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

THE PATRIOT GROUP, INC., et al.	:	CIVIL ACTION
v.	:	NO. 04-5814
COLUMBIA CASUALTY COMPANY	:	

MEMORANDUM

Padova, J. **August 23, 2005**

Plaintiffs, The Patriot Group, Inc. ("Patriot") and Ron Dunn, have brought this declaratory judgment action against Defendant Columbia Casualty Company ("Columbia") seeking the enforcement of an Errors and Omissions insurance policy. Presently before the Court are the parties' Cross-Motions for Summary Judgment. For the reasons that follow, Plaintiffs' Motion is granted and Columbia's Motion is denied.

I. BACKGROUND

Ron Dunn is the President and owner of Patriot, which is in the business of selling life insurance and annuity products. (Pls.'s Ex. L at 43-45; Def.'s Ex. E.) In February 2004, Columbia issued an Errors and Omissions insurance policy, Policy No. 169846365, with a policy period running from February 1, 2004 through February 1, 2005, to Legacy Marketing Group (the "Policy"). (Pls.' Ex. E; Def.'s Ex. F.) Ron Dunn is insured as an agent or general agent under the Policy. (Id.) The Policy also provides that Columbia will defend and indemnify "any corporation, partnership, or other business entity owned and controlled by [an

agent or general agent], but only with respect to the liability of such entity as it arises out of such natural person rendering or failing to render Professional Services." (Id., General Terms & Conditions, at 1.)

Patriot has been named as a defendant in Gilmour v. Bohmueller, Civ. A. No. 04-2535, and Miller v. Amerus Group, Civ. A. No. 04-3799, two civil actions filed in the United States District Court for the Eastern District of Pennsylvania. (Pls.' Ex. C-D; Def.'s Ex. A-B.) Plaintiffs in Gilmour and Miller allege that they were the victims of a fraudulent living trusts and annuities scheme, and seek injunctive relief and damages from defendants for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, fraudulent and negligent misrepresentations, breach of contract, breach of fiduciary duty, and consumer protection law violations. (Id.) Ron Dunn tendered the Gilmour and Miller complaints to Columbia and sought coverage for Patriot under the Policy. (Pls.' Ex. F-G; Def.'s Ex. C-D.) Columbia declined to extend coverage to Patriot for the Gilmour and Miller actions on August 4, 2004, and January 25, 2005, respectively, and has since refused to defend Patriot in both cases. (Id. at 2-3.) Columbia explained its decision to decline coverage as follows:

> Our records indicate that The Patriot Group is owned and controlled by you. However, while the Complaint[s] in th[ese] matter[s] name[] The Patriot Group as a defendant, there are no

> allegations pertaining to and/or arising out of your "rendering or failing to render Professional Services." . . . As such, The Patriot Group is not an Insured under the Policy relative to the referenced action[s].

(Id. at 2.)

In response to Columbia's denial of coverage Plaintiffs filed the instant lawsuit seeking a declaratory judgment that Columbia is required to defend and indemnify Patriot in the Gilmour and Miller actions under the terms of the Policy. Plaintiffs further seek an order compelling Columbia to reimburse Plaintiffs for all costs they have thus far incurred in defending the Gilmour lawsuit and pursuing the instant declaratory judgment action. Presently before the Court are the parties' Cross-Motions for Summary Judgment.

II. LEGAL STANDARD

Summary judgment is appropriate "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" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial

responsibility for 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 (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. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "If the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d

1358, 1363 (3d Cir. 1992). Where, as here, cross-motions for summary judgment have been presented, the court must consider each party's motion individually. Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998). Each side bears the burden of establishing a lack of genuine issues of material fact. Id.

III. DISCUSSION

A. Applicable Law

This Court has diversity jurisdiction over the instant action pursuant 28 U.S.C. § 1332. In diversity actions, the Court must apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Under Pennsylvania's choice of law principles actions on insurance policies are governed by the law of the state in which the policy was delivered. CAT Internet Servs., Inc. v. Provident Wash. Ins. Co., 333 F.3d 138, 141 (3d Cir. 2003). When, as here, there is no information as to where a contract was delivered, Pennsylvania courts presume the place of delivery to be the location of the insured's residency. Travelers Indem. Co. v. Fantozzi, 825 F. Supp. 80, 84 (E.D. Pa. 1993). Ron Dunn, the relevant insured under the Policy, (see Policy General Terms & Conditions at 1), is a resident of the Commonwealth of Arizona. (Compl. ¶ 1.) The parties, however, seem to agree that Pennsylvania law applies and have briefed this matter accordingly.

