9

Service: **Get by LEXSEE®**
Citation: **7 f3d 225**

Select for FOCUS™ or Delivery

*7 F.3d 225; 1993 U.S. App. LEXIS 32435, **

PALMETTO FORD, INCORPORATED, Plaintiff-Appellant, v. FIRST SOUTHERN INSURANCE COMPANY, Defendant-Appellee.

No. 92-2350

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

7 F.3d 225; 1993 U.S. App. LEXIS 32435

July 15, 1993, Argued
September 22, 1993, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Reported as Unpublished Full-Text Opinion at: 1993 U.S. App. LEXIS 24481.

OPINION: AFFIRMED

*1993 U.S. App. LEXIS 24481, **

PALMETTO FORD, INCORPORATED, Plaintiff-Appellant, v. FIRST SOUTHERN INSURANCE COMPANY, Defendant-Appellee.

No. 92-2350

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1993 U.S. App. LEXIS 24481

July 15, 1993, Argued
September 22, 1993, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 7 F.3d 225, 1993 U.S. App. LEXIS 32435.

PRIOR HISTORY: Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. CA-91-2981-2-18

DISPOSITION: AFFIRMED

CASE SUMMARY

PROCEDURAL POSTURE: Appellant insured sought review of the decision of the United States District Court for the District of South Carolina, which granted appellee insurer's motion for summary judgment in the insured's declaratory judgment action against the insurer to determine whether the comprehensive general liability insurance policy between the parties obligated the insurer to defend the insured in a defamation action brought by a former employee.

OVERVIEW: An insurance policy between the insured and the insurer stated that the insurer had a duty to defend the insured, but provided limitations on that coverage for allegations of violations of the penal code. A former employee sued the insured for defamation, among other causes of action. The insurer declined to defend the insured on the ground that the ex-employee alleged an intentional defamation. The employee amended his complaint and alleged that the statements were negligent. Nevertheless, the insurer again refused to defend the insured. Meanwhile, a district court held that S.C. Code Ann § 16-7-150 (1976), South Carolina's defamation statute, was overbroad. The district court granted the insurer's motion for summary judgment based on the policy exclusion. The court affirmed. The court held that the policy put the insured on notice of the policy exclusion. The court also held that the decision that declared the defamation statute unconstitutional should not have retroactive application in this action because all the actions occurred before the declaration of unconstitutionality. The court found no bad faith in the insurer's conduct.

OUTCOME: The court affirmed the grant of summary judgment in favor of the insurer in the insured's declaratory judgment action to determine whether the policy between the

parties obligated the insurer to defend the insured in a defamation action brought by a former employee of the insured.

CORE TERMS: coverage, penal statute, summary judgment, duty to defend, nonretroactivity, defamation, insured, retroactively, defamatory, notice, declared unconstitutional, retroactive application, personal injury, willful, partial, nonretroactively, nonretroactive, premium, advertising injury, breach of contract, insurance contract, willful violation, causes of action, denied coverage, penal code, ordinance, reckless, weigh, judicial decision, fully satisfied

LexisNexis(R) Headnotes ◆ Hide Headnotes

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN1 When a person has notice of facts as are sufficient to put him on inquiry, and those facts, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts. This duty places a significant obligation on a party who has had information partially disclosed to him to discover any undisclosed facts. The party to whom the partial disclosure was made must conduct a reasonable investigation to ascertain all relevant facts, otherwise those undiscovered facts will be imputed to him. More Like This Headnote

Governments > Courts > Judicial Precedents

HN2 In deciding retroactivity questions, the general rule is to apply civil decisions retroactively. More Like This Headnote

Governments > Courts > Judicial Precedents

HN3 In cases dealing with the nonretroactivity question, the Fourth Circuit generally considers three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may rely, or by deciding an issue of first impression whose resolution is not clearly foreshadowed. Second, the appellate court weighs the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, the court weighs the inequity imposed by retroactive application, for where a decision of the Fourth Circuit could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the "injustice or hardship" by a holding of nonretroactivity. More Like This Headnote

Contracts Law > Breach > General Overview

Contracts Law > Types of Contracts > Covenants

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Payments

HN4 The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured. More Like This Headnote

COUNSEL: Argued: Stephen Peterson Groves, Sr., Joseph Rutledge Young, Jr., YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina, for Appellant.

Argued: Ruskin C. Foster, MCKAY, MCKAY, HENRY & FOSTER, P.A., Columbia, South Carolina, for Appellee.

On Brief: Amy R. Jordan, YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina, for Appellant.

On Brief: Glenn V. Ohanesian, MCKAY, MCKAY, HENRY & FOSTER, P.A., Columbia, South Carolina, for Appellee.

JUDGES: Before ERVIN, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges. Chief Judge Ervin wrote the opinion, in which Judge Phillips and Judge Murnaghan joined.

OPINION BY: ERVIN

OPINION:

OPINION

ERVIN, Chief Judge:

Palmetto Ford ("Palmetto") appeals the district court's granting of First Southern Insurance Company's ("First Southern") motion for summary judgment. The district court held that under the terms of the comprehensive **[*2]** general liability insurance policy ("Policy") First Southern had issued to Palmetto, First Southern did not have a duty to defend Palmetto in another lawsuit. Palmetto raises three issues on appeal: whether the district court erred (1) in holding that Palmetto was bound by the Policy's exclusions found in a form referenced in the Policy, but not given to Palmetto; (2) in granting summary judgment to First Southern on Palmetto's bad faith cause of action; and (3) in denying Palmetto's motion for partial summary judgment. For the reasons stated below, we affirm the decision of the district court.

I

On March 1, 1990, Palmetto purchased a comprehensive general liability insurance policy from First Southern which it marketed for automobile dealerships. The Policy covered numerous potential grounds for liability including: building and personal property, legal liability, business income, extra expense and commercial general liability coverage. It provided $ 2,000,000 in commercial general liability coverage and $ 1,000,000 in personal and advertising coverage.

The Policy's Statement of Declarations ("Declarations") contained a reference to exclusions and limitations of coverage in **[*3]** the Policy.

These exclusions were listed on forms separate from the Declarations. Form CG 0104 (11/85) ("Form CG 85") was among the separate forms which listed specific duties and exclusions. This form stated that First Southern had a duty to defend the insured, but provided limitations on that coverage for allegations of violations of the penal code. Form CG 85 stated

> we will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this coverage part applies. We will have the right and duty to defend any "suit" seeking those damages.

It provided that the insured was covered for "'personal injury' caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you." The form, however, defined "personal injury" or "advertising injury" so as to exclude injuries

> (1) arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity; . . .
>
> (3) arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured. **[*4]** (emphasis added).

On February 26, 1991, a former Palmetto employee, L. Nathan Mundy, sued Palmetto for wrongful termination, defamation, and discrimination. L. Nathan Mundy v. Palmetto Ford Inc., No. 92-1041, slip op. (4th Cir. July 27, 1993) (We affirmed the district court's granting of Palmetto Ford's motion for summary judgment). Mundy alleged that Palmetto employees made defamatory allegations about him engaging in drug use. In his complaint, Mundy averred that the defamatory statements were

> made by [Palmetto Ford's] agents with actual malice and with wrongful, reckless and willful intent to injure [Mr. Mundy] when they knew that the statements were false. . . . Said Publications did convey, to [Mr. Mundy's] co-workers and to the community at large the impression that [Mr. Mundy] was a drug addict who was not a good and honorable employee, and they were calculated to, and did, hold [Mr. Mundy] up to public scorn, hatred, and ridicule.

Palmetto presented First Southern with Mundy's complaint and requested that, pursuant to the Policy, First Southern defend the suit. First Southern declined to defend Palmetto on the ground that Mundy's allegations fell outside the **[*5]** scope of the Policy. It stated that the suit was excluded from coverage because Mundy alleged that the defamation was intentional.

Subsequently, Mundy amended his complaint on July 5, 1991. In his amended complaint, Mundy alleged that Palmetto's agent's defamatory statements were

> the result of the negligent, reckless, willful and wanton defamatory statements made by Sam Lyons, an employee of [Palmetto Ford]. . . . Sam Lyons was negligent, reckless, willful and wanton in making these defamatory statements without determining the truth or veracity of such statements.

Palmetto presented the amended complaint to First Southern; it again denied coverage and refused to defend Palmetto in the Mundy action. First Southern concluded that the amended complaint did not sufficiently allege negligent conduct because the underlying allegations were the same as in the original complaint. Palmetto then retained its own counsel to defend the Mundy action.

Palmetto initiated this declaratory judgment action against First Southern to determine coverage under the Policy. It also alleged a breach of contract. Furthermore, Palmetto contended that First Southern's failure to defend the **[*6]** Mundy action was in bad faith.

Palmetto moved for partial summary judgment. On May 22, 1992, during a hearing on the summary judgment motion, First Southern disclosed the portion of the Policy upon which it had relied in denying coverage. It based its denial of coverage on Form CG 85. Palmetto claimed that it neither received a copy of Form CG 85 nor knew of its existence prior to the hearing. Palmetto asserted that it could not be bound by the provisions found in Form CG 85 since it never received a copy of the form.

On July 28, 1992, the district court denied Palmetto's motion for partial summary judgment. It held that First Southern did not have a duty to defend Palmetto against Mundy's amended complaint because Form CG 85 excluded the causes of action Mundy alleged. The district court found that Form CG 85's exclusion for willful violations of the penal code was applicable because if Mundy's allegations were true, they would constitute a violation of South Carolina's defamation statute.

First Southern moved for summary judgment on the three causes of action raised by Palmetto. Palmetto also made a motion to the district court to alter or amend its July 28, 1992 order. **[*7]** It asserted that the district court should find that Form CG 85 was newly discovered evidence.

On September 25 the district court granted First Southern's motion for summary judgment on all three causes of action. It reiterated that under the terms of the Policy First Southern had no duty to defend Palmetto. The court based its decision on the Policy's exclusion for injuries "arising out of the willful violation of a penal statute or ordinance . . . ." It granted First Southern's motion for summary judgment on Palmetto's breach of contract claim finding that there was no breach. Furthermore, the district court found that there was no bad faith on the part of First Southern as it had no duty to defend Palmetto. The district court denied Palmetto's motion to alter or amend its prior findings. This appeal ensued.

