IN THE COURT OF APPEALS OF IOWA

No. 9-419 / 08-0944
Filed December 17, 2009

SCOTTSDALE INSURANCE COMPANY,
Plaintiff-Appellee,

vs.

ATTORNEYS PROCESS & INVESTIGATION SERVICES, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, Denver D. Dillard, Judge.

Defendant appeals the district court's grant of summary judgment to plaintiff in this declaratory judgment action concerning insurance coverage. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Steven L. Nelson of Davis, Brown, Koehn, Shors & Roberts, Des Moines, for appellant.

John Grier of the Grier Law Firm, Marshalltown, and Merrill C. Swartz of the Swartz Law Firm, Marshalltown, for appellee.

Heard by Vaitheswaran, P.J., Mansfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

Attorneys Process & Investigation Services, Inc. (APIS), appeals the district court's grant of summary judgment to Scottsdale Insurance Company on its petition seeking a declaratory judgment that an insurance policy it had issued to APIS provided no coverage for acts alleged in a lawsuit filed by the Sac & Fox Tribe of the Mississippi in Iowa (Tribe) against APIS in tribal court. APIS also appeals the district court's dismissal of its counterclaims against Scottsdale. We affirm in part, reverse in part, and remand to the district court for further proceedings.

I. Background Facts & Proceedings

The Tribe operates the Meskwaki Bingo Casino Hotel near Tama, Iowa. A dispute arose between two factions in the Tribe—an Elected Tribal Council and an Appointed Tribal Council. On March 26, 2003, the Appointed Tribal Council seized control of the Casino, over the objection of the Elected Tribal Council. At that time the Elected Tribal Council was recognized by the United States Department of the Interior as the leadership body of the Tribe.

On June 16, 2003, APIS entered into a written agreement with Alexander Walker, Jr., a member of the Elected Tribal Council, for the purpose of investigation, security, and law enforcement consulting services. On October 1, 2003, employees of APIS entered the Tribe's community center and Casino and remained on the premises for less than twenty-four hours.

The Appointed Tribal Council was later lawfully elected and was recognized by the federal government as the governing council of the Tribe. The new governing body created a tribal court.

On August 3, 2005, the Tribe filed a tort action against APIS in the tribal court. The petition alleged: (1) APIS took unauthorized possession of $1,022,171; (2) APIS intentionally entered and remained on the Tribe's property; (3) APIS intentionally damaged and destroyed property worth at least $7035; (4) APIS improperly obtained and exercised control over confidential property; (5) APIS employees committed unlawful assault, battery, and false imprisonment against Tribal members and employees. The petition raised claims of trespass to land, trespass to chattel, conversion, and misappropriation of trade secrets. The Tribe sought compensatory damages or reimbursement, and punitive damages.

APIS had a commercial general liability policy with Scottsdale Insurance Company, including personal and advertising injury coverage and errors and omissions coverage. APIS claimed there was coverage under the policy for the claims made against it by the Tribe, including a duty to defend.

Scottsdale filed a petition for declaratory judgment in Iowa district court on April 2, 2007, seeking a declaration that there was no coverage under the policy for the Tribe's claims against APIS. In general, Scottsdale claimed there was no coverage because: (1) the policy does not cover wrongful entry; (2) the policy does not cover misappropriation of trade secrets; (3) the complaint does not seek damages as defined in the policy; and (4) the acts described in the complaint were intentional acts. Specific to the general liability coverage, Scottsdale

claimed the complaint failed to allege an "occurrence" resulting in "bodily injury" or "property damage," as defined by the policy. Scottsdale also asserted there was no coverage under the personal and advertising part of the policy because the complaint did not meet the definitions in the policy and the conduct in the complaint was specifically excluded by the policy. As to the errors and omissions coverage, Scottsdale claimed the complaint alleged only intentional conduct, which was excluded. Scottsdale also asserted the exclusions for errors and omissions coverage included dishonest, fraudulent, or criminal conduct.

APIS filed a counterclaim against Scottsdale, raising claims of breach of contract, breach of implied contract, estoppel, and bad faith. Scottsdale raised an affirmative defense to the counterclaims that "[n]o damages have ever been determined in the underlying action, as that action is still in litigation and by reason thereof, the counterclaim Plaintiff presents no justiciable issue for this court."

Scottsdale filed a motion for summary judgment, asserting that under the terms of the insurance policy it did not have a duty to defend or indemnify APIS. APIS resisted the motion for summary judgment, and filed a trial court brief to support its resistance. Scottsdale replied to the resistance filed by APIS.