Before a choice of law question arises, there must first be an actual conflict between the potentially applicable bodies of law. On Air Entm't Corp. v. Nat'l Indem. Co., 210 F.3d 146, 149 (3d Cir. 2000). The parties have not pointed to any differences between the Pennsylvania and Arizona laws relevant to this case, and this Court has not independently found any conflict. Accordingly, no choice of laws question is presented, and the laws of both Pennsylvania and Arizona can be referred to interchangeably. Id. As the parties have addressed only Pennsylvania law in their motions, the Court will equally cite to Pennsylvania cases.

The interpretation of insurance contracts is a question of law which lies within the province of the courts. Sphere Drake, P.L.C. v. 101 Variety, Inc., 35 F. Supp. 2d 421, 427 (E.D. Pa. 1999) (citing Niagra Fire Ins. Co. v. Pepicelli, Pepicelli, Watts & Youngs, P.C., 821 F.2d 216, 219 (3d Cir. 1987)). The court's primary consideration is "to ascertain the intent of the parties as manifested by the language of the written instrument." Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). In doing so, "an insurance policy must be read as a whole and construed according to the plain meaning of its terms." C.H. Heist Caribe Corp. v. Am. Home Assurance Co., 640 F.2d 479, 481 (3d Cir. 1981). "In cases where the wording is ambiguous, relevant extrinsic evidence should be considered to resolve the ambiguity." 12th Street Gym, Inc. v. Gen. Star Indem. Co., 980 F. Supp. 796,

801 (E.D. Pa. 1997). When such evidence does not resolve the dispute, "the provision must be construed in favor of the insured, and against the insurer, the drafter of the contract." Sphere Drake, 35 F. Supp. 2d at 427. However, "a court should read policy provisions to avoid ambiguities, if possible, and not torture the language to create them." St. Paul Fire & Marine Ins. Co. v. United States, 655 F.2d 521, 524 (3d Cir. 1981).

An insurer's duty to defend is determined solely from the allegations in the underlying complaint giving rise to the claim against the insured. State Farm Fire & Cas. Co. v. Tolmie, Civ. A. No. 97-7878, 1998 WL 737981, at *2 (E.D. Pa. Oct. 22, 1998) (citing Lebanon Coach Co. v. Carolina Ins. Co., 675 A.2d 279, 286 (Pa. Super. Ct. 1996)).[1] The duty to defend an insured 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 (3d Cir. 1985). The duty to defend thus exists "even if the complaint asserting claims against the insured is 'groundless, false, or fraudulent.'" Sphere Drake, 35 F. Supp. 2d

[1] The Court notes that under Arizona law, "[t]he duty to defend stems from the facts, not the allegations of the complaint." N. Ins. Co. of N.Y. v. N.W. Nat'l Cas. Co., 918 P.2d 1051, 1053(Ariz. Ct. App. 1996). Accordingly, "[t]he insurer may conduct a reasonable investigation and refuse to defend based upon the actual rather than alleged facts." Id. Here, however, the Policy provides that Columbia has "the right and the duty to defend [a claim brought against an insured], even if any allegations of the [c]laim are groundless, false or fraudulent." (Policy, General Terms & Conditions, at 7.) Arizona law permitting an insurer to refuse to defend based upon the actual rather than alleged facts is, therefore, inapplicable.

at 427 (quoting Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 321 (Pa. 1963)).

> In determining whether the complaint asserts a claim against the insured to which the policy potentially applies, the factual allegations of the complaint are controlling. If the factual allegations of the complaint, taken as true and construed liberally, state a claim to which the policy potentially applies, the insurer must defend, unless and until it can narrow the claim to a recovery that the policy does not cover.

Sphere Drake, 35 F. Supp. 2d at 427 (internal quotations omitted). "To determine whether a claim may potentially come within the coverage of a policy[,] [courts] must ascertain the scope of the insurance coverage, and then analyze the allegations in the complaint." Id. While the insured has the burden of establishing coverage under an insurance policy, Erie Ins. Exch. v. Transam. Ins. Co., 533 A.2d 1363, 1368 (Pa. 1987), the insurer has the burden of showing that policy exclusions preclude coverage. Am. States Ins. Co. v. Maryland Cas. Co., 218 A.2d 275, 277 (Pa. 1966).