II

A

The first issue is whether Palmetto is bound by the exclusions listed in Form CG 85 of the Policy. Palmetto did not have actual notice of the exclusions contained in Form CG 85 because it did not possess a copy of it. We must determine whether Palmetto was deemed to have constructive notice of the restrictions because Form CG 85 was referenced in the Policy's Declarations. **[*8]**

The South Carolina Supreme Court made a sweeping pronouncement regarding when a person is deemed to have notice of facts in Multi Media Publishing, S.C. v. Mullins, et al., No. 23860 S.C. Lexis 106, at *4 (S.C. May 17, 1993). In Mullins, a breach of contract case, the court held that a corporation's veil had been pierced properly. The court stated that

> it is settled law in South Carolina that HN1 when a person has notice of facts as are sufficient to put him on inquiry, and those facts, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts. Norris v. Greenville S.& A. R. Co., 111 S.C. 322, 330, 97 S.E. 848, 850 (1919).

1993 S.C. Lexis 106 at *5. This duty places a significant obligation on a party who has had

information partially disclosed to him to discover any undisclosed facts. The party to whom the partial disclosure was made must conduct a reasonable investigation to ascertain all relevant facts, otherwise those undiscovered facts will be imputed to him.

In the instant matter, the Policy's **[*9]** Declarations stated:

> Item 3: Other forms and endorsements applying to this coverage part and made a part of this policy at time of issue: S.C. Changes - Exclusion - Alcoholic Beverages CG 0104(11/85) [Form CG 85] included.

This statement placed Palmetto on notice that there were some exclusions in the coverage not listed in that portion of the Policy, but contained in accompanying forms. The exclusions listed on Form CG 85 are very explicit. Form CG 85 states

> this insurance does not apply to: personal injury or advertising injury . . . arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.

Under South Carolina law, Palmetto was deemed to have knowledge of the above section because the Policy's Declarations placed Palmetto on notice of Form CG 85. Mullins required Palmetto to conduct a reasonable investigation to ascertain the facts. Palmetto neither requested a copy of Form CG 85 nor did it make any inquiry at all into the contents of Form CG 85 prior to the hearing. Palmetto concedes that it was given notice that other exclusions applied, but not given the actual list of exclusions. Moreover, there **[*10]** is no evidence that First Southern was either attempting to deceive or commit fraud against Palmetto. Therefore, Palmetto is deemed to have constructive knowledge of Form CG 85 and its contents. Finding that Palmetto is bound by the exclusions listed in Form CG 85, however, does not end the inquiry.

The district court held that there was no coverage because of the Policy's exclusion of coverage for violations of the penal code, specifically S.C. Code Ann. § 16-7-150 (Law. Co-op. 1976). Section 167-150 provides that

> any person who shall with malicious intent originate, utter, circulate or publish any false statement or matter concerning another the effect of which shall tend to injure such person in his character or reputation shall be guilty of a misdemeanor . . . .

Id. The allegations in Mundy's complaint, if true, would clearly constitute a violation of this statute. Therefore, the district court determined that the penal statute exclusion applied and First Southern did not have a duty to defend.

Unbeknownst to the district court, section 16-7-150 had been declared unconstitutional. n1 Fitts v. Kolb, 779 F. Supp. 1502, 1519 (D.S.C. 1991). **[*11]** Fitts arose due to the prosecution of a newspaper reporter under section 16-7-150. Fitts was charged with defamation under this statute because of an article he wrote in which Fitts allegedly defamed two local politicians. He then initiated a declaratory action seeking to have the statute declared unconstitutional. The Fitts court held that the

South Carolina criminal libel statute, S.C. Code Ann. § 16-7-150 (Law. Co-op. 1976), as presently drafted, is overbroad and vague in violation of the First and Fourteenth Amendments to the United States Constitution.

Id. The court determined that the statute was so overly broad that an ordinary citizen could not determine what conduct was prohibited and what conduct was permitted. Id. at 1516. It found that the statute's use of the term "malicious" did not comport with and could create confusion with the term "malice" as used in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Id. at 1515. No appeal was taken in the case. South Carolina neither amended its defamation statute to narrow it nor did South Carolina repeal the statute in light of Fitts. **[*12]** Therefore, the district court's basis for finding that First Southern did not have a duty to defend Palmetto, the penal statute exclusion, may be jeopardized.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 This was also unbeknownst to counsel for both parties as well. This issue arose sua sponte. We discovered that section 16-7-150 had been declared unconstitutional prior to oral argument. At oral argument, we requested that both sides brief the effect of Fitts on this matter.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The critical question is whether to apply the holding in Fitts either retroactively or nonretroactively to the instant matter. A nonretroactive application of Fitts would mean that it would have no bearing on the outcome of this case. The test created for civil cases is the most appropriate test to employ for this nonretroactivity question because the instant case is a civil action not involving the criminal application of section 16-7-150.

HN2

In deciding retroactivity questions we have noted that the "general rule is to apply such decisions [civil] retroactively." Sargent **[*13]** v. Sullivan, No. 90-1521, slip op. at 6 (4th Cir. August 22, 1991). In certain instances the doctrine of nonretroactivity is applicable. The Supreme Court established the factors to be considered in determining the nonretroactivity of judicial decisions in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 We note that the utility of the Chevron analysis may have been limited by the Supreme Court in some cases by its decision in James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735 (U.S. June 20, 1991). This limitation does not affect this case because Beam was decided on narrow grounds "confined entirely to an issue of choice of law . . . ." Id. at 4739.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The Chevron Court held that a state statute of limitations should not apply because

retroactive application of the statute of limitations would unfairly penalize petitioner Huson. The Court noted that the cause of action arose three years before the subsequent **[*14]** judicial determination altering the law. The effect of retroactive application would have been to deny Huson any remedy. It stated "we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." Id. at 106. The Court then created a three part test to decide the nonretroactivity question. It opined

> HN3
> in our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is **[*15]** ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-107. (citations omitted).

In Grimes v. Owens-Corning Fiberglass Corp. 843 F.2d 815 (4th Cir.), cert denied, 488 U.S. 889 (1988) we held that an intervening judicial decision should be applied nonretroactively. This court noted that the first Chevron factor was the initial and most important factor to be considered. Id. at 819. We stated that the three interrelated factors "need not be fully satisfied in order to preclude retroactivity." Id. The three factors should be balanced against one another.

The first Chevron factor is whether clear circuit precedent on which the complaining party could have relied was overturned or whether the court decided an issue of first impression. In the instant matter, this factor favors First Southern. The Fitts case appears to be the first instance in which the South Carolina defamation statute had been challenged in federal court. First Southern had no way of predicting at the time it entered into the insurance contract **[*16]** with Palmetto that section 16-7-150 either would be challenged or declared unconstitutional.

Moreover, the sequence of events prior to Fitts favors nonretroactive application of that decision. Palmetto purchased the Policy in March 1990. First Southern denied Palmetto coverage on the Mundy claims initially in March 1991 and again in July 1991. Palmetto's action against First Southern was filed on October 4, 1991. Both of the denials of coverage and the commencement of this action occurred prior to the Fitts decision which was issued in November 1991. First Southern rightfully denied coverage based upon the then valid penal statute.

The second Chevron factor requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Chevron, 404 U.S. at 106. In the instant matter this factor is neutral. Fitts concerned the constitutionality of the South Carolina defamation statute and the court's primary interest was the statute's effect on First

and Fourteenth Amendment rights. In contrast, **[*17]** this issue has no constitutional implications, but is a contractual matter. Nonretroactive application of Fitts would place the parties in the position they were in when they entered into the insurance contract.

The final Chevron factor is whether retroactive application of the judicial decision would produce inequitable results. The Chevron Court noted that its precedent provided "ample basis . . . for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Id. at 107. This factor weighs in favor of First Southern. First Southern and Palmetto entered into the Policy on the basis of certain expectations and assumptions. In determining the Policy's premium, First Southern calculated in the value of not having to defend this type of lawsuit. Retroactively applying Fitts to this case would give Palmetto a windfall because its premiums reflected the Policy's exclusion of this type of liability. Likewise, it would be detrimental to First Southern, who rightfully relied on the South Carolina statute when drafting the Policy, setting the premium and later denying coverage.

Based upon the factors enunciated in Chevron, **[*18]** the Fitts decision should not be applied retroactively in the instant matter. Although the penal statute upon which First Southern relied is no longer valid, at the time First Southern issued the Policy and denied coverage section 16-7-150 was in effect. Mullins provides that Palmetto was deemed to have constructive notice of Form CG 85 and its penal statute exclusion. Therefore, the district court did not err in granting First Southern's motion for summary judgment.

B

Next, Palmetto contends that the district court erred in granting summary judgment to First Southern on its claim of bad faith in refusing to defend the Mundy action. Palmetto asserts that First Southern denied its claim in bad faith because there was not a legitimate reason for First Southern to deny coverage.

The South Carolina Supreme Court listed the elements of a cause of action for bad faith refusal to pay benefits under an insurance contract in Crossley v. State Farm Mutual Automobile Ins. Co., 415 S.E.2d 393, 396-397 (S.C. 1992). The court held that

> HN4
> the elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance **[*19]** are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured. Id.

In the instant case the first, second, and fourth elements are fully satisfied. As to the third element, First Southern's actions were in no way an exercise of bad faith. First Southern's actions were based on a reasonable interpretation of the terms of the Policy. Form CG 85 contained a provision relieving First Southern of its duty to defend actions which would constitute a violation of a penal statute. First Southern based its refusal to defend on an exclusion in the Policy which was valid at the time. No bad faith can be demonstrated or imputed from First Southern's course of conduct.

C

Having found that the district court properly granted summary judgment to First Southern on all issues, we need not address Palmetto's remaining assignment of error.

III

The district court properly granted summary judgment **[*20]** to First Southern. The Policy between First Southern and Palmetto provided an exclusion of coverage for violations of a penal statute. Therefore, the decision of the district court is

AFFIRMED.

10

*442 F.3d 1239, *; 2006 U.S. App. LEXIS 7458, ***

PARK UNIVERSITY ENTERPRISES, INC., Plaintiff-Appellee, v. AMERICAN CASUALTY COMPANY OF READING, PA, Defendant-Appellant.