The district court issued a ruling on April 14, 2008, granting Scottsdale's motion for summary judgment. The court noted it would apply Iowa law, and not tribal law, which had not been pled or proved. The court found, "The allegations of fact all stem from allegedly intentional actions taken by APIS." The court stated that under the definition of "occurrence" there is no coverage for

intentional acts. The court found there was no coverage for property damage "intended from the standpoint of the insured." The court additionally found "the torts alleged to have been committed by APIS specifically are not covered under the terms of the policy." The court concluded Scottsdale had no duty to defend or indemnify APIS. After granting summary judgment to Scottsdale, the court dismissed APIS's counterclaims as a matter of law.

APIS filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court denied the motion, noting "all of the issues were addressed in the Ruling." APIS appealed.

II. Standard of Review

We review the district court's ruling on a motion for summary judgment for the correction of errors of law. *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 681 (Iowa 2008). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the non-moving party. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008).

> Construction of an insurance policy—the process of determining its legal effect—is a question of law for the court. Interpretation—the process of determining the meaning of words used—is also a question of law for the court unless it depends on extrinsic evidence or a choice among reasonable inferences to be drawn.

Grinnell Mut. Reins. Co. v. Jungling, 654 N.W.2d 530, 536 (Iowa 2002). When, as here, neither party offers extrinsic evidence as to the meaning of relevant

language of an insurance policy, the process of interpretation is for the court to determine as a matter of law. *See Cairns v. Grinnell Mut. Reins. Co.*, 398 N.W.2d 821, 823-24 (Iowa 1987).

III. Facts that May be Considered

As a preliminary matter, we note what may be a disagreement between the parties concerning what facts a court may consider in resolving a coverage dispute such as the one before us. APIS asserts that a court may look to the insurance policy, the petition in the underlying lawsuit (here the complaint against APIS filed by the Tribe in the tribal court), and any other admissible and relevant facts in the record. Scottsdale at least appears to urge a narrower scope, stating at points in its brief that "coverage depends . . . on the facts alleged in the underlying complaint," "a court's focus should be on the conduct alleged in the complaint," "[w]hat governs coverage . . . are the allegations of fact made in the complaint against APIS," and "APIS's . . . affidavits . . . do not aid its quest for coverage."

Central Bearings Co. v. Wolverine Insurance Co., 179 N.W.2d 443 (Iowa 1970), was an action by the plaintiff against its insurer alleging breach of an insurance policy by failing to defend and indemnify the plaintiff in a lawsuit against the plaintiff. In discussing whether the district court had erred in granting summary judgment in favor of the plaintiff the court stated, in part:

> [I]f, after construing both the policy in question, the pleadings of the injured party *and any other admissible and relevant facts in the record*, it appears the claim made is not covered by the indemnity insurance contract issued, the insurer has no duty to defend or indemnify.

Central Bearings, 179 N.W.2d at 445 (emphasis added).

In the later case of *McAndrews v. Farm Bureau Mutual Insurance Co.*, 349 N.W.2d 117 (Iowa 1984), the court cited, quoted, and emphasized the above-emphasized language from *Central Bearings*, and did so just after stating that although the facts to be considered

> have traditionally been those alleged in the petition in the suit against the insured . . . *[t]he scope of the inquiry . . . must sometimes be expanded beyond the petition,* especially under "notice pleading" petitions which often give few facts upon which to assess an insurer's duty to defend.

Id. at 119 (emphasis added). The language of these cases indicates that when determining a coverage dispute the court may consider not only the facts alleged in the underlying complaint and the language of the insurance policy, but may also consider at least such other facts as are established by the record to be undisputed.

In *Smithway Motor Express, Inc. v. Liberty Mutual Insurance Co.*, 484 N.W.2d 192 (Iowa 1992), the court affirmed the district court's grant of summary judgment to the insured and against the insurer on a coverage question. In doing so it stated, in part: "Under the record, the known facts are limited to the insurance policy and the employee's petition. *No further facts were supplied by affidavit or otherwise*." *Smithway Motor*, 484 N.W.2d at 194 (emphasis added). The emphasized language appears to indicate that when considering, in the context of a request for summary judgment, the issue of whether insurance coverage exists, the court may consider all relevant and admissible undisputed facts.

