.C.D. Indus. v. Federal Ins. Co., 879 F. Supp. 480, 488 (E.D. Pa. 1995); Nutrisystem, Inc. v. Nat'l Fire Ins. of Hartford, No. 03-6932, 2004 U.S. Dist. LEXIS 23496, 21-22 (E.D. Pa. 2004).

whether a duty to defend exists, the factual allegations of the complaint must be taken as true and liberally construed in favor of the insured. Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. Ct. 1992) (citing Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484 (1959)). As the duty to defend is broader than the duty to indemnify, it follows that there is no duty to indemnify where there is no duty to defend. Atlantic Mutual v. Brotech, 857 F. Supp. 423, 430, n. 7 (E.D. Pa. 1994).

Discussion

The heart of Dr. Cavoto's abuse of process claim is that Dion Rosenau used its deposition and subpoena powers as a pretext to investigate Dr. Cavoto's business practices, and that these business practices subsequently became part of the public record. The central issue before this Court is whether the injury alleged by Dr. Cavoto arises from Dion Rosenau's "misappropriation" of Dr. Cavoto's "advertising ideas or style of doing business."

For the purposes of Pennsylvania insurance policies, the Third Circuit has defined misappropriation of an advertising idea as "the wrongful taking of an idea concerning the solicitation of business and customers," and misappropriation of a style of doing business as "the wrongful taking of a company's plan for interacting with consumers and getting their business." Green

Mach. Corp. v. Zurich-American Ins. Group, 313 F.3d 837, 841 (3rd Cir. 2002) (citing Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742 (3rd Cir. 1999)). This Court finds that Dion Rosenau's conduct, as described by Dr. Cavoto's complaint, does not fall within these definitions.

First, Dr. Cavoto's complaint merely alleges that Dion Rosenau's conduct was aimed at "attempting to learn the business practices" of Dr. Cavoto, his chiropractic clinics, and Fishbone Advertising. The complaint does not specify that the targeted business practices involved solicitation of customers. Indeed, of the allegedly improper deposition questions highlighted in Dr. Cavoto's complaint, the few which touch on "business practices" do not implicate methods of customer solicitation.[3]

Furthermore, the "wrongful taking" aspect of the Third Circuit's definition necessarily implies that the misappropriated information be taken by a third party either for use towards the third party's own benefit, or in an effort to capitalize unfairly on the original owner's good will or investment. See, e.g., CAT

[3] Of the allegedly improper questions identified in the complaint, the only ones that bear any reasonable relation to Dr. Cavoto and Fishbone Advertising's business practices are questions about the number of shareholders in Fishbone Advertising, the number of offices in which Dr. Cavoto has an interest, and the identity of the individual who drafted the Fishbone Advertising employee's employment agreement. None of these questions directly touch on the solicitation of patients by Dr. Cavoto or Fishbone Advertising.

Internet Servs. v. Providence Wash. Ins. Co., 333 F.3d 138, 142 (3rd Cir. 2002) (misappropriation found where the complaint alleged that an insured wrongfully obtained marketing ideas for the purpose of gaining customers); Sorbee Int'l Ltd. v. Chubb Custom Ins. Co., 735 A.2d 712, 716 (Pa. Super. Ct. 1999) (under the common law tort of misappropriation, defendant's actions can be characterized as "reaping what it has not sown" to gain a competitive advantage). Dr. Cavoto's complaint bears no indication that Dion Rosenau used Dr. Cavoto's business information in an effort to capitalize unfairly on Dr. Cavoto's investment. Indeed, the complaint specifies that the purpose of Dion Rosenau's allegedly improper conduct was to maximize the profits of Dion Rosenau's client, State Farm Insurance, at Dr. Cavoto's expense. Even reading the complaint in its most favorable light, there is no suggestion that Dion Rosenau wished to obtain Dr. Cavoto's business information due to some benefit that might accrue from having the information itself. At best, the complaint alleges only that Dion Rosenau abused the deposition process in an effort to extend discovery and wear down Dr. Cavoto's resources, but that the nature of the information actually obtained was irrelevant. Notably, Dion Rosenau, a general practice law firm, would gain no competitive or other advantage by learning about a chiropractor's business practices or solicitation schemes. Defendants Dion Rosenau have failed to

identify even a single case analogous to this situation, or, for that matter, any cases where the alleged misappropriation arose outside the context of a competitive relationship between two parties within the same industry.

For the above reasons, this Court finds that the abuse of process claim raised in Cavoto v. State Farm Ins. Co. does not allege an injury resulting from Defendant Dion Rosenau's misappropriation of Dr. Cavoto's advertising ideas or style of doing business. Thus, Plaintiff Assurance has no duty to defend or indemnify Defendants Dion Rosenau in the pending action.

An appropriate Order follows.

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	:	
Defendants.	:	

ORDER

AND NOW, this 14th day of April, 2005, upon consideration of Plaintiff Assurance Company of America's Motion for Summary Judgment (Doc. No. 26), Defendants Dion Rosenau's Motion for Summary Judgment (Doc. No. 28), and all responses thereto (Docs. No. 27, 29, 30, 31), it is hereby ORDERED that Plaintiff's Motion is GRANTED and Defendants' Motion is DENIED.

IT IS FURTHER ORDERED that JUDGMENT is ENTERED in the above action for Plaintiff and against Defendants.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.