No. 04-3197

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

442 F.3d 1239; 2006 U.S. App. LEXIS 7458

March 27, 2006, Filed

SUBSEQUENT HISTORY: Later proceeding at Park Univ. Enters. v. Am. Cas. Co., 2006 U.S. Dist. LEXIS 37357 (D. Kan., June 1, 2006)

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the District of Kansas. (D.C. No. 03-CV-2522-GTV). Park Univ. Enters. v. Am. Cas. Co. of Reading, 314 F. Supp. 2d 1094, 2004 U.S. Dist. LEXIS 6649 (D. Kan., 2004)

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured, after being sued in a state court class action for alleged violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227, for sending unsolicited fax advertisements, brought a declaratory judgment action against defendant insurer after it refused to defend. The U.S. District Court for the District of Kansas granted judgment to plaintiff, concluding defendant owed plaintiff a defense. Defendant appealed.

OVERVIEW: The court rejected defendant's argument that the loss of use by the underlying plaintiff of its fax machine, ink, and paper due to the sending of an unsolicited fax was not caused by an "occurrence." Because plaintiff believed it was transmitting a fax to a recipient who wished to receive it (whether mistaken or not), one could not conclude it intended to injure the recipient. The distinction under Kansas law between intent to act and intent to injure was dispositive. The underlying plaintiff's injury could not be deemed the natural and probable consequence of plaintiff's act in sending the fax when plaintiff thought the transmission was welcome. Also, the underlying state complaint alleged both intentional and negligent conduct. The court also concurred that the plain and ordinary meaning of privacy included the right to be left alone and that Kansas law required a broad construction of the term "publication." A TCPA invasion of seclusion claim could have been covered by the policy's advertising injury provisions. The transmission of an allegedly unsolicited fax could have constituted a publishing act, while receiving the same could have resulted in an invasion of privacy.

OUTCOME: The court affirmed the judgment of the district court.

CORE TERMS: fax, insured, privacy, seclusion, advertisement, unsolicited, property damage, occurrence, recipient, duty to defend, insurer, secrecy, advertising injury, reasonable person, permission, invitation, coverage, insurance policy, intentionally, invasion, machine, loss of use, probable consequence, intent to injure, telephone, bodily injury, right of privacy, third party, standpoint, invasion of privacy

LexisNexis(R) Headnotes • Hide Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

HN1 The U.S. Court of Appeals for the Tenth Circuit generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court. More Like This Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

HN2 The Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227, makes it unlawful for any person to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C.S. § 227(b)(1)(c). It defines an "unsolicited advertisement" as any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission. 47 U.S.C.S. § 227(a)(4). The Act creates a private right of action that permits recipients of unwanted faxes to seek injunctions and damages, and allows courts to grant treble damages if they find a fax sender has acted willfully or knowingly. 47 U.S.C.S. § 227(b)(3). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 The U.S. Court of Appeals for the Tenth Circuit reviews a district court's grant of a motion for judgment on the pleadings de novo, using the same standard that applies to a Fed. R. Civ. P. 12(b)(6) motion. So doing, the Court accepts all facts pleaded by the non-moving party as true and grant all reasonable inferences from the pleadings in favor of the same. Judgment on the pleadings should not be granted unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law. As with the practice for motions to dismiss under Rule 12(b)(6), documents attached to the pleadings are exhibits and are to be considered in the Court's review of a district court's grant of a Rule 12(c) motion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview

HN4 Where a case arises under diversity jurisdiction, the forum state's choice-of-law principles are applied. More Like This Headnote

Insurance Law > Claims & Contracts > Choice of Law

HN5 Kansas follows the general rule that the law of the state where the insurance contract is made controls. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Unambiguous Terms

Insurance Law > General Liability Insurance > Obligations > Defense

Insurance Law > General Liability Insurance > Obligations > Indemnification

HN6 Like any other contract, the language of an insurance policy is construed to give effect to the intention of the parties. If a policy is unambiguous, the intention of the parties and the meaning of the contract are determined from the instrument itself. Under Kansas law, the test for determining the meaning of an insurance policy's language is what a reasonable person in the position of the policyholder would understand the language to mean. Moreover, the duty to defend under an insurance policy is not necessarily coextensive with the duty to indemnify. Rather, an insurer's duty to defend arises whenever there is a potential of liability under the policy. The insurer determines if there is a potential of liability under the policy by examining the allegations in the complaint or petition and considering any facts brought to its attention or which it could reasonably discover. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > General Liability Insurance > Exclusions > Intentional Acts

Insurance Law > General Liability Insurance > Occurrences

HN7 In determining for insurance purposes whether the damages resulting from an insured's acts were accidental and therefore an occurrence under a policy, the State of Kansas follows the natural and probable consequences test. Under this test, an insured's intent to injure can be inferred if the resulting injury, from the standpoint of the insured, is the natural and probable consequence of the act ultimately causing the injury. A finding of specific intent to injure is not necessary. Alternatively, even if an act itself is intentional, it may result in an unintended injury. Therefore, when determining whether an insurer is required to defend an insured under a policy barring coverage for intentional injuries, the courts must examine, from the standpoint of the insured, whether the injury for which insurance coverage is being sought is the natural and probable consequence of the insured's act. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Coverage Favored

HN8 The Kansas courts have acknowledged that because standard insurance policies are predetermined by the insurance carrier itself and, long in advance of the individual insurance sale, the law, in its concern for even-handed fairness, has attempted to minimize the imbalance between insurer and insured, so far as that is possible, by means of a rule that in the event of ambiguity or conflict in the policy provisions a policy of insurance is to be construed strictly against the insurer and in favor of the insured. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > Reasonable Person

HN9 Where an ambiguity arises, the test for determining the meaning of an insurance

policy's language focuses not on what the insurer intended the policy to mean, but what a reasonable person in the position of the insured would have understood it to mean. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > General Liability Insurance > Coverage > Advertising Injuries

HN10 Courts have noted the term "privacy" can be interpreted in multiple ways and be used to mean either secrecy or seclusion. "Privacy" is a word with many connotations. The two principal meanings are secrecy and seclusion, each of which has multiple shadings. A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. More Like This Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

HN11 Courts have consistently held the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227, protects a species of privacy interest in the sense of seclusion. Looking at how Congress described unsolicited fax advertisements, it is clear that Congress viewed violations of the Act as private nuisances and invasions of privacy under ordinary, lay meanings of these phrases. More Like This Headnote | *Shepardize:* Restrict By Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

Insurance Law > General Liability Insurance > Coverage > Advertising Injuries

HN12 The plain and ordinary meaning of privacy includes the right to be left alone, unburdened by unsolicited facsimiles. More Like This Headnote

Insurance Law > General Liability Insurance > Coverage > Advertising Injuries

HN13 "Publication" is defined, in part, as the act of bringing before the public; announcement. The term is also defined as the action of making something generally known; public declaration or announcement. More Like This Headnote

Insurance Law > General Liability Insurance > Coverage > Advertising Injuries

HN14 The legal definition for "publication" reads: Notification of communication to a third party or to a limited number of people regarded as representing the public. More Like This Headnote

Available Briefs and Other Documents Related to this Case:

- U.S. Circuit Court Brief(s)
- U.S. Circuit Court Motion(s)

COUNSEL: Andrew Butz of Bonner Kiernan Trebach & Crociata, Washington, D.C. (William H. White, Jr. and Jeffrey M. Koonankeil of Bonner Kiernan Trebach & Crociata, Washington, D.C.; and Barry W. McCormick of McCormick, Adam & Long, Overland Park, Kansas, with him

on the briefs), for Defendant-Appellant.

Thomas M. Van Camp of Van Camp, Meacham & Newman, PLLC, Pinehurst, North Carolina (Heywood H. Davis of Dicus, Davis, Sands & Collins, PC, Kansas City, Missouri, with him on the brief), for Plaintiff-Appellee.

JUDGES: Before BRISCOE, SEYMOUR, and ANDERSON, Circuit Judges.

OPINION BY: SEYMOUR

OPINION:

[*1242] SEYMOUR, Circuit Judge.

Park University Enterprises, Inc. (Park University) was sued in a state court class action by JC Hauling Company (JC Hauling) for alleged violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, a federal statute that bans unsolicited fax advertisements. Park University's insurer, American Casualty Company of Reading, Pa. (American), declined to provide any defense or coverage in the action. Park University filed this **[**2]** action seeking a declaratory judgment that American has a duty to defend it in the underlying state court suit. On cross-motions for partial judgment on the pleadings, the district court concluded that American does owe Park University a defense, *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, Pa.*, 314 F. Supp. 2d 1094 (D. Kan. 2004), and certified that decision as final under FED. R. CIV. P. 54(b). We affirm. n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 American has filed a motion asking us to certify a variety of issues to the Kansas Supreme Court. American did not seek certification in the district court. HN1 "We generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court." *Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325, 1331 (10th Cir.1994) (citing *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir.1988)). Moreover, we are not persuaded the issues raised in this appeal present sufficiently novel or unsettled questions of Kansas State law. Accordingly, we deny American's request for certification.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**3]**

I

HN2 The TCPA makes it "unlawful for any person . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). It defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* § 227(a)(4). The act creates a private right of action that permits recipients of unwanted faxes to seek injunctions and damages, and allows courts to grant treble damages if they find a fax sender has acted "willfully or knowingly." *Id.* § 227(b)(3).

JC Hauling filed suit in Illinois state court alleging that Park University violated the TCPA when it sent an advertisement to JC Hauling's telephone fax machine in Illinois "without prior express invitation or permission." Aplt. App. at 81. It brought the suit as a class action consisting of "all individuals who received unsolicited advertisements" via fax from or on behalf of Park University. *Id.* JC Hauling sought an injunction and treble damages, **[**4]**

contending that Park University's actions were "willful and knowing" and that it "knew or should have known that it did not have the prior express invitation or permission of Plaintiff and the other members of the Class to send the advertisements and knew or should have known that its actions constitute a violation of law." *Id.* at 82-83. In response, Park University asserted that any fax advertisements it sent to JC Hauling were not unsolicited because Park University had an existing business relationship with JC Hauling or, in the alternative, it had prior express invitation or permission from JC Hauling to send the fax advertisement. Specifically, Park University contended that any fax it had sent to JC Hauling was addressed to Patty Evansco, one if its employees, who **[*1243]** had registered for one of Park University's seminars while acting in the scope of her employment and had supplied JC Hauling's fax number to Park University. Consequently, Park University denied intentionally violating the TCPA.