Other cases also indicate, either expressly or by implication, that undisputed facts beyond the underlying complaint and insurance policy may be considered in deciding a coverage question in the context of deciding a motion for summary judgment. *See, e.g., Employers Mut. Cas. Co. v. Cedar Rapids Television Co.*, 552 N.W.2d 639, 642 (Iowa 1996) ("In determining whether there is a duty to defend we look '*first and primarily* to the petition for the "facts at the outset of the case."'") (emphasis added); *Newton Nat'l Bank v. Gen. Cas. Co.*, 426 N.W.2d 618, 623 (Iowa 1988) ("We look first and primarily to the petition for the 'facts at the outset of the case.' When necessary we expand our scope of inquiry to any other admissible and relevant facts in the record.") (citations omitted); *First Nat'l Bank v. Fidelity & Deposit Co.*, 545 N.W.2d 332, 335 (Iowa Ct. App. 1996) (same); *Kartridg Pak Co. v. Travelers Indem. Co.*, 425 N.W.2d 687, 688 (Iowa Ct. App. 1988) (holding that in order to determine whether there is coverage under an insurance policy a court looks not only to the petition against the insured, but also to "all other admissible and relevant facts in the record").

We conclude that in determining whether summary judgment was appropriate in this case the district court could, and we can on appeal, consider not only the allegations of the Tribe's complaint against APIS and the contents of APIS's policy with Scottsdale, but also all other relevant and admissible facts that the summary judgment record shows to be undisputed.

IV. Commercial General Liability Coverage

APIS asserts there is a duty to indemnify and a duty to defend under its insurance policy with Scottsdale, which provides that there is coverage for "bodily injury" and "property damage" only if the "'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory.'" If there is no fact question, and the only conflict concerns the legal consequences flowing from the undisputed facts, such as in the construction and interpretation of an insurance policy, summary judgment is appropriate. *Grinnell Mut. Reins. Co.*, 654 N.W.2d at 535.

In determining the meaning of an insurance contract, the intent of the parties is controlling, and unless the language is ambiguous, this is determined by the terms of the policy. *Id.* at 536. We interpret ambiguous policy provisions in favor of the insured because insurance policies are in the nature of adhesion contracts. *Id.* An insurer has the burden to define any limitations or exclusions in clear and explicit terms. *AMCO Ins. Co. v. Haht*, 490 N.W.2d 843, 845 (Iowa 1992). Words undefined in a policy are given their ordinary meaning, rather than a technical interpretation only a specialist would understand. *A.Y. McDonald Indus. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 619 (Iowa 1991).

Scottsdale claims there was not an "occurrence" under the terms of the policy. The term "occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful

conditions." The arguments on appeal relate only to whether there has been an "occurrence" under the terms of the policy.[1]

An accident is defined as "an event which, under the circumstances, is unusual and unexpected." *Weber v. IMT Ins. Co.*, 462 N.W.2d 283, 287 (Iowa 1990). In defining "occurrence," the Iowa Supreme Court has stated, "[a]n accident, happening, event, or exposure to conditions is an unexpected and unintended 'occurrence' so long as the insured does not expect to intend both it *and* some injury." *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 601 (Iowa 1993) (quoting *First Newton Nat'l Bank*, 426 N.W.2d at 625).

We affirm the district court's finding there was no "occurrence," as that term is defined in the insurance policy. The petition filed by the Tribe does not seek damages based on an accident, or an event that was unexpected and unintended. The petition alleges APIS "intentionally entered and remained in the Tribe's Community Center (which houses the Tribe's executive offices and records) and the Casino." The petition also alleges APIS "intentionally damaged and destroyed tribal property." We conclude the court did not err in determining there was no duty to indemnify under the commercial general liability portion of the insurance policy because the Tribe's petition does not make a claim for "bodily injury" or "property damage" caused by an "occurrence."[2]

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[1] In its motion for summary judgment, Scottsdale claimed the allegations against APIS were not for "property damage" under the policy. The district court did not address this issue. We also do not address the issue of whether the complaint against APIS alleged "property damage" as the term is defined in the insurance policy because that issue has not been raised on appeal.

[2] The insurance policy excludes, "'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured." Based on our finding there was no

V. Personal and Advertising Coverage

APIS also claims there is a duty to indemnify and a duty to defend under the personal and advertising coverage portion of the Commercial General Liability Coverage provisions. Scottsdale argued the complaint filed by the Tribe against APIS did not include any claims that would trigger personal and advertising coverage.

