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United States District Court  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALLSTATE INSURANCE COMPANY,  
  
Plaintiff,  
  
v.  
  
RICHARD BARNETT, *et al.*,  
  
Defendants.

No. C-10-0077 EMC

**ORDER DENYING PLAINTIFF'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS OR, IN THE  
ALTERNATIVE, FOR SUMMARY  
JUDGMENT; AND GRANTING  
DEFENDANT'S MOTION TO STAY**

**(Docket Nos. 23, 25)**

Plaintiff Allstate Insurance Company has filed suit against Defendants Richard Barnett and Mario Alexander.<sup>1</sup> Previously, Allstate had issued a homeowners insurance policy to Mr. Barnett. While the policy was in place, Mr. Alexander was allegedly injured as a result of actions taken by Mr. Barnett. Mr. Alexander filed an action against Mr. Barnett in state court asserting negligence as well as an intentional tort. Mr. Barnett tendered defense of this underlying action to Allstate. Allstate agreed to pay and has been paying for the defense of the underlying action subject to a reservation of rights. In the case pending before this Court, Allstate asks for a declaration that it has no duty to defend or indemnify Mr. Barnett.

Currently pending before the Court are two motions: (1) Allstate's motion for judgment on the pleadings or, in the alternative, for summary judgment and (2) Mr. Barnett's motion to dismiss, or, in the alternative, stay Allstate's lawsuit. Having considered the parties' briefs and

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<sup>1</sup> Allstate and Mr. Alexander have reached a stipulation that he will be bound by any judgment and rulings by the Court in this case. *See* Docket No. 44 (stipulation); Docket No. 45 (order).

1 accompanying submissions, as well as the oral argument of counsel, the Court **DENIES** Allstate’s  
2 motion in its entirety and **GRANTS** Mr. Barnett’s alternative motion for a stay.

3 **I. FACTUAL & PROCEDURAL BACKGROUND**

4 In their pleadings, the parties agree that, in April 2009, Allstate issued a homeowners policy  
5 to Mr. Barnett. *See* Compl. ¶ 6; Ans. ¶ 6. The parties also agree that, in September 2009, Mr.  
6 Alexander initiated a lawsuit against Mr. Barnett based on an event that took place while the  
7 homeowners policy was in place. *See* Compl. ¶ 7; Ans. ¶ 7.

8 In his counterclaims, Mr. Barnett describes the incident that occurred as follows. On April  
9 12, 2009, two cars drove up to Mr. Barnett’s residence. Two men were inside the first car, and three  
10 men were inside the second. The second car was driven by Mr. Alexander. The occupants of both  
11 cars, except for Mr. Alexander, exited the vehicles upon reaching the residence. They then invaded  
12 the home and stole approximately two pounds of marijuana, which Mr. Barnett was growing under a  
13 medical marijuana license. *See* Countercl. ¶ 27.

14 Mr. Barnett’s two sons were in the house along with Mr. Barnett at the time of the home  
15 invasion. The sons ran after the robbers as they left the house. Mr. Barnett grabbed his gun and ran  
16 out after his sons to protect them. Mr. Barnett saw Mr. Alexander sitting in the car and pointing  
17 what appeared to be a gun in Mr. Barnett and the sons’ direction. Mr. Barnett responded in self-  
18 defense by shooting twice in the direction of the car to scare the robbers away. The robbers then  
19 sped away. *See* Countercl. ¶ 27.