Park University has a commercial general liability insurance policy with American and sought a defense and coverage upon JC Hauling's instigation of the state class action suit. American **[**5]** declined to provide either, prompting Park University to bring the instant action. Park University contends the insurance company owes it a defense under two different provisions of its policy: 1) "property damage" liability coverage; and 2) "advertising injury" liability coverage. n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Park University also alleged various breach of contract claims and sought a declaration that American owed a duty to indemnify it in the state case. The district court held that such a declaration would be premature, *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, Pa.*, 314 F. Supp. 2d 1094, 1098 (D. Kan. 2004), and these claims have not been raised on appeal.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The property damage provision of the policy states:

> A. Bodily Injury and Property Damage Liability
>
> 1. Insuring Agreement a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured **[**6]** against any "suit" seeking those damages.
>
> b. *This insurance applies to "bodily injury" and "property damage" only if. . . the "bodily injury" or "property damage" is caused by an "occurrence". . . .*

Id. at 68 (emphasis added). "Property damage" includes the "loss of use of tangible property that is not physically injured . . . ." *Id.* at 79. The policy defines an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 78. It does not, however, define the terms "loss of use" or "accident." Finally, the policy excludes coverage for "'property damage' *expected or intended from the standpoint of the insured*." *Id.* at 68 (emphasis added).

The advertising injury provision states in relevant part:

B. Personal and Advertising Injury Liability

1. Insuring Agreement a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

Id. at 71. The policy defines **[**7]** "advertising injury" as "injury, including consequential 'bodily injury', *arising out of . . . oral or written publication* of material that violates a person's right of privacy." *Id.* at 78 (emphasis added). The terms "oral or written publication" and "right of privacy" are not defined. The policy characterizes an "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." *Id.* at 76.

Both parties moved for partial judgments on the pleadings pursuant to FED. R. CIV. P. 12(c). The district court concluded that American has a duty to defend Park University in the state action under the property damage and the advertising injury provisions of the policy. *Park* **[*1244]** *Univ. Enters.*, 314 F. Supp. 2d at 1111. We address each issue in turn.

II

HN3 We review a district court's grant of a motion for judgment on the pleadings *de novo*, using the same standard that applies to a Rule 12(b)(6) motion. *See Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1259 (10th Cir. 2004). So **[**8]** doing, we accept all facts pleaded by the non-moving party as true and grant all reasonable inferences from the pleadings in favor of the same. Judgment on the pleadings should not be granted "unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 462 (8th Cir. 2000). As with our practice for motions to dismiss under Rule 12(b)(6), documents attached to the pleadings are exhibits and are to be considered in our review of the district court's grant of Park University's Rule 12(c) motion. *See Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991); FED. R. CIV. P. 10 (c).

Our primary task is to construe the insurance policy between Park University and American. HN4 Because this case arises under our diversity jurisdiction, we apply Kansas' choice-of-law principles. *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir. 1996). HN5 "Kansas follows the general rule that the law of the state where the insurance **[**9]** contract is made controls." *Safeco Ins. Co. of Am. v. Allen*, 262 Kan. 811, 941 P.2d 1365, 1372 (Kan. 1997). The policy in this case was made for Park University in Kansas and was delivered to it there. As a result, we apply Kansas law. HN6 Like any other contract, the language of an insurance policy is construed to give effect to the intention of the parties. *Catholic Diocese of Dodge City v. Raymer*, 251 Kan. 689, 840 P.2d 456, 459 (Kan. 1992). If a policy is unambiguous, the intention of the parties and the meaning of the contract are determined from the instrument itself. *Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1524 (10th Cir. 1997) (applying Kansas law). Under Kansas law, the test for determining the meaning of an insurance policy's language is what a reasonable person in the position of the policyholder would understand the language to mean. *See Farm Bureau Mut. Ins. Co. v. Horinek*, 233 Kan. 175, 660 P.2d 1374, 1378 (Kan. 1983). Moreover, the duty to defend under an insurance policy is not necessarily coextensive with the duty to indemnify. *Spivey v. Safeco Ins. Co.*, 254 Kan. 237, 865 P.2d 182, 188 (Kan. 1993). **[**10]** Rather, an insurer's duty to defend arises "whenever there is a 'potential of

liability' under the policy." *Id.*; *see also* State Farm Fire & Cas. Co. v. Finney, 244 Kan. 545, 770 P.2d 460, 466 (Kan. 1989). "The insurer determines if there is a potential of liability under the policy by examining the allegations in the complaint or petition *and considering any facts brought to its attention or which it could reasonably discover*." Spivey, 865 P.2d at 188 (emphasis added). With these principles in mind, we turn to the policy provisions.

A. Property Damage

Under the property damage provision at issue here, a duty to defend arises if a plaintiff contends that "loss of use of tangible property" was caused by an "occurrence." American agrees that sending an unsolicited fax can result in "loss of use of tangible property." Here, JC Hauling lost the use of its fax machine, ink, and paper. *See* Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 654-55 (8th Cir. 2003) (discussing TCPA legislative history identifying the range of harms created by **[*1245]** junk faxes). American nevertheless maintains that this loss of use was not **[**11]** caused by an occurrence because the loss of use damages were inflicted intentionally by Park University and were therefore not the result of an accident within the meaning of the policy. It also argues that Kansas public policy prohibits its coverage for non-fortuitous loss or damage, so that the loss would be excluded under the policy's intentional act exclusion even if it could be deemed an occurrence. We are not persuaded by these arguments.

HN7 In determining for insurance purposes whether the damages resulting from an insured's acts were accidental and therefore an occurrence under a policy, the state of Kansas follows the natural and probable consequences test. Under this test, an insured's intent to injure can be inferred if the resulting injury, *from the standpoint of the insured*, is the natural and probable consequence of the act ultimately causing the injury. Harris v. Richards, 254 Kan. 549, 867 P.2d 325, 327-28 (Kan. 1994). A finding of specific intent to injure is not necessary. *Id.* at 328. Alternatively, even if an act itself is intentional, it may result in an unintended injury. Spruill Motors, Inc. v. Universal Underwriters Ins. Co., 212 Kan. 681, 512 P.2d 403, 408 (Kan. 1973) **[**12]** (duty to defend where intentional wrongful taking of truck resulted in unintentional injury); *see also* State Farm Fire & Cas. Co. v. Falley, 23 Kan. App. 2d 21, 926 P.2d 664, 668 (Kan. Ct. App. 1996). Therefore, when determining whether an insurer is required to defend an insured under a policy barring coverage for intentional injuries, the courts must examine, from the standpoint of the insured, whether the injury for which insurance coverage is being sought is the natural and probable consequence of the insured's act.

The district court held there was a possible occurrence under the policy because the alleged property damage may have been an accident and not the natural and probable consequence of Park University's intentional fax transmission. In arguing to the contrary, American cited case law supporting the general proposition that intent to injure can be inferred from an intentional act because the resulting injury was the natural and probable consequence of the act. *See, e.g.*, Harris, 867 P.2d at 328 (no occurrence under policy where insured fired shots into vehicle knowing it was occupied and as a result one occupant was killed and the other **[**13]** severely injured); Spivey, 865 P.2d at 186 (applying Missouri law similar to that in Kansas and finding no coverage where insured could expect injury from intentionally threatening co-employee with weapons, firing a gun at her, and forcing her to perform sexual acts); *see also* Bell v. Tilton, 234 Kan. 461, 674 P.2d 468, 475-77 (Kan. 1983) (no duty to indemnify where one could infer intent to injure from insured's intent to hit playmate with pellet from BB gun). The district court distinguished these cases as inapposite, because their egregious facts clearly supported an inference under the natural and probable consequences test that by the insureds' intentional acts they also intended to cause injury. Park Univ. Enters., 314 F. Supp. 2d at 1104. The court declined to draw the same inference from Park University's intentional fax transmission, reasoning that the recipient of a fax is not injured by the loss of paper and use of its fax machine if he or she welcomes or solicits the fax. Thus, because Park University believed it was transmitting a fax to a recipient who wished to

receive it (whether mistaken or not), one could not conclude **[**14]** it intended to injure the recipient. *Id.* at 1105. Consequently, the alleged injury was potentially an occurrence within the meaning of the policy, requiring American **[*1246]** to defend Park University. *Id.* Under this reasoning, the court also rejected American's arguments that the damages were non-fortuitous, *see Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 275 Kan. 698, 71 P.3d 1097, 1134-35 (Kan. 2003) (non-fortuity is a defense to policy providing coverage for accidents), and that the policy's exclusion for "expected or intended injury" should apply. *Park Univ. Enters.*, 314 F. Supp. 2d at 1105-06.

On appeal, Park University does not dispute that it intentionally sent a fax. Instead, it reasserts its claim that it did not intend to *injure* the fax recipient because it believed the fax was solicited, either as part of an existing business relationship or through prior express invitation or permission. We agree with the district court that the distinction under Kansas law between intent to act and intent to injure is dispositive in this case. *See Spruill Motors*, 512 P.2d at 408. Significantly, the policy **[**15]** provides the intent to injure must be inferred from the "standpoint of the insured." Aplt. App. at 68; *see Harris*, 867 P.2d at 328-29. When Park University sent the fax to JC Hauling, it thought it had permission to do so. Hence, from its standpoint, any resulting use of JC Hauling's fax machine, paper, and toner could not have resulted in injury because Park University thought the fax was welcome. Unlike intentionally firing a gun into an occupied car as in *Harris* or intentionally firing a gun at an employee and forcing her to perform sexual acts as in *Spivey*, neither of which is even arguably a welcome act, JC Hauling's injury cannot be deemed the natural and probable consequence of Park University's act in sending the fax when Park University thought JC Hauling welcomed the transmission. If Park University intentionally sent a *solicited* fax, one cannot infer it intended to injure the recipients anymore than one can infer from the intentional taking of someone's truck that the driver's subsequent accidental injury of the victim was intentional, as in *Spruill Motors*.

