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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

TAMIKO CARRILLO,  
Plaintiff,  
v.  
NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY, et al.,  
Defendants.

Case No.: C 07-1979 JF (PVT)  
**ORDER DENYING PLAINTIFF'S  
MOTION TO QUASH DEPOSITION  
SUBPOENAS TO DR. BRUCE  
ELIASHOF AND BARBARA  
KRZYCZKOWSKA AND/OR FOR  
PROTECTIVE ORDER**

On September 29, 2009, the parties appeared before Magistrate Judge Patricia V. Trumbull for hearing on Plaintiff's Motion to Quash Deposition Subpoenas to Dr. Bruce Eliashof and Barbara Krzyczkowska and/or for Protective Order. Based on the briefs and arguments submitted,

IT IS HEREBY ORDERED that Plaintiff's motion is DENIED because she has put her mental and emotional condition at issue by filing this litigation.

**I. BACKGROUND**

This is an insurance coverage and bad faith case in which the insured's judgment creditor and assignee is suing the insurance company for breach of contract, recovery of judgment under California Insurance Code section 11580, and breach of the implied covenant of good faith and fair dealing.

1 The Underlying Action<sup>1</sup> arose from the relationships between Plaintiff Tamiko Carrillo and  
2 two women she claims were her therapists, Kristen Mansheim and Catherine Casey.<sup>2</sup> In the  
3 Underlying Action, Carrillo alleged that Casey and Mansheim committed negligence and malpractice  
4 by crossing boundaries, over-medicating Carrillo, failing to maintain the therapeutic container,  
5 abusing the transference phenomenon when Mansheim began a personal and sexual relationship with  
6 Carrillo, and by having Carrillo arrested and involuntarily committed to a psychiatric facility.  
7 Carrillo’s state law complaint included, among other things, causes of action against both Mansheim  
8 and Casey for malpractice, general negligence and premises liability, and causes of action against  
9 Mansheim (but not Casey) for intentional infliction of emotional distress, sexual harassment, sexual  
10 battery and battery.

11 Casey tendered defense of the Underlying Action to Defendant, but Defendant declined.  
12 Thereafter, Casey assigned to Plaintiff any claims she had against Defendant.

13 Plaintiff’s trial brief in the Underlying Action detailed numerous allegations of professional  
14 negligence and misconduct which occurred in the course of Mansheim’s and Casey’s treatment of  
15 Plaintiff, and which caused Plaintiff harm including significant psychological disorders, humiliation,  
16 mental anguish, severe emotional distress, depression and suicidal ideation. After a 25 minute trial  
17 at which no defense was mounted, the state court announced judgment for the plaintiff and against  
18 defendant Casey. The court awarded special damages of \$723,800.00 and general damages of  
19 \$700,000.00.

20 At issue in the present motion is whether Nationwide may depose two of Carrillo’s mental  
21 health providers.

## 22 II. DISCUSSION

23 Plaintiff argues that allowing Defendant to depose her mental health providers will  
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25 <sup>1</sup> As used herein, the “Underlying Action” refers to *L. Doe vs. Kristen Mansheim,*  
26 *individually and dba Principle Psychology and Mansheim & Casey; Catherine Casey, individually and*  
27 *dba Principle Psychology and Mansheim & Casey; and Does 1-25, Superior Court of the State of*  
*California in and for the County of Santa Clara, Civil Action No. 1-03-CV-817594.*

28 <sup>2</sup> See “Plaintiff’s Trial Brief” in the Underlying Action, attached as Exhibit C to the  
Declaration of Anna A. Chopova, filed herein on March 4, 2008 (Docket No. 46) (“Chopova  
Declaration”), at 1:23-26.

1 impermissibly invade her privacy rights and the psychotherapist-patient privilege, and that she has  
2 not waived either in connection with the present action. The court disagrees.

3 Plaintiff waived both her privacy rights and the psychotherapist-patient privilege by putting  
4 her mental and emotional condition at issue in *this* lawsuit. See CAL.EVID.CODE, § 1016 (no  
5 privilege as to a communication relevant to an issue concerning the mental or emotional condition of  
6 the patient if such issue has been tendered by the patient); see also, *In re Lifschutz*, 2 Cal.3d 415  
7 (1970) (psychotherapist must answer deposition questions about patient’s mental condition where  
8 patient raises the issue of the specific condition in litigation).

9 In an insurance coverage action “the initial burden of establishing harm within coverage falls  
10 on the insured, not the insurer.” See *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135  
11 Cal.App.4th 958, 1003-1004 (2006).<sup>3</sup> In order to make that showing, an insured must show that the  
12 damages for which she has been held liable resulted from covered causes. See *State v. Allstate Ins.*  
13 *Co.*, 45 Cal. 4<sup>th</sup> 1008, 1035 (Mar. 9, 2009). In *State v. Allstate* the California Supreme Court  
14 explained:

15 “When the insurer has promised to indemnify the insured for all ‘sums  
16 which the Insured shall become obligated to pay ... for damages ...  
17 because of’ nonexcluded property damage, or similar language,  
18 coverage necessarily turns on whether the damages for which the  
19 insured became liable resulted--*under tort law*--from covered causes.”  
20 *Ibid.*

19 Here the pertinent language in The Policy<sup>4</sup> is similar to that in *Allstate*. The Policy provides  
20 that “We will pay damages the insured is legally obligated to pay due to an occurrence.” (See Paige  
21 Decl.,<sup>5</sup> Exh. B at p. 28.) Under The Policy, the term “occurrence” means “bodily injury or property  
22 damage *resulting from* an accident, including continuous or repeated exposure to the same general  
23 condition. The occurrence must be during the policy period.” (See Paige Decl., Exh. B at p. 10

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25 <sup>3</sup> As the insured’s assignee, that burden falls on Plaintiff. See *In re Feature Realty  
Litigation*, 468 F.Supp.2d 1287, 1293-94 (E.D. Wash. 2006).

