

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

v.

OPINION
AND
ORDER

SUBSCRIPTIONS PLUS, INC., KARLEEN
HILLERY, ALLSTATE INSURANCE
COMPANY, UNIVERSAL UNDERWRITERS
INSURANCE, ALBERT L. ROBERTS,
DEANNA ROBERTS, JANET HANSON,
CHARLES HANSON, PHILLIP
ELLENBECKER, BONITA LETTMAN, JOHN
LETTMAN, DONALD WILD, DIANA WILD,
MICHAEL McDANIEL, PAM CHRISTMAN,
STACI M. BECK, NICOLE McDOUGAL,
ELAINE McDOUGAL, MONICA FORGUES,
NANCY ASHTON, KAILA BLAINE GILLOCK,
CRAIG L. FECHTER, SHAWN KELLY-WEIR,
JEREMY HOLMES, YES! INC., CHOAN A.
LANE, DEBBIE McDANIEL, UNITY HEALTH
PLANS INSURANCE CORPORATION,
HEART OF TEXAS DODGE, INC. and PPD
PHARMCO,

Defendants,
and

ACCEPTANCE INSURANCE COMPANIES,

99-C-0539-C

Intervening Defendant.

In this civil action, plaintiff Scottsdale Insurance Company seeks a declaration that it has no obligation to defend or indemnify defendants Subscriptions Plus, Inc. and Karleen Hillery in connection with claims arising out of a van crash on March 25, 1999. Jurisdiction is present under 28 U.S.C. § 1332. Presently before the court are motions for summary judgment filed by plaintiff Scottsdale Insurance Company and intervening defendant Acceptance Insurance Companies, both contending that this court can decide as a matter of law that neither company's policy provides coverage to Subscriptions Plus.

I conclude that determining the issue of insurance coverage in this case could require resolution of factual issues that are better resolved in the underlying liability actions. Accordingly, I will stay the decision on Scottsdale's and Acceptance's duty to indemnify on all claims except punitive damages until liability is decided in Wild v. Subscriptions Plus, Inc., 00-C-67-C, which is also before this court, and is scheduled for trial in January 2001. Further, I conclude that Scottsdale has a duty to defend Subscriptions Plus in the underlying actions because there is a possibility that Scottsdale's policy provides coverage for the acts alleged in the complaints of the injured parties.

For the purpose of deciding this motion, I find from the parties' proposed findings of fact

that the following material facts are undisputed.

UNDISPUTED FACTS

A. The Parties

Defendant Subscriptions Plus, Inc. is an Oklahoma corporation that was in the business of processing magazine orders and providing customer service on the telephone to magazine subscribers. Defendant Karleen Hillery is the owner. During 1999, defendant Y.E.S! Inc. was one of ten or eleven sales crews that sold the magazine subscriptions processed by Subscriptions Plus. Defendant Choan Lane was the manager of Y.E.S.! Inc. Defendants Bonita and John Lettman, Stacy Beck, Shawn Kelly-Weir, DeAnna and Albert Roberts, Diana and Donald Wild, Phillip Ellenbecker, Nicole and Elaine McDougal, Monica Forgues, Nancy Ashton, Debbie and Michael McDaniel, Pam Christman, and Craig Fechter have each filed claims against Subscriptions Plus for injuries arising out of a van crash.

Plaintiff Scottsdale Insurance Company is an Ohio corporation that issued a commercial general liability policy to Subscriptions Plus and Karleen Hillery. Intervening defendant Acceptance Insurance Companies is a Nebraska corporation that issued a policy of excess liability indemnity insurance to Subscriptions Plus.

B. The Accident

In the early morning hours of March 25, 1999, thirteen young men and women, some of them minors, were traveling southbound at a high speed in a van on the interstate highway in Rock County, Wisconsin. All occupants of the van were members of the Y.E.S. sales crew and were returning from door-to-door sales in the Appleton, Wisconsin area. Jeremy Holmes was driving the van, although he did not have an operator's license. The van crashed after Holmes attempted to switch seats with a passenger. Seven passengers were killed and the rest were injured.

C. The Insurance Policies

In April 1997, Scottsdale issued a "Commercial General Liability" insurance policy to Subscriptions Plus, Inc. and Karleen Hillery (then known as Karleen Humphries). (Because Scottsdale's request for declaratory relief is identical in regard to both Subscriptions Plus and Karleen Hillery, I will refer to the latter two collectively as Subscriptions Plus). The policy was negotiated and issued in Oklahoma. It was renewed in 1999 and was in effect at the time of the accident. Subscriptions Plus did not purchase "commercial auto" coverage, which was also offered by Scottsdale. Scottsdale's policy contains the following relevant provisions:

SECTION 1 - COVERAGES

COVERAGE 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 against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply.