This case is distinguishable from two other federal circuit court cases holding that **[**16]** property damage insurance provisions did not require a duty to defend in TCPA cases. *See Resource Bankshares Corp. v. St. Paul Mercury Ins.*, 407 F.3d 631 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 568, 163 L. Ed. 2d 463 (2005); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004). Contrary to the present case, where the question of Park University's intent to cause injury to those it sent faxes lies at the heart of the underlying controversy, the intentional nature of the alleged injuries in *American States* appears to have been wholly undisputed. *See* 392 F.3d at 943. Moreover, the underlying state complaint here alleged both intentional and negligent conduct: Park University "*knew or should have known* that it did not have the prior express invitation or permission of Plaintiff . . . to send the advertisements and *knew or should have known* that its actions constitute a violation of law." Aplt. App. at 82-83 (emphasis added). In *American States*, the court focused its brief analysis regarding the property damage insurance clause solely on intentional conduct. 392 F.3d at 943. **[**17]** Because an occurrence could result from *negligent* conduct on the part of Park University, any need for analysis of whether intentional conduct and injury occurred is obviated. *See, e.g., Fidelity & Deposit Co. of Md. v. Hartford Cas. Ins. Co.*, 189 F. Supp. 2d 1212, 1218 (D. Kan. 2002) (noting that natural and probable consequences test has not been applied to allegations of negligent conduct by an insured).

In *Resource Bankshares*, 407 F.3d at 638, the plaintiff argued that although it did send a fax, "it only intended to fax ads **[*1247]** to recipients who actually wanted them, and only did otherwise inadvertently." The plaintiff cited the district court's published opinion from the instant case in support of its argument that a TCPA violation could be accidental. *Id.* The court pointed out that the TCPA defines "unsolicited advertisement" as one that "'is transmitted to any person without that person's *prior express invitation or permission*.' 47 U.S.C. § 227(a)(4) (2003) (emphasis added)." *Id.* Because the plaintiff there failed to present any evidence "that would cause a reasonable person to mistakenly believe that they **[**18]** had received prior express consent to send their fax ads," the *Resource*

Bankshares court decided against it on summary judgment. *Id.* at 639. We stand in a different posture here because we are reviewing the district court's judgment on the pleadings. In so doing, we are permitted to treat exhibits attached to a complaint as part of the pleadings. *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 964-65 (10th Cir. 1994) (citation omitted). Park University's assertions that its actions were in fact solicited are clearly expressed in its answer in the state court action, which in turn was attached to the complaint in this case. Aplt. App. at 159, 160-161, 162, 163. n3 *Resources Bankshares* is thus inapposite.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 As noted above, Park University affirmatively asserted in its response to the underlying complaint that the fax was addressed to an employee of JC Hauling who had registered for one of Park University's seminars while acting in the scope of her employment, and who had supplied her employer's fax number.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**19]**

In conclusion, under the minimal potential of liability standard of Kansas law, *see Finney*, 770 P.2d at 466, we conclude that an occurrence was possible under the insurance contract, and that American must provide a defense to Park University pursuant to the property damage provision. For similar reasons, as detailed by the district court, *see Park Univ. Enters.*, 314 F. Supp. 2d at 1105-06, we are not persuaded by American's related claims of non-fortuity and exclusion under the policy.

B. Advertising Injury

The advertising injury provision of the insurance policy covers injuries "arising out of . . . oral or written publication of material that violates a person's right of privacy." Aplt. App. at 78. As noted above, the terms "oral or written publication" and "right of privacy" are not defined. The parties dispute the meaning of these terms and whether such terms are implicated by a violation of the TCPA. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 We reject out of hand American's argument that there can be no coverage here because the named plaintiff in the underlying suit, JC Hauling, is a corporation, and corporations cannot claim a right to privacy. *See Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 942 (7th Cir. 2004). American conveniently ignores that the offending fax in question was sent to Patty Evansco, an individual and employee of JC Hauling. Moreover, the complaint in the underlying class action suit seeks redress for a group of individuals who have allegedly suffered TCPA violations as a result of Park University's faxing activities. Even the court in *American States* acknowledged "the class of junk-fax recipients may include real rather than artificial people." *Id.* Likewise, several courts that have addressed TCPA invasion of privacy claims have implicitly rejected the merits of American's argument by acknowledging such actions even where the named plaintiffs were corporate or business entities rather than natural persons. *See e.g.*, *Resource Bankshares Corp. v. St. Paul Mercury Ins.*, 407 F.3d 631 (4th Cir. 2005) (complaining plaintiff in underlying class action was law firm); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876 (8th Cir. 2005) (plaintiff was computer business); *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N.D. Texas 2003) (plaintiff was group of businesses), *aff'd*, 96 Fed. Appx. 960 (5th Cir. 2004).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**20]**

[*1248] As we observed above, HN8 the Kansas courts have acknowledged that because

> standard insurance policies are predetermined by the insurance carrier itself and, long in advance of the individual insurance sale . . . [,] the law, in its concern for even-handed fairness, has attempted to minimize the imbalance between insurer and insured, so far as that is possible, by means of a rule that in the event of ambiguity or conflict in the policy provisions a policy of insurance is to be construed strictly against the insurer and in favor of the insured.

Gowing v. Great Plains Mut. Ins. Co., 207 Kan. 78, 483 P.2d 1072, 1074-75 (Kan. 1971). HN9 Where an ambiguity arises, the test for determining the meaning of an insurance policy's language focuses not on what "the insurer intended the [policy] to mean, but what a reasonable person in the position of the insured would have understood [it] to mean." *Casey v. Aetna Cas. & Sur. Co.*, 205 Kan. 495, 470 P.2d 821, 826 (Kan. 1970); *see also Farm Bureau Mut. Ins. Co.*, 660 P.2d at 1378; *Gowing*, 483 P.2d at 1075.

HN10 Courts have noted the term "privacy" can be interpreted in **[**21]** multiple ways and be used to mean either secrecy or seclusion. *See Resource Bankshares Corp.*, 407 F.3d at 639-40 & n.9; *Am. States Ins. Co.*, 392 F.3d at 941.

> "Privacy" is a word with many connotations. The two principal meanings are secrecy and seclusion, each of which has multiple shadings. *See Restatement (Second) of Torts* § 652 (1977); Richard S. Murphy, *Property Rights as Personal Information*, 84 Geo. L.J. 2381 (1996). A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion.

Id. American argues that at most the TCPA allows recovery for injuries arising from an invasion of privacy in the form of seclusion, whereas the policy at issue here only provides coverage for an invasion of privacy in the form of secrecy. American's basic thesis is that the policy, by virtue of its language detailing that a personal privacy **[**22]** violation might occur when material is published, implicitly defines the violation as the disclosure of secrets rather than the invasion of one's seclusion. Despite the lack of any specific definitions in the policy supporting this position, American reasons the term "publish" requires that material or information be disseminated to a third party. From this, it contends the term "privacy" must relate to secrets rather than seclusion, because dissemination of information to a third party that violates a person's right to privacy mirrors the tort of defamation and the invasion of secrecy interests. American further argues that the receipt of an unsolicited fax cannot violate a secrecy interest because no offensive material is being transmitted to a third party. According to American, therefore, even if this case presents a violation of privacy in the sense of seclusion, the policy it issued to Park University only provides coverage for secrecy

violations.

American's argument is not entirely unreasonable and at least two circuit courts have ruled accordingly in similar situations. *See* Resource Bankshares Corp., 407 F.3d at 641-42; *Am. States Ins. Co.*, 392 F.3d at 943. **[**23]** n5 We are convinced by **[*1249]** countervailing case law in three other circuits, however, that the policy American issued to Park University, defined by a reasonable person in the position of the insured, provides coverage for TCPA violations. *See* Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc., 401 F.3d 876 (8th Cir. 2005); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 157 Fed. Appx. 201, 2005 WL 3292089 (11th Cir., 2005) (unpub.), *aff'g* Hooters of Augusta, Inc. v. Am. Global Ins. Co., 272 F. Supp. 2d 1365 (S.D. Ga. 2003); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 Fed. Appx. 960, 2004 WL 1160165 (5th Cir., 2004) (unpub.), *aff'g W. Rim Inv. Advisors Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 847 (N.D. Tex. 2003). n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 The court in *Resource Bankshares* examined a policy with language distinct from the policy language at issue here. *Resource Bankshares Corp.*, 407 F.3d at 634 (policy provided coverage for damages arising from "*making known to* any person or organization written or spoken material that violates a person's right of privacy." (emphasis added)). Hence, the court's determination that this language did not provide coverage for an invasion of seclusion claim under the TCPA is not determinative of the issue here. **[**24]**

n6 The Eleventh Circuit affirmed the district court in *Hooters v. Augusta, Inc. v. Am. Global Ins. Co.*, 157 Fed. Appx. 201, 2005 WL 3292089 (11th Cir., 2005), in a lengthy unpublished opinion which we find persuasive and helpful to our analysis. *See* TENTH CIR. R. 36.3(B). The Fifth Circuit affirmed in *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 Fed. Appx. 960, 2004 WL 1160165 (5th Cir., 2004), stating only that "the court finds no reversible error of fact or law and affirms for essentially the reasons stated by the district court." *96 Fed. Appx. at 961*. We therefore look to the district court opinion in *Western Rim* as descriptive of the Fifth Circuit's determination.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

HN11↑Courts have consistently held the TCPA protects a species of privacy interest in the sense of seclusion. "Looking at how Congress described unsolicited fax advertisements, it is clear that Congress viewed violations of the Act as 'private nuisances' and 'invasions of privacy' under ordinary, lay meanings of these phrases." *Universal Underwriters Ins.*, 401 F.3d at 881; **[**25]** *see also* Resource Bankshares Corp., 407 F.3d at 639 ("the harm occasioned by unsolicited faxes involves protection of some sort of 'privacy'" and class action seeking redress of TCPA harms addresses "seclusion privacy"); *Am. States Ins. Co.*, 392 F.3d at 942 (TCPA promotes "interest in seclusion"); *Hooters*, 272 F. Supp. 2d at 1373 ("the TCPA provides that no one is to be harassed with advertisement faxes unless he specifically solicits them"); *W. Rim Inv. Advisors Inc.*, 269 F. Supp. 2d at 847 (purpose of TCPA "is to protect the privacy of individuals from receiving unsolicited faxed advertisements); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744, 752-53 (M.D. N.C. 2002) ("TCPA was enacted to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home . . ." (quotations and citations omitted)).

