

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

DEREK HAMBURG : CIVIL ACTION
v. :
14,000 SIBLINGS, INC. d/b/a PAPA :
JOHN'S BOARDWALK BAR AND GRILL :
v. :
CERTAIN UNDERWRITERS AT LLOYD'S, :
LONDON, GARNISHEE : No. 97-7951

ORDER-MEMORANDUM

AND NOW, this 26th day of August, 1998, upon cross-motions for judgment on the pleadings, Fed.R.Civ.P. 12(c), the motion of plaintiff Derek Hamburg is denied, and the motion of garnishee Certain Underwriters at Lloyd's, London is granted.

According to plaintiff, the garnishee Certain Underwriters is liable for all or part of a judgment in plaintiff's favor against the Underwriters' insured, defendant 14,000 Siblings, Inc., for \$800,000.¹ Pl. cross-mot. ¶ 9. The judgment was part of a settlement of plaintiff's claims against defendant 14,000 Siblings for liquor liability, general liability and general negligence.² Before the settlement occurred, defendant had demanded that Certain Underwriters, its liability carrier, provide

¹ See Hamburg v. 14,000 Siblings et al., No. 2222, March Term 1996, C.P. Philadelphia, "Stipulation for Entry of Judgment" dated July 22, 1997. The stipulation is at exh. 2 to def. notice of removal.

² According to plaintiff, the agents and employees of defendant 14,000 Siblings, the owner and operator of Papa John's Boardwalk Bar and Grill, "encouraged and solicited Plaintiff to become inebriated, intoxicated and to leave the premises and operate his automobile which resulted in a one-car collision...." Pl. cross-mot. ¶ 5.

a defense and undertake indemnification against plaintiff's claims. Pl. cross-mot. ¶ 5. Relying upon a liquor liability exclusion in the insurance policy,³ Certain Underwriters disclaimed its obligation to do so.⁴ Def. mot. at 4. Defendant thereupon assigned its insurance policy rights to plaintiff, who initiated a garnishment proceeding in state court against the insurer.⁵ Id. Certain Underwriters' defense is that it had no duty to defend in the underlying action by reason of the policy exclusion. The parties stipulated to resolve the controversy by cross-motions for judgment on the pleadings.⁶

Certain Underwriters' duty to defend, plaintiff maintains, arose because the underlying complaint contained a "general negligence" count,⁷ and "Pennsylvania state courts have

³ The exclusion is as follows: "This insurance does not apply to: (c) 'Bodily injury or 'property damage' for which any insured may be held liable by reason of (1) Causing or contributing to the intoxication of any person; (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages." Pl. cross-mot. exh. C.

⁴ The timeliness of the disclaimer is not an issue.

⁵ On December 23, 1997, the garnishment action was removed here by defendant.

⁶ See "Joint Statement as to Procedural Posture": "The parties agree that the issue of whether the Underwriters had a duty to defend the underlying action is a question of law which can be determined by the Court through cross-motions for judgment on the pleadings." Pl. cross-mot. exh. F.

⁷ The negligence alleged in the underlying complaint, No. 2222, March Term 1996, C.P. Philadelphia, is "General negligence specially alleging negligence, improper supervision and improper
(continued...)

held that in the analogous situation of an assault and battery exclusion, the insurer must defend against claims sounding in negligence." Pl. cross-mot. ¶ 8.⁸ For further support, plaintiff points to the recent case of Nationwide v. Pipher, 140 F.3d 222, 225 (3d Cir. 1998). There, our Court of Appeals predicted that, in the assault and battery context, Pennsylvania would "hold that an insurance company has a duty to defend its insured against complaints alleging negligent conduct on the part of the insured as well as a third party's intentional conduct." Also, plaintiff's cross-motion contends that the insurer was required to file a declaratory judgment action and, having not done so, is estopped now to deny that duty. Id. at 4.