B. Scope of Insurance Coverage

The Policy insures Legacy Marketing Group, the policyholder, as well as every "Agent and/or General Agent" thereof. (Policy, Agents & General Agents, at 1.) The Policy defines an "Agent and/or General Agent" as:

> a natural person:
> a. who maintains a life agent contract with a life insurance company **Policyholder** (or with a life insurance company subsidiary of the **Policyholder**); and

> b. who has elected to enroll for coverage under this Policy; and
> c. whose enrollment is on file with the **Policyholder**.
>
> **Agent and General Agent** also includes any corporation, partnership, or other business entity owned and controlled by such natural person, but only with respect to the liability of such entity as it arises out of such natural person rendering or failing to render **Professional Services**.

(Policy, General Terms and Conditions, at 1.) The term "Professional Services"

> means only the following services to the extent they are provided in the course and scope of the **Insured's** business as an **Agent and/or General Agent**[:]
> . . .
> **d.** Sale, attempted sale or servicing of life insurance, . . . fixed annuities . . .;
> **e.** Sale, attempted sale, or servicing of variable annuities . . . ;
> financial planning activities in conjunction with services described in . . . this definition, whether or not a separate fee is charged.

(Policy, Agents & General Agents, at 2.)

The parties do not dispute that Ron Dunn is an insured agent or general agent under the Policy. (Pls.' Mot. at 3; Def.'s Mot. at 9.) Similarly, the parties do not dispute that Patriot is owned and controlled by Ron Dunn. (Id.) Accordingly, Columbia is under a duty to defend Patriot against any liability that "arises out of [Ron Dunn] rendering or failing to render Professional Services." (Policy, General Terms and Conditions, at 1.) It is well-established that "language in a professional liability policy

stating that the insurer will cover all injuries 'arising out of' the rendering or failure to render professional services . . . signals that the coverage is to be broadly construed." Westport Ins. Corp. v. Bayer, 284 F.3d 489, 497 (3d Cir. 2002) (citing Danyo v. Argonaut Ins. Cos., 464 A.2d 501, 502 (Pa. Super. Ct. 1983)). Accordingly, in the absence of a more specific definition in the insurance contract,

> 'arising out of' means causally connected with, not proximately caused by. The phrase 'arising out of,' has been equated with 'but for' causation. Therefore, if the nature of the allegations and claims raised in the underlying complaint . . . arise[s] out of the [actions] enumerated in the policy, those claims would potentially fall under the coverage of the policy and [the insurer] would be under a duty to defend.

Roman Mosaic & Tile Co. v. Aetna Cas. & Sur. Co., 704 A.2d 665, 669 (Pa. Super. Ct. 1992) (internal quotations and citations omitted); see also CGU Ins. v. Tyson Assocs., 140 F. Supp. 2d 415, 420 (E.D. Pa. 2001). The term "Professional Services" is defined by the Policy itself to include only the sale, attempted sale, or servicing of certain investment vehicles, including annuities. (Policy, Agents & General Agents, at 2.) The Court, therefore, finds that coverage under the Policy extends to Patriot for lawsuits in which the alleged liability is causally connected to Ron Dunn engaging or failing to engage in the sale, attempted sale, or servicing of certain investment vehicles, including annuities.

C. Allegations in Underlying Complaints

The parties agree that, for purposes of this action, the Miller and Gilmour complaints set forth substantially identical allegations. (Pls.' Mot. at 1-2; Def.'s Mot. at 6.) As the parties have addressed the instant Motions primarily on the basis of the Gilmour complaint, the Court will similarly conduct its analysis of the underlying complaints' allegations based upon the pleadings submitted in Gilmour.[2] The third amended complaint ("Complaint") in Gilmour contains the following allegations. The Gilmours are the victims of a fraudulent living trusts and annuities scheme that was perpetrated by attorneys, annuity and insurance companies, and their sales agents. (Gilmour Compl. ¶ 1.) As part of this scheme, the attorneys and companies promote, market, and sell annuities, insurance policies, and living trusts to senior citizen consumers through the sales agents, which included Patriot, as well as Stephen Strope and Michael Hamilton, both of whom are former Patriot employees. (Id. ¶¶ 1, 33-38.).