The district court in the instant case ruled accordingly. *Park Univ. Enters.*, 314 F. Supp. 2d at 1109 ("Congress . . . sought to address the right of facsimile recipients to be left alone"). Applying **[**26]** Kansas law requiring it to interpret the policy as viewed by a reasonable

person in the position of the insured, the district court also was of the view that the policy term "privacy" could be understood to include the right to seclusion.[HN12] "The plain and ordinary meaning of privacy includes the right to be left alone, unburdened by unsolicited facsimiles." *Id.* at 1109-10 (following *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 300 F. Supp. 2d 888, 895 (D. Mo. 2004); *Hooters of Augusta, Inc.*, 272 F. Supp. 2d at 1372). Contrary to American's arguments otherwise, the court further concluded the term "publication" could be read by a reasonable person in the position of insured, in **[*1250]** the absence of any definition to the contrary in the insurance contract, to mean either the transmittal of material to a third party or the simple transmittal of material to a recipient. Viewing the term "publication" as ambiguous, the court construed the policy against American pursuant to Kansas law, and held that the policy protects seclusion interests.

We find no fault with the district court's ruling. As noted above, the court correctly **[**27]** determined that in layman's terms, "the plain and ordinary meaning of privacy includes the right to be left alone." *Id.* at 1110. Certainly, the insurer could impose a more restrictive, technical and legal definition to the term "privacy" following that of the classic tort of invasion of secrecy interests or defamation. *See, e.g., Resource Bankshares*, 407 F.3d at 641; *Am. States Ins. Co.*, 392 F.3d at 941-42. Such an approach, however, would construe the language of the contract from the vantage of an insurer or an attorney, rather than the insured. American failed to provide specific terms in the policy to narrow the scope of privacy interest violations for which it intended to provide coverage, and we decline to permit it to do so now. *Accord Universal Underwriters Ins. Co.*, 401 F.3d at 882; *Hooters of Augusta, Inc.*, 157 Fed. Appx. 201, 2005 WL 3292089 at *3; *W. Rim Inv. Advisors*, 269 F. Supp. 2d at 847; *Prime TV, LLC*, 223 F. Supp. 2d at 752-53 & n.5.

We likewise agree with the district court's broad construction of the term "publication" in favor of Park University. Random House [HN13] defines publication, **[**28]** in part, as "the act of bringing before the public; announcement." RANDOM HOUSE UNABRIDGED DICTIONARY 1563 (2d ed. 1987). Similarly, the Oxford English Dictionary defines the term as "the action of making something generally known; public declaration or announcement." NEW SHORTER OXFORD ENGLISH DICTIONARY 2405 (1993). Reading the terms in the policy from the vantage point of the insured, rather than an insurer or lawyer, *Gowing*, 483 P.2d at 1074-75; *Casey*, 470 P.2d at 826, it is entirely reasonable to define publication as making something generally known. By faxing advertisements to the class of plaintiffs as alleged in the underlying state court complaint, Park University effectively published material in this broader sense, i.e., communicated information generally, which undermined the recipients' rights to be left alone. *Accord Hooters of Augusta, Inc.*, 157 Fed. Appx. 201, 2005 WL 3292089 at *5; *W. Rim Inv. Advisors, Inc.*, 269 F. Supp. 2d at 846-47; *Prime TV, LLC*, 223 F. Supp. 2d at 752-53.

Of course, as with the term "privacy," the word publication can be defined in the limited manner advocated by American. Thus, **[**29]** Random House states the *legal* definition for the term "publish" means "to communicate (in a defamatory statement) to some person or persons other than the person defamed." RANDOM HOUSE UNABRIDGED DICTIONARY 1563. [HN14] The Oxford English Dictionary's *legal* definition for publication reads: "Notification of communication to a third party or to a limited number of people regarded as representing the public." NEW SHORTER OXFORD ENGLISH DICTIONARY 2405. To give the term this narrow, technical reading would depart from the definition a reasonable person in the position of an insured might give the word. As noted above, we are precluded by Kansas law from construing the term "publication" so narrowly in this insurance policy when a reasonable person could view the term more broadly. n7

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n7 In this regard, we find American's reliance on *MGM, Inc. v. Liberty Mutual Ins. Co.*, 253 Kan. 198, 855 P.2d 77 (Kan. 1993), as support for its definition of publication, to be largely inapposite. First, *MGM, Inc.* did not address any form of advertising injury or coverage for the same. Second, the injury at issue in *MGM, Inc.*, is more focused on a violation of secrecy, rather than a violation of seclusion. *Id.* at 78 (employer secretly taped employees' private conversations). Finally, the court's conclusion that there was no privacy violation because the employer in *MGM, Inc.* did not disseminate to *anyone* the private information he had secretly obtained from his employees, *id.* at 79, does not aid in fleshing out the proper definition for the term "publish," and how that term is used in a seclusion setting.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**30]**

[*1251] In conclusion, we agree with the district court that when the policy is strictly construed against American and in favor of Park University, a TCPA invasion of seclusion claim might be covered by the policy's advertising injury provisions. The transmission of an allegedly unsolicited fax can constitute a publishing act, while receiving the same can result in an invasion of privacy. An asserted TCPA violation easily dovetails, therefore, with the language in the insurance policy. Similarly, in agreement with the district court's reasoning, *see Park Univ. Enters.*, 314 F. Supp. 2d at 1110, and relying on our earlier analysis as to whether there was an occurrence under the policy, we reject American's allied argument regarding non-fortuitous advertising injuries. Consequently, the district court correctly determined that American has a duty to defend Park University in the underlying TCPA action.

We **AFFIRM**.

11

Service: **Get by LEXSEE®**
Citation: **2004 us dist lexis 5771**

*2004 U.S. Dist. LEXIS 5771, **

View Available Briefs and Other Documents Related to this Case

REGISTRY DALLAS ASSOCIATES, L.P., d/b/a HOTEL INTER-CONTINENTAL DALLAS, Plaintiff, v. WAUSAU BUSINESS INSURANCE COMPANY, Defendant.

Civil Action No. 3:02-CV-2662-L

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2004 U.S. Dist. LEXIS 5771

February 26, 2004, Decided
February 26, 2004, Filed

DISPOSITION: [*1] Plaintiff's Partial Motion for Summary Judgment granted. Defendant's Motion for Complete and Final Summary Judgment denied.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant insurer issued a commercial general liability policy to plaintiff insured. Thereafter, the insured sought a defense and indemnity from a putative class action lawsuit filed against it, arising from unsolicited facsimile advertisements. The insurer denied the claim, and the insured filed suit. The insured moved for summary judgment solely on issue of the duty to defend, and the insurer moved for summary judgment on all claims.

OVERVIEW: The factual allegations in the underlying lawsuit alleged an "advertising injury," and therefore the insurer had a duty to defend. According to precedent, when used in the context of invasion of privacy torts, the term "publication" did not require communicating material to a third party, as it would when used in the context of defamation. Moreover, unsolicited faxed advertisements themselves, regardless of their content, could constitute material that violated a person's right of privacy given that the purpose of the Telephone Consumer Protection Act was to protect the privacy of individuals from receiving unsolicited faxed advertisements. Accordingly, the court determined that the factual allegations in the underlying complaint satisfied the "publication" requirement and the requirement that the material violated a person's right to privacy. Thus, the underlying complaint fell within the advertising injury coverage section of the policy, and the insurer had a duty to defend.

OUTCOME: The insured's partial motion for summary judgment was granted, and the insurer's motion for summary judgment was denied.

CORE TERMS: summary judgment, duty to defend, underlying lawsuit, unsolicited, facsimile, coverage, advertising injury, advertisements, property damage, lawsuit, right of privacy, cause of action, insurer, advertising, third party, intrusion, insured, invasion of privacy, insurance policy, nonmoving party, offensive, seclusion, right to privacy, injury arising, occurrence, sending, faxing, owe, obligation to defend, actual damages

LexisNexis(R) Headnotes ◆ Hide Headnotes

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

Civil Procedure > Summary Judgment > Standards > Materiality

Civil Procedure > Summary Judgment > Supporting Materials > Affidavits

HN1 Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). More Like This Headnote

Civil Procedure > Summary Judgment > Standards > Materiality

HN2 For summary judgment purposes, a dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. More Like This Headnote

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN3 When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. More Like This Headnote

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN4 A court may not make credibility determinations or weigh the evidence in ruling on motion for summary judgment. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

HN5 Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case on a motion for summary judgment, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. More Like This Headnote

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Summary Judgment > Supporting Materials > General Overview

HN6 Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Summary Judgment > Supporting Materials > General Overview

HN7 Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Evidence

HN8 The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. More Like This Headnote

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Opposition > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN9 Fed. R. Civ. P. 56 does not impose a duty on the court to sift through the record in search of evidence to support the nonmovant's opposition to the motion for summary judgment. More Like This Headnote

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN10 Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment. Disputed fact issues which are irrelevant and unnecessary will not be considered by a court in ruling on a summary judgment motion. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

HN11 If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. More Like This Headnote

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Insurance Law > Claims & Contracts > Policy Interpretation > Questions of Law

HN12 The interpretation of an insurance policy is a question of law. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN13 Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts. More Like This Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN14 In determining whether an insurer has a duty to defend, the court must examine the pleading upon which the insurer based it refusal to defend the action. More Like This Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN15 In determining whether an insurer has a duty to defend, Texas courts follow the "eight corners" or "complaint allegation" rule, which requires the trier of fact to examine only the allegations in the underlying complaint and the insurance policy, without reference to their veracity. In reviewing the underlying pleadings, the court must focus on the factual allegations that show the origin of the damages rather than on the legal theories alleged. More Like This Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN16 In determining whether an insurer has a duty to defend, the allegations in the underlying petition are to be interpreted liberally, resolving any doubt in favor of the insured. More Like This Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN17 The duty to defend arises when the facts alleged in the petition, if taken as true, potentially state a cause of action within the terms of the policy. Thus, it is the insured's burden to show that the claim against it is potentially within the policy's coverage. More Like This Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN18 An insurer has an obligation to defend an insured if the petition alleges at least one cause of action within the policy's coverage. If, however, under the facts alleged, there is a prima facie showing that the claim is not covered under the policy, the insurer has no duty to defend. More Like This Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN19 A petition need not allege specific causes of action to trigger an insurer's duty to defend. The duty arises if the factual allegations in third party's pleading potentially state a cause of action covered under the insurance policy. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Denials