Scottsdale contends this issue was not preserved because it was not specifically addressed by the district court. The district court set forth the applicable provisions of the personal and advertising coverage, and the arguments relating to those provisions. It is clear the district court's legal conclusions encompassed the issues arising under the personal and advertising provisions. Additionally, in its resistance to APIS's post-trial motion, Scottsdale asserted, "[t]he court's ruling thoroughly addresses all issues raised in the motion for summary judgment and finds in Plaintiff's favor on all counts." The district court's ruling on the post-trial motion also states "all of the issues were addressed in the Ruling." We conclude APIS's issues relating to personal and advertising coverage were adequately preserved for our review.

An insurer may extend liability coverage only to specific torts. *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 402 (Iowa 2005). Under this type of coverage we look to the type of legal theory brought against the insured, to determine if it is covered under the policy. *Id.* Also, even if the theory of

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"occurrence" under the terms of the policy, we do not address whether "bodily injury" and "property damage" coverage is excluded by this provision. Thus, we do not address whether the alleged property damages were expected or intended by APIS.

recovery is not listed as being covered under the policy, there may still be coverage if the operative facts contain allegations expressly covered in the policy. *See Employers Mut. Cas. Co.*, 552 N.W.2d at 642.

The applicable portion of the definition of "personal and advertising injury" provides:

> "Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:
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> . . .
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> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord, or lessor.

The complaint against APIS raises factual allegations that APIS "intentionally entered and remained at the Tribe's Community Center (which houses the Tribe's executive offices and records) and the Casino."[3] The petition does not allege APIS entered the community center and Casino "on behalf of its owner, landlord or lessor." The complaint specifically states, "Such entering and remaining was not authorized by the Tribe." The complaint against APIS does not include an offense giving rise to personal and advertising injury under the terms of the policy.[4]

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[3] One of the allegations contained in the claim for punitive damages is that APIS committed "assaults and batteries and false imprisonment on tribal members and employees." Additional offenses covered by the personal and advertising injury provisions are "False arrest, detention, and imprisonment." The claims, however, are not that the Tribe, the entity that brought the suit, was subjected to false arrest, detention, and imprisonment. The claims relate to Tribal members and employees, who are not parties to the suit. We conclude, therefore, there is no coverage for the claims for punitive damages based on assault and battery and false imprisonment.

[4] Scottsdale also raised an argument that the community center and Casino were occupied by a person. The term "person" is not defined in the policy. We note that

We affirm the district court's conclusion there was no duty to indemnify under the personal and advertising provisions of the policy for the claims made against APIS by the Tribe.

VI. Errors and Omissions Coverage

APIS further contends there is coverage and a duty to defend under the errors and omissions coverage provisions of its insurance policy with Scottsdale. In the motion for summary judgment Scottsdale asserted there was no coverage under the errors and omissions coverage because the complaint alleges only intentional conduct, not negligent acts.

Again, Scottsdale claims error was not preserved on this issue because it was not specifically addressed by the district court. For the same reasons discussed above concerning the personal and advertising injury coverage, we conclude error was preserved on this issue as well.

The term "error or omission" is defined in the insurance policy as "any negligent act, error or omission while performing any services normal to the business of the insured described in the Declarations." On the declarations page APIS's business is listed as "Investigation." An "error" is a mistake or blunder. *Employers Reins. Corp. v. Mut. Med. Plans, Inc.*, 504 N.W.2d 885, 888 (Iowa 1993). An "omission" means "apathy toward or neglect of duty." *Id.* Errors and

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elsewhere the policy distinguishes between persons and organizations. *See, e.g.*, "Any person or organization having proper temporary custody of your property," "Any other person or organization responsible for the conduct of such person," "Persons or organizations making claims or bringing 'suits.'" Due to our conclusion, however, that there were no allegations APIS's acts were committed by or on behalf of the owner, landlord, or lessor of the property, we do not specifically address whether the Tribe is a person for purposes of this provision in the insurance policy.

omissions coverage does not apply to deliberate, as opposed to negligent, acts. *Id.*

APIS contends that while the petition alleges it engaged in intentional acts, a fact finder addressing the merits of the complaint could find APIS negligently or mistakenly entered the Tribe's property or damaged the Tribe's property. APIS points out that it believed it had authority from a member of the Elected Tribal Council to engage in the acts which are the subject of the complaint. As APIS claims, there is the possibility it could be found negligent for failing to determine with complete precision which Tribal faction rightfully controlled the Tribe. *See* Restatement (Second) of Torts § 164, at 296 (1965) (addressing trespass under mistake); 75 Am. Jur. 2d *Trespass* § 8, at 21 (2007) (recognizing a tort of negligent trespass); 87 C.J.S. *Trespass* § 6, at 664 (2000) (noting civil liability may be predicated upon unintentional trespass, or upon acts done accidentally, inadvertently, or by mistake).