20 In a declaration submitted in opposition to Allstate’s currently pending motion, Mr. Barnett  
21 essentially provides the same description as above. He emphasizes in the declaration that “[t]he sole  
22 reason I took the two shots was to scare the perpetrators away. I never intended to shoot anyone.”  
23 Barnett Decl. ¶ 7. In opposing Allstate’s motion, Mr. Barnett also asserts that the two shots he did  
24 fire never actually hit anyone, including Mr. Alexander. (In his underlying lawsuit, Mr. Alexander  
25 claims that he suffered bullet wounds to his hand and stomach as a result of Mr. Barnett’s actions.  
26 *See* Docket No. 1 (complaint for underlying action)). More specifically, Mr. Barnett offers a  
27 statement of probable cause prepared by an investigator for Humboldt County, which states that (1)  
28 Mr. Barnett’s gun expended only two shells and that (2) three gunshot holes were visible in the car

1 that Mr. Alexander had driven – two in the hood and one in the windshield. *See* Perlman Decl., Ex.  
2 2 (statement of probable cause). According to Mr. Barnett, his two gunshots accounted for the holes  
3 in the hood, *see* Barnett Decl. ¶ 9, and therefore, he did not actually shoot Mr. Alexander.

## 4 II. DISCUSSION

### 5 A. Allstate’s Motion to Strike

6 As a preliminary matter, the Court addresses Allstate’s request that the Court strike two  
7 briefs filed by Mr. Barnett: (1) his reply brief filed in support of his motion to dismiss or stay, *see*  
8 Docket No. 39, and (2) his brief filed in response to Allstate’s response to his evidentiary objections  
9 (filed in conjunction with his opposition to Allstate’s motion for judgment on the pleadings or  
10 summary judgment). *See* Docket No. 41. Allstate asks that both briefs be stricken because they are  
11 untimely and unauthorized.

12 With respect to the reply brief, Allstate correctly points out that it is untimely. Under the  
13 Court’s order, the brief was due on July 21, 2010, *see* Docket No. 19 (order), but Mr. Barnett did not  
14 file the reply until three court days later, on July 26, 2010. The late filing, however, does not appear  
15 to have caused Allstate any prejudice, particularly because Allstate was not required to file any  
16 response to the reply brief and because the reply brief was filed more than two weeks before the  
17 hearing date. In light of the gravity of the impending motions and the lack of any prejudice, the  
18 merits are paramount and hence the request to strike is denied.

19 As for the brief filed in response to Allstate’s response to Mr. Barnett’s evidentiary  
20 objections, again, Allstate is correct that such a brief was not authorized by the Court. But in the  
21 absence of any showing of prejudice, again, the request to strike is denied.

### 22 B. Allstate’s Motion for Judgment on the Pleadings or, in the Alternative, for Summary 23 Judgment

24 The Court addresses next Allstate’s motion for judgment on the pleadings or, in the  
25 alternative, for summary judgment. The Court does so, in spite of Mr. Barnett’s motion to dismiss  
26 or stay, for two reasons. First, although Mr. Barnett has styled his motion as one to dismiss, he does  
27 not cite to any authority establishing that, under the circumstances presented herein, the Court  
28 should dismiss the action. Rather, his authority indicates that, at best, the Court should stay the

1 action. Second, although Mr. Barnett has alternatively moved for a stay of the case, Allstate is  
2 arguing that it is entitled to judgment even accepting Mr. Barnett’s characterizations as true – *i.e.*,  
3 that (1) he did not shoot Mr. Alexander at all or that (2) his gunshot(s) did hit Mr. Alexander but he  
4 did not intend to shoot Mr. Alexander. Under these circumstances, the Court addresses Allstate’s  
5 motion first, in spite of the motion to stay. *See Montrose Chem. Corp. of Cal. v. Superior Court*, 25  
6 Cal. App. 4th 902, 908 n.4 (1994) (noting that one exception to the general rule barring declaratory  
7 relief on the insurer’s duty to defend is when “the insurer can establish lack of coverage by means  
8 of facts that the insured does not dispute”).

9 In its motion, Allstate argues in essence, that, even accepting Mr. Barnett’s characterizations  
10 as true, it has no duty to defend the underlying action brought by Mr. Alexander. “Because the duty  
11 to defend is broader than the duty to indemnify, a conclusion here [that Allstate does] not have a  
12 duty to defend will be dispositive of [any] claim that [Allstate has] a duty to indemnify.” *Delgado v.*  
13 *Interins. Exchange of the Auto. Club of S. Cal.*, 47 Cal. 4th 302, 308 n.1 (2009) (emphasis in  
14 original). Allstate’s motion is made as one for judgment on the pleadings or in the alternative for  
15 summary judgment.