Insurance Law > General Liability Insurance > Obligations > Defense

HN20 In determining whether an insurer has a duty to defend, while courts may liberally interpret the allegations in a pleading to determine whether the facts could potentially support a cause of action, courts may not read facts into the pleadings, may not look outside the pleadings, and may not imagine factual scenarios which might trigger coverage. More Like This Headnote

Torts > Intentional Torts > Invasion of Privacy > Intrusion > Elements

HN21 When used in the context of invasion of privacy torts, the term "publication" does not require communicating material to a third party, as it would when used in the context of defamation. More Like This Headnote

Torts > Intentional Torts > Invasion of Privacy > Intrusion > General Overview

HN22 The elements of a claim for intrusion upon seclusion are simply (1) an intentional intrusion, (2) upon the seclusion, solitude, or private affairs of another; (3) which would be highly offensive to a reasonable person. More Like This Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

Torts > Intentional Torts > Invasion of Privacy > Intrusion > General Overview

HN23 Unsolicited faxed advertisements, themselves regardless of their content, could constitute material that violates a person's right of privacy given that the purpose of the Telephone Consumer Protection Act is to protect the privacy of individuals from receiving unsolicited faxed advertisements. More Like This Headnote | *Shepardize:* Restrict By Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

Torts > Intentional Torts > Invasion of Privacy > Intrusion > General Overview

HN24 The Telephone Consumer Protection Act presumes all advertising, so long as it is unsolicited, is an offensive intrusion into the recipient's solitude. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > General Liability Insurance > Coverage > Property

Insurance Law > General Liability Insurance > Obligations > Defense

HN25 An insurer has an obligation to defend an insured if the petition alleges at least one cause of action within the policy's coverage. More Like This Headnote

Available Briefs and Other Documents Related to this Case:

- U.S. District Court Motion(s)

COUNSEL: For Registry Dallas Associates LP, Plaintiff: Richard A Illmer, Brown McCarroll, Dallas, TX. Chad A Johnson, Brown McCarroll, Dallas, TX.

For Wausau Business Insurance Co, Defendant: Russell Ray Yager, Vinson & Elkins, Dallas, TX. Todd A Murray, Vinson & Elkins, Dallas, TX.

JUDGES: Sam A. Lindsay, United States District Judge.

OPINION BY: Sam A. Lindsay

OPINION: ORDER

Before the court are Plaintiff's Motion for Partial Summary Judgment, filed April 17, 2003;

and Defendants Cross-Motion for Complete and Final Summary Judgment, filed May 30, 2003. After careful consideration of the motions, responses, replies, summary judgment evidence, record and applicable law, the court **grants** Plaintiff's Motion for Partial Summary Judgment; and **denies** Defendants Cross-Motion for Complete and Final Summary Judgment.

I. Factual and Procedural Background

This is an insurance coverage dispute. Wausau Business Insurance Company ("Defendant" or "Wausau") issued a commercial general liability policy ("CGL policy" or "policy"), policy number 2320-00-064719, to **[*2]** Plaintiff Registry Dallas Associates, L.P. d/b/a Hotel Inter-Continental Dallas ("Plaintiff" or "Registry") covering the time period relevant to this lawsuit.

Coverage A of the CGL policy provides coverage for "damages because of 'bodily injury' or 'property damage' to which this insurance applies." n1 Pl. App. at 18. For the insurance to apply, the "property damage" must, among other things, be caused by an "occurrence." *Id.* "Property damage" is defined, in relevant part, as "physical injury to tangible property, including loss of use of that property" and "loss of use of tangible property that is not physically injured." Pl. App. at 36.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Registry does not contend that the allegations in the underlying lawsuit constitute "bodily injury" as defined by the CGL policy.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Coverage B of the CGL policy provides coverage for "damages because of 'personal injury' or 'advertising injury' to which this insurance applies." n2 Pl. App. at 23. The insurance applies if, among other things, the "advertising injury" is **[*3]** "caused by an offense committed in the course of advertising your goods, products or services." *Id.* "Advertising injury" is defined as injury arising out of one or more of the following offenses:

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan.

Id. at 32. Only subpart b, namely, "oral or written publication of material that violates a person's right of privacy," is at issue in this case.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Registry does not contend that the allegations in the underlying lawsuit constitute "personal injury" as defined by the CGL policy.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Registry seeks a defense and indemnity from Wausau in a putative class action lawsuit filed against it on July 13, 2001 ("the underlying lawsuit" **[*4]** or "the *Girards* lawsuit"). n3 The plaintiffs in the underlying lawsuit claim violations of the Telephone Consumer Protection Act ("TCPA") and section 35.47 of the Texas Business and Commerce Code, invasion of privacy and trespass, arising from unsolicited facsimile advertisements allegedly sent by American Blast Fax, Inc. on behalf of Registry to over 30,000 recipients. Registry forwarded the underlying lawsuit to Wausau for defense and indemnity coverage. Wausau denied the claim.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 The underlying lawsuit is styled *James E. Girards, Christopher G. Sharp and Christopher G. Sharp, P.C. v. Inter-Continental Hotels Corp., Registry Dallas Associates, L.P., its general partner Dallas Hotel Associates, Ltd.*, cause number 01-3456-K, 192nd Judicial District Court of Dallas County, Texas.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Registry filed this action on November 14, 2002 in the 192nd Judicial District Court of Dallas County, Texas. Wausau removed the case to federal court on December 12, 2002. In addition to seeking a declaration that Wausau has **[*5]** duties to defend and indemnify in the underlying lawsuit, Registry asserts a breach of contract claim and seeks attorney's fees. Registry moves for summary judgment solely on issue of the duty to defend, and Wausau moves for summary judgment on all claims. The court now considers these motions.

II. Summary Judgment Standard

HN1 Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). HN2 A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). HN3 When ruling on a motion for summary judgment, the court is required to view all inferences **[*6]** drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Ragas*, 136 F.3d at 458. Further, HN4 a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000); *Anderson*, 477 U.S. at 254-55.

HN5 Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. HN6 Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). HN7 Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), **[*7]** *cert. denied*, 513 U.S. 871, 130 L.

Ed. 2d 127, 115 S. Ct. 195 (1994). HN8 The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. HN9 Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.; see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 832, 121 L. Ed. 2d 59, 113 S. Ct. 98 (1992). HN10 "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* HN11 If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

[*8] III. Analysis

A. Interpretation of Insurance Contracts

HN12 The interpretation of an insurance policy is a question of law. *New York Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 338 (5th Cir. 1996). HN13 Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts. *Amica Mut. Ins. Co. v. Moak*, 55 F.3d 1093, 1095 (5th Cir. 1995) (citing *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665, 30 Tex. Sup. Ct. J. 191 (Tex. 1987)). As this is a diversity case, Texas rules of contract interpretation control. *See id.; see also Potomac Ins. Co. v. Jayhawk Medical Acceptance Corp.*, 198 F.3d 548, 550 (5th Cir. 2000).

B. Duty to Defend

HN14 In determining whether an insurer has a duty to defend, the court must examine the pleading upon which the insurer based it refusal to defend the action. *See Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co.*, 99 F.3d 695, 701 (5th Cir. 1996). HN15 Texas courts follow the "eight corners" or "complaint allegation" rule, which requires the trier of fact to examine only the allegations in the underlying complaint and the insurance policy, **[*9]** *see id.; see also Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 369 (5th Cir. 1993), without reference to their veracity. *See Argonaut Southwestern Ins. Co. v. Maupin*, 500 S.W.2d 633, 635, 17 Tex. Sup. Ct. J. 40 (Tex. 1973). In reviewing the underlying pleadings, the court must focus on the factual allegations that show the origin of the damages rather than on the legal theories alleged. *American States Ins. Co. v. Bailey*, 133 F.3d 363, 369 (5th Cir. 1998); *National Union Fire Ins. Co. v. Merchants Fast Motor Lines*, 939 S.W.2d 139, 141, 40 Tex. Sup. Ct. J. 353 (Tex. 1997) (citing *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673, 676 (Tex. App. -- Houston [14th Dist.] 1993, writ denied) ("It is not the cause of action alleged that determines coverage but the facts giving rise to the alleged actionable conduct.")).

HN16 The allegations in the underlying petition are to be interpreted liberally, resolving any doubt in favor of the insured. *National Union*, 939 S.W.2d at 141. HN17 The duty to defend arises when the facts alleged in the petition, if taken as true, potentially state a cause of action within **[*10]** the terms of the policy. *Canutillo*, 99 F.3d at 701. Thus, it is the insured's burden to show that the claim against it is potentially within the policy's coverage. *Id.* HN18 An insurer has an obligation to defend an insured if the petition alleges at least one cause of action within the policy's coverage. *Id.* If, however, under the facts alleged, there is a *prima facie* showing that the claim is not covered under the policy, the insurer has no duty to defend. *See National Union*, 939 S.W.2d at 141.

C. The Underlying Lawsuit

HN19 The *Girards* petition need not allege specific causes of action to trigger Wausau's duty to defend. *See* St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp., 249 F.3d 389, 393 (5th Cir. 2001) (citing St. Paul Ins. Co. v. Texas Dep't of Transp., 999 S.W.2d 881, 886 (Tex.App.--Austin 1999, pet. denied)). "The duty arises if the factual allegations in third party's pleading *potentially* state a cause of action covered under the insurance policy." *Id.* (citing Houston Petroleum Co. v. Highlands Ins. Co., 830 S.W.2d 153, 155 (Tex.App.--Houston [1st Dist.] 1990, **[*11]** writ denied)) (emphasis in original). HN20 "While courts may liberally interpret the allegations in a pleading to determine whether the facts could potentially support a cause of action, courts may not read facts into the pleadings, may not look outside the pleadings, and may not imagine factual scenarios which might trigger coverage." *Id.* at 394 (quoting St. Paul Ins. Co., 999 S.W.2d at 885 (quoting Merchants Fast Motor Lines, Inc., 939 S.W.2d at 142)) (internal quotation marks omitted). The court must, therefore, consider whether the factual allegations in the *Girards* petition potentially state a case triggering coverage.