The position of Certain Underwriters is that "the claims of Derek Hamburg are plainly subject to the [liquor liability] policy exclusion, and the Underwriters had no duty to defend or to indemnify their insured in the underlying case." Def. mot. at 7-8. The reason is that "no legal duty would have been owed by the tavern to Mr. Hamburg and no liability would have existed had it not been for the tavern's role in causing or contributing to Hamburg's drunkenness, or furnishing him with alcoholic beverages."

⁷(...continued)
training" of defendant's employees. Pl. cross-mot. ¶ 4.

⁸ Plaintiff relies on cases in which a claim of negligence against an insured has been found to trigger the insurer's duty to defend despite an assault and battery exclusion. Pl. cross-mot. at 9-13; see, e.g., Britamco Underwriters v. Weiner, 431 Pa. Super. 276, 636 A.2d 649, alloc. denied, 540 Pa. 575, 655 A.2d 508 (1994).

Id. at 8. Therefore, argues Certain Underwriters, because the "gravamen of plaintiff's complaint" is the service of alcoholic beverages, all of plaintiff's claims are subsumed in the liquor liability exclusion. Id. at 8-9.

Here, there is no theory of liability advanced that would not necessarily involve the serving of alcohol. This is in sharp contrast to the assault and battery intentional conduct exclusion cases in which the issue concerns the intent of a third party and not the insured. In those instances, the conduct of the third party may be intentional albeit not the conduct of the insured.

The law on the insurer's duty to defend is: "In the event that the complaint alleges a cause of action which may fall within the coverage of the policy, the insurer is obligated to defend." Stidham v. The Millvale Sportsmen's Club, 421 Pa. Super. 548, 564, 618 A.2d 945, 953 (1992). In the assault and battery cases, where a separate cause of action for negligence is pleaded against the insured, the insurer's duty to defend is implicated. See, e.g., Stidham v. The Millvale Sportsmen's Club, 421 Pa. Super. at 564-65, 618 A.2d at 953-54. However, "if coverage cannot possibly extend to the claims at issue ... an insurer has no duty to either indemnify or defend." Those Certain Underwriters v. 6091 Frankford Ave., Inc., No. 96-4733, 1997 W.L. 22407, *2 (VanArtsdalen, J.) (citing Germantown Ins. Co. v. Martin, 407 Pa. Super. 326, 595 A.2d 1172 (1991), appeal denied, 531 Pa. 646, 612 A.2d 985 (1992)). In the liquor liability context, "the question...becomes whether the negligence claims seek to impose liability on the insured on any

other basis than as a business which sold and served alcoholic beverages to [plaintiff]." Those Certain Underwriters, 1997 W.L. 22407 at *4. See also Hermitage Ins. Co. v. Walters, 882 F. Supp. 31, 33 (D. Conn. 1995) (same). If the negligence claims arise solely out of selling or serving of alcohol, the claims are not potentially within the scope of the policy and the duty to defend is not occasioned.

Here, despite a claim of "general negligence," the sole basis for liability against the insured is the serving of alcoholic beverages. This specific conduct is expressly excluded from coverage under the insurance policy.⁹ Furthermore, there appears to be no legal obligation on the part of the insurer to obtain a declaratory judgment before denying the duty to defend or raising the exclusion as a defense.¹⁰

⁹ Nationwide v. Pipher, *supra*, is not on point. Like the other assault and battery cases, in Pipher the act of a third-party - in addition to the insured's negligence - contributed to plaintiff's injuries. In contrast, in the liquor liability context, the only acts causing injury are those of the insured. This is true even if, as here, those acts are pleaded as the negligent hiring of employees or negligently controlling its business. See complaint ¶¶ 27-28. An inseparable causal factor remains the serving of liquor.

¹⁰ The cases cited in plaintiff's cross-motion are unhelpful. See Stidham, 421 Pa. Super. at 568, 618 A.2d at 955 (insurer that denied duty to defend was collaterally estopped from re-litigating issues decided in the underlying proceeding); Mechetti v. Weisberg, No. 3102 Phil. 1996, slip op. at 12 (Pa. Super. June 10, 1997) (as a matter of law, insurer that violated duty to defend could not establish that plaintiff's claims fell within the policy's assault and battery exclusion).

Edmund V. Ludwig, J.