Acting on behalf of the attorneys, insurance and annuity companies, Patriot, Strope, and Hamilton induced elderly consumers to purchase various investment vehicles by exploiting the trust

[2] Plaintiffs and Columbia have cited to the second amended complaint and the initial RICO case-statement filed in the Gilmour action. In the time since the parties submitted their Cross-Motions for Summary Judgment, however, plaintiffs in Gilmour have filed a third amended complaint and an amended RICO case-statement. As the third amended complaint and amended RICO case-statement contain identical allegations with respect to Patriot as the previous submissions, the Court will cite to the third amended complaint and amended RICO case-statement for purposes of deciding the instant Motions.

these consumers place in them and misrepresenting the various investments' benefits. (Id.) In doing so, Patriot and the other sales agents "engaged in unfair and deceptive trade practices through their misrepresentations, actions and conduct, in promoting, marketing, selling and delivering living trusts to senior citizen consumers . . . and in promoting, marketing, and delivering trusts and other legal documents." (Id. ¶ 106.)

In furtherance of the overall fraudulent living trusts and annuities scheme, Hamilton met with the Gilmours on March 22, 2001. (Id. ¶¶ 123, 125.) Hamilton never disclosed that he was acting as an insurance salesperson for Patriot, and persuaded the Gilmours of the need to purchase a revocable living trust and estate planning. (Id.) After this initial meeting with Hamilton, the Gilmours met exclusively with Strope, who continued to promote the living trusts and annuities that the sales agents were selling on behalf of the attorneys and annuity company defendants. (Id. ¶¶ 127-28.) As a result of Patriot, Hamilton, and Strope's actions, the Gilmours transferred "all or a portion of their assets and their life savings" and purchased annuities, insurance products, and living trusts that were adverse to their interests. (Id. ¶ 114.) The Complaint asserts claims against Patriot for fraudulent and negligent misrepresentations, civil RICO, conspiracy to violate RICO, civil conspiracy, breach of contract, breach of fiduciary duty, and violations of the Pennsylvania Unfair Trade Practices and

Consumer Protection Act. (Id. at 53-84.)

The Gilmours also filed an amended RICO case-statement, which alleges that one of the annuity company defendants wired "Ron Dunn/Patriot" a payment of $61,336.07. (Gilmour RICO Case-Statement at 35, ¶ 5.) Moreover, the RICO case-statement alleges that "Ron Dunn, President and CEO of Patriot," sent a letter to the Gilmours relating to the departure of Strope from Patriot in mid-May 2002. (Id. at 43, ¶ 38.)

D. Rule 56(c) Motions

Plaintiffs argue that the facts alleged in the underlying complaints and RICO case-statement suffice to extend Policy coverage to Patriot, because Ron Dunn fully controlled Patriot and the company, therefore, could not have acted as alleged without Ron Dunn himself authorizing and implementing the relevant actions. As discussed *supra*, pursuant to the Policy, Columbia is under a duty to defend Patriot in actions where Patriot's potential liability is causally connected to Ron Dunn's sale, attempted sale, or servicing of annuities. Columbia argues that Policy coverage does not extend to the Gilmour and Miller actions because Ron Dunn is not named as a defendant in the underlying complaints. Moreover, Columbia contends that any actions taken by Patriot with respect to the sale, attempted sale or servicing of annuities cannot be equated with similar actions taken by Ron Dunn, because Patriot is, by definition, a separate and distinct legal entity. Accordingly,

Columbia argues that it is not under a duty to defend Patriot in the Gilmour and Miller actions.

However, it is well-established that corporate liability can be based upon actions taken by corporate officers, because a "corporation acts only through its officers." Maier v. Maretti, 671 A.2d 701, 707 (Pa. Super. Ct. 1995). Here, it is undisputed that Ron Dunn is the President, owner, and sole officer of Patriot. Ron Dunn's actions taken on behalf of Patriot are, therefore, actions by a corporate officer, and can form the basis of any liability that might be imposed on Patriot. Moreover, the underlying complaints do not exclude actions taken by Ron Dunn with respect to Patriot's sale and promotion of annuities as a potential basis for the imposition of liability. Accordingly, the Court finds that Patriot's liability in the underlying actions potentially flows from Ron Dunn's actions.

