

1 HONORABLE RONALD B. LEIGHTON

2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 AMERICAN COMMERCE  
10 INSURANCE COMPANY,

11 Plaintiff,

12 v.

13 CHADBOURNE LADENBURG, et al.,

14 Defendants.

CASE NO. C18-5047 RBL

ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT

15 THIS MATTER is before the Court on Plaintiff ACIC's Motion for Summary Judgment.  
16 [Dkt. # 7]. This declaratory judgment action arises out of the sale of Defendant Ladenburg's<sup>1</sup> Gig Harbor home. The home was insured under an ACIC homeowners' policy.

17 Ladenburg listed the home for sale with a real estate agent, Wetter. Ladenburg apparently  
18 negotiated with one potential buyer, Hoffnagle, before selling the home to a different buyer,  
19 Brandt. In December 2017, Hoffnagle sued Ladenburg in Pierce County Superior Court,  
20 asserting only a breach of contract claim<sup>2</sup>.

21  
22  
23 <sup>1</sup> Ladenburg and Patel are both defendants, and both owned the home. They are referred to in the singular for clarity. No disrespect is intended.

24 <sup>2</sup> This was actually an "amended complaint;" the nature of the initial complaint is not described.

1           Ladenburg made a claim under his homeowners’ policy, asking ACIC to defend him  
2 from Hoffnagle’s claim, and potentially, to indemnify him for any damages. ACIC commenced  
3 this Declaratory Judgment action in January, seeking a declaration that its policy provides  
4 Ladenburg no coverage for Hoffnagle’s breach of contract claim.

5           Around the same time, Hoffnagle amended his Pierce County complaint. He added  
6 Wetter and Brandt as defendants, and asserted breach of contract (duties of good faith and fair  
7 dealing), specific performance, civil conspiracy, and fraud claims against Ladenburg. He sued  
8 Wetter (as Ladenburg’s agent) for tortious interference, civil conspiracy, and fraud. The fraud  
9 and civil conspiracy claims assert that Ladenburg and Wetter concealed damage to the home<sup>3</sup>.

10           ACIC moves for summary judgment, arguing that its policy does not provide coverage  
11 for Hoffnagle’s breach of contract claim. Ladenburg argues that the Motion does not address the  
12 second amended complaint and its various claims. ACIC argues in reply that each of the new  
13 claims sounds in intentional tort and none are covered under the policy as a matter of law.

14 **A. Discussion.**

15           Summary judgment is proper “if the pleadings, the discovery and disclosure materials on  
16 file, and any affidavits show that there is no genuine issue as to any material fact and that the  
17 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In determining whether  
18 an issue of fact exists, the Court must view all evidence in the light most favorable to the  
19 nonmoving party and draw all reasonable inferences in that party’s favor. *Anderson Liberty*  
20 *Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

21 A genuine issue of material fact exists where there is sufficient evidence for a reasonable  
22

---

23 <sup>3</sup> It is unclear why Hoffnagle sues simultaneously to force Ladenburg to sell him the home, and to obtain damages  
24 from him for fraudulently concealing material defects in it. That is a matter for the Superior Court.

1 factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is “whether  
2 the evidence presents a sufficient disagreement to require submission to a jury or whether it is so  
3 one-sided that one party must prevail as a matter of law.” *Id.* at 251-52. The moving party bears  
4 the initial burden of showing that there is no evidence which supports an element essential to the  
5 nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has  
6 met this burden, the nonmoving party then must show that there is a genuine issue for trial.  
7 *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine  
8 issue of material fact, “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477  
9 U.S. at 323-24. There is no requirement that the moving party negate elements of the non-  
10 movant’s case. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Once the moving  
11 party has met its burden, the non-movant must then produce concrete evidence, without merely  
12 relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson*, 477  
13 U.S. 242, 248 (1986).

14         The interpretation of an insurance policy is a question of law. *Overton v. Consolidated*  
15 *Ins.*, 145 Wn.2d 417, 423 (2002). Insurance policies are contracts which are construed as a  
16 whole with the terms interpreted in the way that an average insurance buyer would understand.  
17 *Id.* If the language is clear and unambiguous, the court must enforce it as written and may not  
18 create ambiguity where none exists. *Am. Nat’l Fire Ins. v. B&L Trucking & Constr. Co.*, 134  
19 Wn.2d 413, 419 (1998).

20         Determining whether insurance coverage exists is a two-step process. *McDonald v. State*  
21 *Farm Fire & Cas.*, 119 Wn.2d 724, 727 (1992). The insured must first demonstrate that “the loss  
22 falls within the scope of the policy’s insured losses.” *Id.* To avoid coverage, the insurer must  
23 then show that the loss is excluded by specific policy language. *Id.* at 728. In Washington, the  
24

1 duty to defend is broader than the duty to indemnify. *Hayden v. Mutual of Enumclaw Ins.*, 141  
2 Wn.2d 55 (2000). A duty to defend exists where the complaint against the insured, construed  
3 liberally, alleges facts which could impose liability upon the insured within the policy's  
4 coverage. *Truck Ins. Exch. v. VanPort Homes*, 147 Wn.2d 751 (2002). The duty to defend is not,  
5 however, limitless. *E-Z Loader v. Travelers Ins.*, 106 Wn.2d 901, 910 (1986) ("We decline to  
6 impose on an insurer coverage of a liability not set forth in the policy."). A claim that is clearly  
7 outside of the policy's coverage relieves the duty to defend. *Woo v. Fireman's Fund Ins. Co.*,  
8 161 Wn.2d 43, 53 (2007). The duty to indemnify, unlike the duty to defend, turns on whether the  
9 facts of the underlying matter are "actually covered." *American Best Foods v. Alea London*, 168  
10 Wn.2d 398 (2010).