26 <sup>4</sup> As used herein, “The Policy” refers to Policy No. 72 04 U0 150102, in effect from March  
27 3, 2002 to March 3, 2003. See Paige Decl., Exh. B.

28 <sup>5</sup> As used herein, “Paige Decl.” refers to the Declaration of Leslie Paige in Support of  
Nationwide Mutual Fire Insurance Company’s Motion for Partial Summary Judgment, filed herein on  
May 4, 2009 (docket no. 77).

1 (emphasis added).)<sup>6</sup>

2 Plaintiff appears to be banking on using the judgment in the Underlying Action to meet all or  
3 part of her burden of showing coverage. However, it is not at all clear that she will succeed. Aside  
4 from the question of whether the judgment was obtained through fraud or collusion (*see Hogan*, 3  
5 Cal.3d at 564-65), the judgment appears to be based in large part, if not in whole, on acts that are *not*  
6 covered under The Policy.<sup>7</sup>

7 When both covered and excluded acts concur to cause injury, the insured has the burden of  
8 “proving a covered act or event was a substantial cause of the injury or property damage for which  
9 the insured is liable.” *See State v. Allstate*, 45 Cal. 4<sup>th</sup> at 1036. As the insured’s assignee, Plaintiff  
10 must thus prove which of the acts she alleged against the insured were both: 1) covered under The  
11 Policy; and 2) a substantial cause of her injuries and/or property damage for which Casey was held  
12 liable. Because the judgment in the Underlying Action did not make that determination, Plaintiff  
13 must make that showing in the present action. *See Hogan v. Midland National Ins. Co.*, 3 Cal.3d  
14 553, 564-65 (1970) (insurer is not bound as to “issues not necessarily adjudicated in the prior  
15 action”).

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17 <sup>6</sup> This definition is found in the Amendatory Endorsement to The Policy. It differs from  
18 the pre-amendment definition in that it indicates the phrase “continuous or repeated exposure to the same  
19 general condition” is a subset of the term “accident,” and it expressly states that the “occurrence” must  
20 occur during the policy period.

21 <sup>7</sup> The judgment in the Underlying Action, which was drafted by plaintiff’s counsel, is  
22 vague as to the specific acts upon which it premised liability, and both the complaint and trial brief in  
23 the Underlying Action focus almost exclusively on wrongful conduct committed in the context of  
24 Mansheim’s and Casey’s professional (patient-therapist) relationships with Plaintiff. The Policy  
25 excludes coverage for injuries that arise out of any professional liability except teaching. While there  
26 is one brief allegation in the underlying complaint that Mansheim and Casey offered “classes” in Health  
27 Realization, there is no allegation in the underlying complaint or trial brief that Plaintiff took such  
28 classes from either underlying defendant, or that any such classes caused any of her injuries.

The claim for premises liability, as outlined in the underlying complaint and trial brief, does not  
appear to include any “accidents” that would qualify as an “occurrence” under The Policy. To the extent  
Casey was negligent in allowing Mansheim to engage in an improper relationship with Plaintiff at  
Casey’s home, such “antecedent negligence” only created a potential for Plaintiff’s injuries, and might  
not constitute an “accident” within the meaning of The Policy. *See, e.g., Farmer v. Allstate Ins. Co.*, 311  
F.Supp.2d 884, 892-93 (C.D. Cal. 2004) (opining, although not holding, that antecedent negligence of  
day care provider which created the potential for injury from her husband’s molestation of one of the  
children in her care was not an “accident”). Moreover, it appears the relationship began years before the  
policy period commenced.


And with regard to the incident in which Mansheim and/or Casey had Plaintiff arrested and  
involuntarily committed to a psychiatric facility, The Policy’s exclusion for bodily injury “which is  
expected or intended by the insured” would appear to apply.

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**III. CONCLUSION**

As discussed herein, Plaintiff’s case in chief requires her to prove that covered acts were a substantial cause of the mental and emotional injuries she suffered. By filing an action that requires that showing, Plaintiff has tendered issues regarding her mental and emotional condition, and has thus waived her right of privacy and the psychotherapist-patient privilege as to those mental and emotional conditions. Defendant is entitled to conduct discovery—including depositions of Plaintiff’s mental health providers—with regard to the mental and emotional conditions Plaintiff has put at issue.<sup>8</sup> See *In re Lifschutz*, 2 Cal.3d at 433 (“[I]n all fairness, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters”).

Dated: 10/2/09

  
PATRICIA V. TRUMBULL  
United States Magistrate Judge

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<sup>8</sup> The court notes that there is already a blanket protective order on file in this action. To the extent it does not sufficiently provide for Plaintiff to designate information Confidential or Confidential – Attorneys’ Eyes Only, the court encourages the parties to file an amended form of protective order based on the court’s model form of protective order. The court’s model form of order is available in the forms section of the court’s website at [www.cand.uscourts.gov](http://www.cand.uscourts.gov).