Columbia further argues that, even if Patriot's liability is based on Ron Dunn's actions, it is not under a duty to defend Patriot because Ron Dunn did not render or fail to render professional services. Specifically, Columbia maintains that the underlying complaints allege that the only Patriot employees who had contact with plaintiffs were Strope and Hamilton, and that any liability imposed on Patriot thus arises out of the sale, attempted sale, or servicing of annuities by them, rather than by Ron Dunn. The underlying complaints, however, repeatedly assert that, in

addition to Strope and Hamilton, Patriot itself engaged in the sale of annuities to plaintiffs. (See Gilmour Compl. ¶¶ 1, 33-38, 106, 114.) Construed broadly, the underlying complaints therefore do not limit Patriot's liability to Strope and Hamilton's sale, attempted sale, and servicing of annuities on behalf of Patriot. Rather, Patriot's liability in Gilmour and Miller could also be based on the sale of annuities by other individuals acting on behalf of Patriot who have not yet been identified. See Maier, 671 A.2d at 707 (a corporation cannot itself act, but instead "acts only through its officers"). As Ron Dunn is Patriot's President and sole owner, Ron Dunn cannot at this point be excluded as an individual who sold or attempted to sell the relevant annuities on behalf of Patriot. The Court, therefore, finds that the Gilmour and Miller complaints assert claims that could arise out of Ron Dunn's "sale, attempted sale, or servicing" of annuities for the plaintiffs.

Moreover, the Court finds that coverage under the Policy may extend to Patriot in the Gilmour and Miller actions even if Ron Dunn did not himself directly sell annuities to plaintiffs. Under the Policy, coverage extends to Patriot for liability that is causally related to Ron Dunn's "sale, attempted sale or servicing" of annuities. (See Policy, Agents & General Agents, at 1-2.) The Policy does not state that coverage extends to Patriot only for liability arising out of the direct sale by Ron Dunn of a specific

annuity to a specific consumer. Nor does the Policy specifically exclude the implementation of broader sales practices geared towards advancing the overall sale of annuities from the "sale, attempted sale or servicing" of annuities. Where a policy provision is ambiguous, "the provision must be construed in favor of the insured, and against the insurer, the drafter of the contract." Sphere Drake, 35 F. Supp. 2d at 427. Construing the "sale, attempted sale or servicing" of annuities against Columbia, the Court finds that this provision is not limited to the direct sale of annuities to specific individuals.

The underlying complaints allege that Patriot conspired with the other defendants to create and perpetrate a fraudulent living trusts and annuities scheme. (Gilmour Compl. ¶ 1.) The goal of the conspiracy is to sell as many annuities and living trusts as possible to vulnerable consumers whose best interests were not served by these investment vehicles. (Id. ¶¶ 1-2) In furtherance of this fraudulent living trusts and annuities scheme, Patriot targets elderly persons who own their homes and make a certain level of income. (Id. ¶ 93.) Patriot then interviews these consumers at their homes, misrepresents the benefits of annuities, and persuades the consumers to invest their savings in the annuity products sold by Patriot on behalf of the other defendants. (Id. ¶¶ 94, 98.)

Construed broadly, the underlying complaints thus allege that

Patriot had implemented a corporate policy of selling annuities by defrauding elderly consumers. The responsibility for implementing and overseeing this policy might well lie with Ron Dunn, the President and sole owner of Patriot. The Court, therefore, finds that the Gilmour and Miller complaints state claims against Patriot that could arise out of Ron Dunn rendering or failing to render such professional services. Accordingly, the Court concludes that the underlying complaints, construed liberally, state a claim to which the Policy potentially applies. See Sphere Drake, 35 F. Supp. 2d at 427. As Columbia is under a duty to defend Patriot unless and until it can narrow the underlying claims to a factual scenario that the Policy does not cover, Plaintiffs' Motion for Summary Judgment is granted and Columbia's Motion is denied.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Cross-Motion for Summary Judgment is granted, and Columbia's Cross-Motion for Summary Judgment is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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v.	:	
	:	NO. 04-5814
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O R D E R

AND NOW, this 23rd day of August, 2005, upon consideration of Plaintiffs' Motion for Summary Judgment (Doc. No. 7), Defendant's Motion for Summary Judgment (Doc. No. 9), all filings received in response thereto, and the argument held on August 11, 2005, **IT IS HEREBY ORDERED** as follows:

1. Plaintiffs' Motion for Summary Judgment (Doc. No. 7) is **GRANTED** in its entirety, and judgment is **ENTERED** in favor of Plaintiffs and against Defendant; and
2. Defendant's Motion for Summary Judgment (Doc. No. 9) is **DENIED**.

The Clerk of Court shall close this case for statistical purposes.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.