16 1. Legal Standards

17 a. Rule 12(c)

18 Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the  
19 pleadings after the pleadings are closed so long as the motion is filed “early enough not to delay  
20 trial.” Fed. R. Civ. P. 12(c). In the instant case, no trial has been scheduled as of yet, and so there is  
21 no issue of untimeliness.

22 The basic question for a court under Rule 12(c) is the same as that under Rule 12(b)(6) – *i.e.*,  
23 whether the underlying complaint<sup>2</sup> contains sufficient factual allegations which, taken as true, state a  
24 facially plausible claim for relief. *See, e.g., Johnson v. Rowley*, 569 F.3d 40, 44 (2d Cir. 2009)  
25 (stating that, “[t]o survive a Rule 12(c) motion, the complaint must contain sufficient factual matter,  
26 accepted as true, to state a claim to relief that is plausible on its face”) (internal quotation marks

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27  
28 <sup>2</sup> The instant case is a declaratory relief action, and therefore the “true” plaintiff in this action  
is Mr. Barnett instead of Allstate.

1 omitted); *Perez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008) (noting that “[a] motion  
2 for judgment on the pleadings is treated much like a Rule 12(b)(6) motion to dismiss; adding that “to  
3 survive a Rule 12(b)(6) motion (and, by extension, a Rule 12(c) motion) a complaint must contain  
4 factual allegations that raise a right to relief above the speculative level, on the assumption that all  
5 the allegations in the complaint are true”) (internal quotation marks omitted).

6 b. Rule 56

7 Under Federal Rule of Civil Procedure 56, summary judgment shall be rendered “if the  
8 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
9 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving  
10 party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue of fact is genuine  
11 only if there is sufficient evidence for a reasonable jury to find for the nonmoving party. *See*  
12 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). “The mere existence of a scintilla of  
13 evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for  
14 the [nonmoving party].” *Id.* at 252.

15 At the summary judgment stage, evidence must be viewed in the light most favorable to the  
16 nonmoving party and all justifiable inferences are to be drawn in the nonmovant’s favor. *See id.* at  
17 255. Where the nonmoving party has the ultimate burden of proof, the party moving for summary  
18 judgment may prevail on such a motion simply by pointing to the nonmoving party’s failure “to  
19 make a showing sufficient to establish the existence of an element essential to [the plaintiff’s] case.”  
20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

21 2. Evidentiary Objection

22 In his papers, Mr. Barnett contends that Allstate has improperly offered evidence protected  
23 by the attorney-client privilege in making its motion for judgment on the pleadings or, in the  
24 alternative, for summary judgment. The specific evidence at issue is Exhibit A of the Dillard  
25 declaration. Exhibit A is a transcript of a recorded statement that Allstate made of a telephone  
26 conversation between an Allstate claims adjuster and Mr. Barnett. Mr. Barnett’s attorney (the same  
27 attorney as the attorney of record in the instant case) was also present on the telephone at the time.  
28 The conversation took place in November 2009, which was after Mr. Barnett had tendered the

1 defense of the underlying action to Allstate but prior to Allstate’s decision to pay for the defense  
2 subject to a reservation of rights. *See* Countercl. ¶ 27 (alleging that tender of the defense was made  
3 in October 2009 and that Allstate agreed to pay for the defense subject to a reservation of rights in  
4 December 2009).

5 Mr. Barnett’s objection to this evidence is moot with respect to Allstate’s motion for  
6 judgment on the pleadings. A motion for judgment on the pleadings looks only at the pleadings (*i.e.*,  
7 the complaint and the answer/counterclaims) and not anything beyond the four corners of those  
8 documents.