The *Girards* petition contains the following alleged facts:

(1) Registry used, or had others use on its behalf and with its knowledge, telephone facsimile machines, computers or other devices to fax unsolicited advertisements to the *Girards* plaintiffs. Pl. App. at 87 PP2, 3; 88 P7.

(2) Registry contracted with American Blast Fax, Inc. to send facsimile advertisements in the Dallas area. *Id.* at 88 P8.

(3) "Whenever an unsolicited facsimile is sent, the TCPA gives a right of action for damages, injunctive relief, **[*12]** or both. 47 U.S.C. § 227(b)(3). The measure of damages is the actual damages sustained or $ 500 for each violation, whichever is greater. 47 U.S.C. § 227 (c)(5)." The *Girards* plaintiffs do not seek recovery of their actual damages but rather seek "to recover the $ 500 liquidated reward." *Id.* at 89 P10.

(4) "The sending of unauthorized facsimiles in violation of [the TCPA] . . . violates the [*Girards* plaintiffs'] right to privacy. *Id.* at 89-90 P11.

(5) The *Girards* plaintiffs incurred "expense[s] which they did not request, including but not limited to, the loss of business opportunity and the valuable time and productivity that a business or individual loses in receiving, reading, distributing, circulating, calling, faxing or writing to the sender to get them to stop and usually trashing the junk fax." *Id.* at 90 P11.

(6) Registry's actions deprived the *Girards* plaintiffs of the full use of their property. *Id.*

(7) Registry's actions violated the TCPA and Section 35.47 of the Texas Business and Commerce Code and constituted invasion of privacy and trespass. *Id.* at 90 P12.

(8) "Upon information **[*13]** an belief, many of [Registry's] violations of the [TCPA] were not committed negligently, but alternatively, were committed willfully and/or knowingly. Consequently, the award should be increased to three times the amount of damages as authorized by [TCPA] or alternatively, [the *Girard* plaintiffs] are entitled to punitive damages for the intentional and malicious acts of [Registry]." Id. at 92 P18.

1. Advertising Injury

Wausau contends that the factual allegations in the underlying lawsuit do not allege an "advertising injury," and therefore it has no duty to defend. Specifically, Wausau contends that no advertising injury exists because the *Girards* petition does not allege (1) an injury arising from a "publication;" or (2) an injury arising from "material that violates a person's

right of privacy." Registry counters that the factual allegations in the *Girards* petition are sufficient to establish both "publication" and injury resulting from "material that violates a person's right to privacy."

The court notes that there are two cases directly on point: *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co,* 269 F. Supp.2d 836 (N.D.Tex. 2003), **[*14]** which is relied on by Registry; and *TIG Ins. Co. v. Dallas Basketball, Ltd.,* S.W.3d , 2004 Tex. App. LEXIS 1243, 2004 WL 243773 (Tex.App.--Dallas 2004, no pet. h.). Both cases involve facts that are virtually identical to those in this case. Although the decisions in *Western Rim* and *Dallas Basketball* are not binding on this court, the court finds their reasoning solid and persuasive. The *Western Rim* and *Dallas Basketball* decisions aptly discuss the same issues that are present in this case, and this court can do nothing to enhance the excellent analysis and reasoning in those decisions. Accordingly, the court finds *Western Rim* and *Dallas Basketball* dispositive on the issues in this case and adopts their analyses and reasoning.

In *Western Rim,* the plaintiffs sought a declaratory judgment that their CGL insurance carrier owed them a duty to defend in a TCPA lawsuit arising out of the sending of unsolicited facsimile advertisements. 269 F. Supp.2d at 838. The CGL policy defined advertising injury "as, among other things, 'oral or written publication of material that violates a person's right of privacy.'" *Id.* at 846. **[*15]** The plaintiffs argued that the act of faxing the unsolicited advertisements constituted "publication." *Id.* at 845-46. The defendant disagreed, contending that "publication" necessarily involved a third party. *Id.* at 845. The *Western Rim* court held that HN21 when used in the context of invasion of privacy torts, the term "publication" does not require communicating material to a third party, as it would when used in the context of defamation. *Id.* at 846 ("'Publication,' however, does not necessarily carry the same baggage when employed in the context of invasion-of-privacy torts. An invasion-of-privacy claim based on intrusion upon seclusion, for instance, does not require that its factual underpinnings include an allegation of publication to a third-party.") (footnotes omitted). HN22 The elements of a claim for intrusion upon seclusion are simply "(1) an intentional intrusion, (2) upon the seclusion, solitude, or private affairs of another; (3) which would be highly offensive to a reasonable person." *Id.* at 847 n.13 (citing *Farrington v. Sysco Food Servs., Inc.,* 865 S.W.2d 247, 253 (Tex.App.--Houston [1 **[*16]** Dist.] 1993, writ denied)). The court further noted that the CGL policy did not define the term "publication" and therefore did not necessarily require communication to a third party. *Id.* at 847. Consequently, the *Western Rim* court held that the alleged acts of faxing unsolicited advertisements to the plaintiffs in the underlying lawsuit could constitute a "publication." *Id.*

The *Western Rim* defendants next contended that no "advertising injury" existed because there were no factual allegations in the underlying lawsuit that the content of the facsimiles were offensive or invasive; thus, there was no showing that the facsimiles were "material that violates a person's right of privacy." *Id.* at 847. In the underlying lawsuit, the plaintiffs alleged that the receipt of the unsolicited facsimiles violated their privacy rights. *Id.* The court in *Western Rim* held that the HN23 unsolicited faxed advertisements, themselves regardless of their content, could constitute "material that violates a person's right of privacy" given that "the purpose of the TCPA . . . is to protect the privacy of individuals from receiving unsolicited faxed advertisements." 269 F. Supp.2d at 847. **[*17]**

Wausau contends that *Western Rim* is incorrect in both respects because it "overlooks the plain language and clear intent of the Policy's definition of 'advertising injury.'" Def. Reply at 6. The court disagrees. Indeed, the same analysis and reasoning used in *Western Rim* was followed by a Texas appellate court in *Dallas Basketball.* Moreover, as previously stated, the court has closely analyzed the *Western Rim* decision and finds the decision to be a thorough discussion and analysis of the applicable law.

In *Dallas Basketball,* the plaintiffs filed suit against their CGL insurer for refusing to defend

them in two TCPA lawsuits arising out of the sending of unsolicited facsimile transmissions. 2004 Tex. App. LEXIS 1243, 2004 WL 243773 at *1. The *Dallas Basketball* court held that the factual allegations in the petitions in the underlying TCPA lawsuits were sufficient to fall within the "advertising injury" coverage section of the CGL policy. The court reasoned that as the term "publication" was not defined in the policy, it "must be given its plain, ordinary, and generally accepted meaning. The word "publish" is generally understood to mean to disclose, circulate, or prepare **[*18]** and issue printed material for public distribution." *Id.* at *4 (internal citations omitted). Accordingly, the court held that "we cannot read the term 'publication' to mean only the communication of offending material to a third party." *Id.* (citing *Western Rim*, 269 F. Supp.2d at 847). The court, therefore, concluded that the "distribution of the advertising to the telephone facsimile machine owners was "publication' of the offending material." *Id.* at 5.

The *Dallas Basketball* court also held that the receipt of the unsolicited facsimile advertisements, regardless of their content, constituted "material that violates a person's right of privacy." *Id.* at 4-5. The court reasoned that HN24 the TCPA "presumes all advertising, so long as it is unsolicited, is an offensive intrusion into the recipient's solitude." *Id.* at *4 (citing *Western Rim*, 269 F. Supp.2d at 847).

For the reasons herein stated, the court determines that the factual allegations in the *Girards* petition satisfy the "publication" requirement and the requirement that the "material violates a person's right to privacy." Thus, the *Girards* petition falls within the **[*19]** advertising injury coverage section of the CGL policy. Accordingly, the court determines and declares that Wausau has a duty to defend Registry in the *Girards* lawsuit.

2. Property Damage

Wausau also contends it does not owe Registry a duty to defend because the factual allegations in the *Girards* petition do not constitute "property damage" as defined in the CGL policy, as the alleged damage was not caused by an accident and thus is not an "occurrence;" and the alleged damage is purely economic damage and thus is not "property damage." Even if "property damage" is alleged in the underlying lawsuit, Wausau contends that coverage is precluded pursuant to the "expected or intended injury" exclusion. Registry counters that Wausau owes it a duty to defend because the factual allegations in the *Girards* petition establish "property damage" resulting from an "occurrence."

Having found that Wausau owes Registry a duty to defend pursuant to the "advertising injury" section of Coverage B of the CGL policy, the court need not address whether Registry is also entitled to a defense pursuant to the "property damage" section of Coverage A of the policy. *See, cf.*, *Canutillo*, 99 F.3d at 701 **[*20]** HN25 (An insurer has an obligation to defend an insured if the petition alleges at least one cause of action within the policy's coverage.).

IV. Conclusion

For the reasons herein stated, there is no genuine issue of material fact regarding Wausau's duty to defend. Accordingly, the court **grants** Plaintiff's Partial Motion for Summary Judgment. As the court has granted summary judgment on the duty to defend issue, a favorable ruling on Defendant's motion for summary judgment would be wholly inconsistent with the court's ruling granting summary judgment in favor of Plaintiff. Therefore, the court **denies** Defendant's Motion for A Complete and Final Summary Judgment. The court determines and declares that Wausau has a duty to defend Registry in the *Girards* lawsuit, styled *James E. Girards, Christopher G. Sharp and Christopher G. Sharp, P.C. v. Inter-Continental Hotels Corp., Registry Dallas Associates, L.P., its general partner Dallas Hotel Associates, Ltd.*, cause number 01-3456-K, 192nd Judicial District Court of Dallas County, Texas.

It is so ordered this 26th day of February, 2004.

Sam A. Lindsay

United States District Judge