We conclude there *may* be a duty to indemnify under the errors and omissions portion of the insurance policy based on whether a fact finder determines APIS acted intentionally or negligently. The policy would provide such coverage if there is a finding APIS engaged in a "negligent act, error or omission while performing any services normal to the business of the insured described in the Declarations."

If there were a finding that the claims against APIS came within the errors and omissions coverage, then Scottsdale's claim that the Tribe's claims for damages did not meet the definition of "damages" found in the errors and

omissions coverage would need to be addressed. The definition of damages does not include, "Amounts paid to you as fees or expenses for services performed which are to be reimbursed or discharged as a part of the judgment or settlement."

The Tribe's claims against APIS for trespass to land, trespass to chattel, and misappropriation of trade secrets do not seek damages based on the fees paid to APIS for its services. Only the claim for conversion of Tribal funds seeks damages based on payments received from the Tribe. We conclude that under the definition of "damages" in the errors and omissions coverage, there is no duty to indemnify for the claim of conversion of Tribal funds, but there could be such a duty for the other claims.[5]

Scottsdale furthermore asserted that there was no coverage for the Tribe's claims against APIS under the errors and omissions coverage due to a provision that excluded coverage for "a dishonest, fraudulent, malicious or criminal act by any insured." The petition alleged APIS gained access to the casino by "criminally breaking into and entering the secured areas of the Casino." The petition also alleged APIS "unlawfully gained access to tribal trade secret information and provided tribal trade secret information to others." The complaint did not otherwise raise claims of dishonest, fraudulent, or malicious acts. If a fact

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[5] The claim for punitive damages is based on failure to return Tribal funds, but also the entry into the community center, access to confidential information, committing assault and battery and false imprisonment of Tribal members, and allowing a person to have access to secured areas of the casino. To the extent the claim is based on damages for expenses or fees for services performed, there is no duty to indemnify. For other claims there may be such a duty.

finder determined APIS had engaged in criminal conduct, there would be no duty to indemnify for those acts under the errors and omissions provisions.

We turn then to the issue of whether there is a duty to defend under the errors and omissions portion of the policy. An insurer's duty to defend is broader than its duty to indemnify. *Maxim Techs., Inc. v. City of Dubuque*, 690 N.W.2d 896, 902 (Iowa 2005). This is "because a plaintiff's basis of recovery is necessarily indeterminable until a case is tried." *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 656 (Iowa 2002). The factual allegations against an insured are examined to determine whether the insurer must defend against the claim. *Continental Ins. Co. v. Bones*, 596 N.W.2d 552, 559 (Iowa 1999). "[*T]he duty to defend* rests *solely* on whether the petition contains any allegations that *arguably* or *potentially* bring the action within the policy coverage. *Employers Mut. Cas. Co.*, 552 N.W.2d at 641 (citation omitted).

If a claim rationally falls within the insurance coverage, the insurer is required to defend the entire action. *Id.* Thus, if a claim against an insured involves both covered and non-covered claims, the insurer has a duty to defend against the entire action. *First Newton Nat'l Bank*, 426 N.W.2d at 630. Any doubts as to the extent of the insured's coverage are resolved in favor of the insured. *Maxim Techs.*, 690 N.W.2d at 902.

Because we have determined there is an arguable or potential duty to indemnify under the errors and omissions provisions of the policy, there is also a duty to defend. *See Employers Mut. Cas. Co.,* 552 N.W.2d at 641. Furthermore, although there are both covered and uncovered claims, Scottsdale's duty to

defend encompasses the entire action. *See First Newton Nat'l Bank*, 426 N.W.2d at 630. We reverse the decision of the district court granting summary judgment to Scottsdale on the issue of coverage under the errors and omissions provisions of the policy.

VII. Counterclaims

APIS contends the district court should not have dismissed its counterclaims. The district court's ruling states, "Because there is no duty to defend or indemnify, the Counterclaim stated by APIS against Scottsdale should be dismissed as a matter of law." We have determined Scottsdale does have a duty to defend, and it may have a duty to indemnify on some claims. We reverse the decision of the district court dismissing the counterclaims. The counterclaims should be remanded to the district court for further proceedings.