9 As for the motion for summary judgment, Mr. Barnett argues that the recorded conversation  
10 is a protected attorney-client communication. In support of this argument, he cites *Travelers*  
11 *Insurance Cos. v. Superior Court*, 143 Cal. App. 3d 436 (1983). There, a state court stated as  
12 follows:

13 [According] to the weight of authority, a report or other  
14 communication made by an insured to his liability insurance company,  
15 concerning an event which may be made the basis of a claim against  
16 him covered by the policy, is a privileged communication, as being  
between attorney and client, *if* the policy requires the company to  
defend him through its attorney, *and* the communication is intended  
for the information or assistance of the attorney in so defending him.

17 *Id.* at 451 (internal quotation marks omitted; emphasis added).

18 The problem for Mr. Barnett is that it is not clear whether the homeowners policy at issue  
19 required Allstate to defend him in the first place – indeed, that is the issue that the Court is now  
20 confronting. An additional problem for Mr. Barnett is that he has not offered any evidence to show  
21 that the conversation he had with the Allstate claims adjuster was “intended for the information or  
22 assistance of the attorney in so defending him.” *Id.* In fact, another purpose was arguably served by  
23 the conversation – *i.e.*, to figure out whether Allstate was required to defend Mr. Barnett in the first  
24 place. Notably, the *Travelers* court stated that, “[i]f it appears that the communication is to serve a  
25 dual purpose, one for transmittal to an attorney ‘in the course of professional employment’ and one  
26 not related to that purpose, the question presented to the trial court is as to which purpose  
27 predominates.” *Id.* at 452. In the instant case, Mr. Barnett, as the party asserting the attorney-client  
28 privilege, has the burden of proving which purpose predominates. *See Wellpoint Health Networks v.*

1 *Superior Court*, 59 Cal. App. 4th 110, 123 (1997) (noting that “the burden of showing preliminary  
2 facts necessary to support the privilege lies with the party claiming it”). Mr. Barnett has not carried  
3 that burden.

4 Even assuming that Mr. Barnett did meet his burden of proof, that would not bar admission  
5 of the evidence because Allstate has satisfied its burden of showing that the privilege was waived.  
6 *See id.* (noting that, once the party claiming the privilege has met its burden, then the burden passes  
7 to the opposing party to show that the claimed privilege does not apply or that an exception exists or  
8 that there has been an expressed or implied waiver). As Allstate points out, Mr. Barnett has asserted  
9 a claim for breach of the implied covenant of good faith and fair dealing, and one of the allegations  
10 made in support of that claim is that Allstate failed to properly investigate the claims against him  
11 and to make reasonable coverage decisions. *See* Countercl. ¶ 34. Having put Allstate’s  
12 investigation and coverage decisions at issue, Mr. Barnett has therefore waived any privilege with  
13 respect to the recorded conversation which was part of the investigation and coverage decisions.  
14 *See Southern Cal. Gas Co. v. Public Utils. Comm’n*, 50 Cal. 3d 31, 40 (1990) (noting that a “person  
15 or entity seeking to discover privileged information can show [an implied] waiver by demonstrating  
16 that the client has put the otherwise privileged communication directly at issue and that disclosure is  
17 essential for a fair adjudication of the action”).

18 Finally, even assuming that the attorney-client privilege were applicable and not waived, it  
19 would make no material difference for purposes of the motion for summary judgment because Mr.  
20 Barnett has already provided an account of the incident between him and Mr. Alexander – not only  
21 in his pleadings but also in his declaration offered in opposition to Allstate’s motion. That  
22 declaration essentially provides the same information as the recorded conversation. *See, e.g.*,  
23 Dillard Decl., Ex. A (Tr. at 13) (Mr. Barnett stating that, when he fired his gun, “I didn’t really  
24 aim[;] I just kind of pulled up and just kind of shot, you know, at the front of the car”).<sup>3</sup> All these

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25  
26 <sup>3</sup> In the recorded conversation, Mr. Barnett did make some statements that are not consistent with  
27 his current position. For example, in the recorded conversation, Mr. Barnett stated several times that  
28 he shot through the front windshield. *See* Dillard Decl., Ex. A at 5, 7, 13. This is not consistent with  
his current position that the shots he fired went through the hood only, and not the windshield. It should  
be noted, however, that, in the recorded conversation, Mr. Barnett later backtracked from his statement  
that he shot through the windshield. *See* Dillard Decl., Ex. A at 13 (“I didn’t really aim. I just kind of

1 documents state that Mr. Barnett did not intend to shoot anyone nor did he aim at any person. Thus,  
2 even if the recorded conversation were excluded, the Court would still have before it the declaration  
3 of Mr. Barnett.