11 An insurer may not put its own interests ahead of its insured's. *Mut. of Enumclaw Ins.*  
12 *Co. v. T&G Const., Inc.*, 165 Wash.2d 255, 269 (2008). To that end, it must defend until it is  
13 clear that the claim is not covered. *Truck Ins. Exch.*, 147 Wash.2d at 765.

14 ACIC argues, and demonstrates, that its homeowners' policy specifically excludes  
15 coverage for damages or liability resulting from intentional acts. The policy's "Property  
16 Coverages" exclude losses caused even in part by intentional acts:

- 17 1. "We" do not pay for loss if one or more of the  
18 following exclusions apply to the loss, regardless of  
19 other causes or events that contribute to or  
20 aggravate the loss, whether such causes or events  
21 act to produce the loss before, at the same time as,  
22 or after the excluded causes or events.

23 \*\*\*



1 Dkt. # 8-1 at 18, 19.

2 Ladenburg's first argument, that the Motion addresses the wrong (non-operative)  
3 complaint is correct, but not persuasive. The Motion's primary basis—the policy does not cover  
4 losses arising from intentional acts—applies with equal or greater force to the newly-asserted  
5 fraud and civil conspiracy claims.

6 Ladenburg next argues that there is a material question of fact as to whether the claims  
7 against him are “conceivably covered” under his ACIC homeowners' policy. He argues there are  
8 factual questions about whether Hoffnagle claims “bodily injury or “property damage.” He  
9 points out that his policy had an endorsement modifying the definition of “personal injury” to  
10 include coverage for a series of tort claims:

11 **Personal injury means false arrest, false**  
12 **imprisonment, wrongful eviction, wrongful entry,**  
13 **wrongful detention, malicious prosecution, libel,**  
14 **slander, defamation of character, or invasion of**  
**privacy.**

15 Dkt. # 8-1 at 29. He argues that, read broadly, Hoffnagle's claim could be construed as seeking  
16 damages under this coverage, and that ACIC “should have investigated” the specific nature of  
17 his claims before seeking summary judgment. As he implicitly concedes, however, even if  
18 Hoffnagle seeks damages for personal injury or property damage (and even that conclusion is a  
19 stretch), such a claim is not covered if the cause of the damage was an intentional act.

20 Ladenburg argues that ACIC “assumes” that he intentionally breached the contract, while  
21 his position is that there *never was* an agreement. He complains that ACIC should have first  
22 determined whether there was an enforceable agreement.  
23  
24

1 But that is not correct. The duty to defend “arises when a complaint against the insured,  
2 construed liberally, alleges facts which could, if proven, impose liability upon the insured within  
3 the policy's coverage.” *See Truck Ins. Exch.*, 147 Wn.2d 751, 761 (2002). The duty to defend is  
4 not triggered by the insured’s *denial* of the facts alleged, and the insured cannot create a question  
5 of fact about coverage by disputing the facts alleged against him. The issue is whether there  
6 could “conceivably” be coverage if Hoffnagle established that there was a valid contract and that  
7 Ladenburg breached it. Ladenburg has not cited a single case suggesting that a homeowners’  
8 policy even conceivably covers a claim for specific performance of a real estate purchase and  
9 sale agreement, and the Court is not aware of any.

10 The same is true of Ladenburg’s claim for coverage on Hoffnagle’s revised “breach of  
11 contract” claims, for breach of the duty of good faith and fair dealing. And it is certainly true of  
12 Hoffnagle’s new, intentional tort claims—civil conspiracy and fraud. It is not conceivable that, if  
13 Hoffnagle proves those claims, the resulting damages would be covered; they are instead  
14 expressly excluded. Both tort claims require as an element “intent” on the part of the tortfeasor.

15 Finally, Ladenburg argues that there might be coverage under the policy’s “incidental  
16 coverage.”

1           **2. Contracts and Agreements** – “We” pay for  
2           damages for “bodily injury” or “property damage”  
3           where the liability of others is assumed by an  
4           “insured” under a written contract:

5           a. that directly relates to the ownership,  
6           maintenance, or use of an “insured premises”;  
7           or

8           b. if the contract was made before the loss.

9           The loss causing the “bodily injury” or “property  
10           damage” must have occurred during the policy  
11           period.

12 Dkt. # 8-1 at 16. He argues that, in the underlying real estate purchase and sale agreement, the  
13 buyer (Hoffnagle) agreed he was relying only on Ladenburg’s representations, not Wetter’s.  
14 Ladenburg argues that he could therefore conceivably be liable for Wetter’s intentional  
15 misconduct under this agreement, and that his “assumed liability” is covered.

16           ACIC argues that this is “pure speculation” and not even the most liberal reading of  
17 Hoffnagle’s complaint leads to the conclusion it asserts that Ladenburg “assumed” liability for  
18 Wetter’s intentional fraud.

19 //

20 //

21 //

22 //

23 //

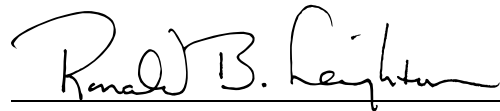
24 //



1           There is no conceivable coverage under Ladenburg's ACIC policy for any of Hoffnagle's  
2 claims against him. As ACIC argues, there is therefore no duty to defend or to indemnify. The  
3 Motion for Summary Judgment on ACIC's Declaratory Judgment claim to this effect is therefore  
4 GRANTED. The matter is closed and judgment shall be entered in ACIC's favor.

5           IT IS SO ORDERED.

6  
7           Dated this 30<sup>th</sup> day of April, 2018.

8  
9           

10           Ronald B. Leighton  
11           United States District Judge