VIII. Summary

We reverse the district court's decision regarding the duty to defend. Scottsdale has the duty to defend APIS against the claims raised by the Tribe. We also reverse the district court's grant of summary judgment to Scottsdale based on a finding there was no coverage under the errors and omissions coverage. We conclude there may be a duty to indemnify under the errors and omissions coverage, depending upon the factual determinations of the fact finder in this case. There is no duty to indemnify under the General Commercial Liability or personal and advertising portions of the policy, and we affirm the grant of summary judgment on these issues. We remand to the district court for further

proceedings not inconsistent with this opinion. Costs of this appeal are assessed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Vaitheswaran, P.J., concurs; Mansfield, J., concurs specially.

MANSFIELD, J. (concurring specially)

The majority opinion is a very thorough and thoughtful treatment of this complex insurance dispute. I agree with the result, and join in most of the court's opinion. My only disagreement is a narrow one pertaining to part V of the court's opinion.

The relevant policy language discussed in part V provides coverage for injury arising out of "wrongful entry into . . . a room, dwelling or premises that a person occupies, committed by or on behalf of its owner . . . ." APIS is being sued, in part, for wrongfully entering and remaining on the Casino and Community Center on or about October 1, 2003. APIS maintains that it entered these buildings at the behest of an entity that it believed to be the true owner. Accordingly, APIS contends that coverage exists under the personal and advertising injury provisions. Scottsdale disputes these points, asserting (1) APIS did not enter the Casino and Community Center on behalf of its true "owner" and (2) these buildings were not occupied by a natural "person." The majority opinion accepts Scottsdale's first argument and does not reach the second. I would rely on Scottsdale's second argument, because I disagree with Scottsdale's first argument.

It is true that any wrongful entry must have been committed by or on behalf of the owner to trigger coverage. *See U.S. Fid. & Guar. Co. v. Goodwin*, 950 F. Supp. 24, 27 (D. Me. 1996) ("the provision unambiguously requires that the wrongful entry be committed by the owner, landlord, or lessor of the room, dwelling, or premises"). The problem here is that it remains unclear who was the

"owner" of the Casino and Community Center as of October 1, 2003. Although the Tribe alleges in its petition that APIS lacked authority from the Tribe to enter the Casino and Community Center, the underlying facts are more complicated. As set forth in the summary judgment record and part I of the court's opinion, two different councils claimed to represent the Tribe at that time. APIS had authority from one of those councils. Thus, it is possible, given the record before us, that APIS could successfully defend the Tribe's lawsuit by establishing that it had permission to enter from an entity that had ownership rights to the buildings as of October 1, 2003. That being the case, if only this portion of the policy language were at issue, I believe Scottsdale would have a duty to defend and, potentially, a duty to indemnify.

As demonstrated very ably in part III of the court's opinion, the "facts that may be considered" in this case are not limited to the petition that has been filed against the insured. In part V of the opinion, I respectfully believe the majority may have disregarded that lesson and focused solely on the wording of the petition, to the exclusion of the broader factual context of this dispute.

However, I nonetheless agree with the majority's ultimate determination that the personal and advertising injury provisions do not afford coverage to APIS in this case. In my view, those provisions do not apply here because, as Scottsdale points out, the Casino and Community Center were not occupied by a natural "person." Case law from certain other jurisdictions offers support for Scottsdale's position. *See 47 Mamaroneck Ave. Corp. v. Hartford Fire Ins. Co*., 857 N.Y.S.2d 610, 611 (N.Y. App. Div. 2008) (holding that eviction of a

commercial tenant that was not a natural person was "not covered by the definition of 'personal and advertising injury'"); *Mirpad, L.L.C. v. Calif. Ins. Guarantee Ass'n*, 34 Cal. Rptr. 3d 136, 144-47 (Cal Ct. App. 2005) ("such coverage should not extend to the wrongful eviction of 'organizations'"). While the Seventh Circuit apparently has a different view, *see Supreme Laundry Serv., L.L.C. v. Hartford Cas. Ins. Co*., 521 F.3d 743, 747-48 (7th Cir. 2008) ("we will not read 'person' in this CGL policy to refer to simply natural persons when it can plausibly apply to a corporate entity"), from my reading of the policy language and the case law I am more persuaded by the decisions of the intermediate appellate courts in California and New York.

With the foregoing qualification, I join in my colleague's excellent opinion.