4 3. Duty to Defend

5 At issue in the pending motion is whether Allstate, as the insurer, has a duty to defend Mr.  
6 Barnett, its insured, in the underlying action brought by Mr. Alexander. To prevail in this  
7 declaratory relief action, Mr. Barnett, as the insured, ““must prove the existence of a *potential* for  
8 coverage, while [Allstate] must establish *the absence of any such potential*. In other words, the  
9 insured need only show that the underlying claim *may* fall within policy coverage; the insurer must  
10 prove it *cannot*.”” *Delgado*, 47 Cal. 4th at 308 (emphasis in original). For purposes of this order,  
11 the Court assumes that Mr. Barnett’s facts are true – *i.e.*, either he did not shoot Mr. Alexander at all  
12 or his gunshot(s) did hit Mr. Alexander but he did not intend to shoot Mr. Alexander.

13 a. Policy Terms

14 In its papers, Allstate quotes two key provisions in the insurance policy at issue: (1) the  
15 general coverage provision and (2) the exclusionary clause for intentional acts. Mr. Barnett does  
16 not, in his papers, argue that those provisions are not in the contract; nor does he make any assertion  
17 that the provisions have not been accurately quoted. Therefore, the Court may proceed with the  
18 assumption that the provisions are in the insurance policy at issue and have been accurately quoted  
19 by Allstate.

20 i. General Coverage Provision

21 The general coverage provision states as follows:

22 Subject to the terms, conditions and limitations of this policy, **Allstate**  
23 will pay damages which an **insured person** becomes legally obligated  
24 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.[<sup>4</sup>]

25 \_\_\_\_\_  
26 pulled up and just kind of shot, you know, at the front of the car.”); Dillard Decl., Ex. A at 19 (“I know  
27 the one [shot] – one of them went through [the windshield]. I seen glass, you know, pop and that’s –  
I – I don’t know if it went – both through the window or one might have went through the hood. I don’t  
– I don’t – really don’t know.”).

28 <sup>4</sup> All bolded terms here and in the provisions below appeared as such in the policy.

1 Occurrence is defined as “an accident . . . resulting in **bodily injury** or **property damage**.”

2 ii. Exclusionary Clause for Intentional Acts

3 The exclusionary clause of intentional acts states as follows:

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

8 . . . .

9 b) such **bodily injury** or **property damage** is of a different kind  
10 or degree than intended or reasonably expected; or

11 c) such **bodily injury** or **property damage** is sustained by a  
12 different person than intended or reasonably expected.

13 This exclusion applies regardless of whether or not such **insured**  
14 **person** is actually charged with, or convicted of a crime.

15 b. No Shooting Mr. Alexander

16 As noted above, Mr. Barnett’s first contention is that he never shot Mr. Alexander in the first  
17 place – *i.e.*, his two gunshots went through the hood and never the windshield. But that is not the  
18 issue in determining coverage. In making that determination, the Court must assume the facts in the  
19 underlying complaint are true; if coverage is afforded under any of the claims pled therein, the  
20 insurer must provide a defense. *See Davis v. Farmers Ins. Group*, 134 Cal. App. 4th 100, 104  
21 (2005) (stating that “[a]n insurer’s duty to defend turns on the facts alleged in the underlying  
22 complaint or available to the insurer from extrinsic sources at the time the claim is made”). Thus,  
23 the primary question here is whether there is a potential for coverage if Mr. Barnett did not intend to  
24 shoot Mr. Alexander.

25 c. Shooting Mr. Alexander

26 As noted above, Mr. Barnett’s second contention is that, even if his gunshot(s) did hit Mr.  
27 Alexander, he did not intend to shoot Mr. Alexander. Here, the critical question is whether Allstate  
28 has a duty to defend under the general coverage provision. Allstate makes a secondary argument  
that it has no duty to defend given the exclusionary clause for intentional acts but that argument is  
not very persuasive. An exclusionary clause does not apply where the insured acted out of self-  
defense, even if that defense is mistaken. *See, e.g., Walters v. American Ins. Co.*, 185 Cal. App. 2d

1 776, 782-83 (1960) (stating that exclusionary clause for intentional acts is designed to prevent  
2 indemnifying one against loss from his own wrongful acts; here, because insured acted out of self-  
3 defense, he did not act with a wrongful intent and therefore exclusionary clause was not applicable);  
4 *Mullen v. Glens Falls Ins. Co.*, 73 Cal. App. 3d 163, 170 (1977) (stating that “[i]t is now settled that  
5 injuries resulting from acts committed by an insured in self-defense are not ‘intended’ or ‘expected’  
6 within the meaning of those terms as customarily used in an exclusionary clause like the one  
7 involved in the present case”). Furthermore, regardless of the applicability of the exclusionary  
8 clause, there must be coverage in the first place.

9 Focusing on the coverage issue, the question is whether, in the instant case, “an accident . . .  
10 resulting in **bodily injury** or **property damage**” took place. “In the context of liability insurance,  
11 an accident is an unexpected, unforeseen, or undesigned happening or consequence from either a  
12 known or an unknown cause.” *Delgado*, 47 Cal. 4th at 308 (internal quotation marks omitted).  
13 “[A]n injury-producing event is not an ‘accident’ . . . when all of the acts, the manner in which they  
14 were done, and the objective accomplished occurred as intended by the actor.” *Id.* at 311 (emphasis  
15 added). Under this standard – which the California Supreme Court endorsed in *Delgado* just one  
16 year ago – there was an accident. If Mr. Barnett did not intend to shoot Mr. Alexander, then it  
17 cannot be said that Mr. Barnett accomplished his objective.

18 Allstate argues that *Delgado* actually favors its position and not Mr. Barnett’s, but the Court  
19 does not agree. The California Supreme Court did note in *Delgado* that “a purposeful and  
20 intentional act remains purposeful and intentional regardless of the reason or motivation for the act”  
21 and therefore concluded that an insured’s unreasonable, subjective belief in the need for self defense  
22 does not “convert[] into ‘an accident’ an act that is purposeful and intended to inflict injury.” *Id.* at  
23 311, 314. But simply because the reason or motivation for an act is not relevant does not dispose of  
24 the question of what act was intended. The issue as to coverage is not Mr. Mr. Barnett’s belief that  
25 he acted in self-defense, but whether he intended to shoot someone. “Clearly, where the insured  
26 acted deliberately with the intent to cause injury, the conduct would not be deemed an accident.”  
27 *Merced Mutual Ins. Co. v. Mendez*, 213 Cal. App. 3d 41, 50 (1989). Here, Mr. Barnett’s position,  
28 which the Court assumes at this juncture is true, is that he did not intend to cause Mr. Alexander

1 injury. *See also State Farm Fire & Cas. Co. v. Superior Court*, 164 Cal. App. 4th 317, 325, 328  
2 (2008) (noting that “the term ‘accident’ has also been used to refer to the unintended or unexpected  
3 consequences of the act”; concluding that there was an accident when the insured deliberately threw  
4 the victim into a swimming pool but threw too softly so that the victim missed the water); *Fire Ins.  
5 Exchange v. Superior Court*, 181 Cal. App. 4th 388, 392 (2010) (stating that “[a]n accident does not  
6 occur when the insured performs a deliberate act unless some additional, unexpected, independent,  
7 and unforeseen happening occurs that produces the damage”; giving as an example of an accident  
8 “[w]hen a driver intentionally speeds and as a result, negligently hits another car” -- “the speeding is  
9 an intentional act” but “the act directly responsible for the injury -- hitting the other car -- was not  
10 intended by the driver and was fortuitous”).

11 Allstate argues in its brief that Mr. Barnett did in fact intend to shoot the occupants of Mr.  
12 Alexander’s car because he shot at the windshield. However, Mr. Barnett provided testimony in his  
13 declaration and in his recorded interview with Allstate that he did not intend to shoot anyone – that  
14 at most he shot in the direction of the car. He denies aiming the gun. He did not testify that he  
15 aimed at the windshield of a car full of occupants – an act which could be deemed in reckless  
16 disregard, possibly tantamount to intent.

17 Because Mr. Barnett has proved the existence of a potential for coverage (*i.e.*, if he did not  
18 intend to shoot Mr. Alexander and did not aim the gun at Mr. Alexander), the Court must deny  
19 Allstate’s motion for judgment, whether as one for judgment on the pleadings or for summary  
20 judgment.<sup>5</sup>

21 C. Mr. Barnett’s Motion to Stay

22 Having resolved Allstate’s motion, the Court now turns to the motion to stay made by Mr.  
23 Barnett. California case law indicates that “the classic situation” for a stay is “when the third party  
24 seeks damages on account of the insured’s negligence, and the insurer seeks to avoid providing a  
25 defense by arguing that its insured harmed the third party by intentional conduct.” *Montrose*, 25  
26 Cal. App. 4th at 907. This is a classic situation for a stay because “the potential that the insurer’s

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27  
28 <sup>5</sup> For purposes of the summary judgment motion, there is at least a genuine dispute of fact as to whether Mr. Barnett intended to shoot Mr. Alexander.

1 proof will prejudice its insured in the underlying litigation is obvious.” *Id.* This situation obtains  
2 when a factual issue in the underlying litigation overlaps with a factual issue determinative of  
3 coverage. *See id.* (stating that, “[t]o eliminate the risk of inconsistent factual determinations that  
4 could prejudice the insured, a stay of the declaratory relief action pending resolution of the third  
5 party suit is appropriate when the coverage question turns on facts to be litigated in the underlying  
6 action”).

7 The instant case is essentially the classic situation – *i.e.*, Mr. Alexander is seeking damages  
8 on account of Mr. Barnett’s negligence as well as an intentional tort. The intentional tort claim will  
9 turn on whether Mr. Barnett intended to shoot Mr. Alexander and whether he purposefully aimed the  
10 gun at him, the same question that is determinative of Allstate’s disputed coverage. Given the  
11 overlap in factual issues and the potential conflict of interest, the Court hereby stays the instant case  
12 pending a resolution of the underlying lawsuit between Mr. Alexander and Mr. Barnett.

13 **III. CONCLUSION**

14 For the foregoing reasons, Allstate’s motion for judgment is denied and Mr. Barnett’s  
15 alternative motion for a stay is granted.

16 This order disposes of Docket Nos. 23 and 25.

17  
18 IT IS SO ORDERED.

19  
20 Dated: September 9, 2010

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23 EDWARD M. CHEN  
24 United States Magistrate Judge  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALLSTATE INSURANCE COMPANY,

No. C-10-0077 EMC

Plaintiff,

v.

**CERTIFICATE OF SERVICE**

RICHARD BARNETT, *et al.*,

Defendants.

\_\_\_\_\_/

I, the undersigned, hereby certify that I am an employee in the U.S. District Court, Northern District of California. On the below date, I served a true and correct copy of the attached, by placing said copy/copies in a postage-paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail; or by placing said copy/copies into an inter-office delivery receptacle located in the Office of the Clerk.

MARIO ALEXANDER  
829 "C" Street, Apt. 5  
Eureka, CA 95501

MARIO ALEXANDER  
P.O. Box 3232  
Eureka, CA 95502

Dated: September 9, 2010

RICHARD W. WIEKING, CLERK

By: \_\_\_\_\_  
/s/ Leni Doyle  
Leni Doyle  
Deputy Clerk