* * *

2. Exclusions

This insurance does not apply to:

* * *

d. Workers Compensation and Similar Laws

Any obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer’s Liability

“Bodily injury” to:

- (1) An “employee” of the insured arising out of and in the course of:

- (a) Employment by the insured; or
- (b) Performing duties related to the conduct of the insured’s business . . .

* * *

g. Aircraft, Auto or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured.

* * *

SECTION II - WHO IS AN INSURED

* * *

2. Each of the following is also an insured:

a. Your “employees” . . .

* * *

SECTION V - DEFINITIONS

* * *

5. “Employee” includes a “leased worker.” Employee does not include a “temporary worker.”

* * *

9. “Leased worker” means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. “Leased worker” does not include a “temporary worker.”

* * *

17. “Temporary worker” means a person who is furnished to you to substitute for a permanent “employee” on leave or to meet seasonal or short-term workload conditions.

* * *

LIMITATION OF COVERAGE TO THE DESIGNATED PREMISES OR PROJECT

* * *

SCHEDULE

* * *

Project:

PROCESS MAGAZINE SUBSCRIPTION ORDERS & DOES CUSTOMER SERVICE FOR MAGAZINE ORDERS

* * *

This insurance applies only to “bodily injury” . . . arising out of:

* * *

2. The project shown in the Schedule.

* * *

PUNITIVE OR EXEMPLARY DAMAGE EXCLUSION

* * *

If suit is brought against any insured for a claim falling within coverage provided under the policy, seeking both compensatory and punitive or exemplary damages, then the Company will afford a defense to such an action; however, the Company will have no obligation to pay for any costs, interest or damages attributable to punitive or exemplary damages.

In addition to the commercial general liability policy purchased from Scottsdale, Subscriptions Plus purchased an Excess Liability Indemnity Policy from Acceptance Insurance Companies. This policy was also in effect at the time of the crash. It provides:

Agrees with the insured . . .:

PART I - INSURING AGREEMENTS

1. Excess Liability Indemnity

To indemnify the insured for the amount of loss which is in excess of the applicable limits of liability of the underlying insurance [Scottsdale Insurance Company] inserted in section II of item in the declarations; provided that this policy shall apply only to those coverages for which a limit of liability is inserted in section I [Combined Single Limit Bodily Injury and/or Property Damage Other Than Automobile]; provided further that the limit of the company's liability under this policy shall not exceed the applicable amount inserted in section I.

The provisions of the immediate underlying policy are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any "other insurance" provision and any other provisions therein which are inconsistent with the provisions of this policy.

* * *

PUNITIVE DAMAGES EXCLUSION

In consideration of the premium charged, it is understood and agreed that this policy excludes any claim for punitive or exemplary damages whether arising out of acts of the insureds, insured's employees or any other person.

D. Complaints of the Injured Parties

Claims against Subscriptions Plus have been filed by Bonita and John Lettman, Stacy Beck, Shawn Kelly-Weir, DeAnna and Albert Roberts, Diana and Donald Wild, Phillip Ellenbecker, Nicole and Elaine McDougal, Monica Forgues, Nancy Ashton, Debbie and Michael McDaniel, Pam Christman, and Craig Fechter. Each of the complainants alleges that the negligence of Subscription Plus caused his or her injuries. Plaintiffs raise theories of negligent

hiring and supervision and negligent entrustment. Subscriptions Plus and Karleen Hillery have tendered the defense and indemnification of the lawsuits to Scottsdale.

OPINION

A. Summary Judgment Standard

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex, 477 U.S. at 324. If there are no disputed material facts and the sole issue involves the interpretation of an insurance policy, a question of law is presented which is appropriate for summary judgment. See Greene v. General Casualty Co., 216 Wis. 2d 152, 157, 576 N.W.2d 56, 59 (Ct. App.1997).

B. Choice of Law

The first issue to be decided is the law to be applied in this case. Most of the parties

agree that because the insurance policy was issued in Oklahoma, that state's law should be applied to the issues regarding interpretation of the policy. This assessment is correct. Under Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), a federal court in a diversity case must apply the choice-of-law rules of the forum state. See Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975); Frederick v. Simmons Airlines, Inc., 144 F.3d 500 (7th Cir. 1998). In disputes regarding the interpretation of contracts, Wisconsin uses the “grouping of contacts” test to determine choice of law. See Urhammer v. Olsen, 39 Wis. 2d 447, 450, 159 N.W.2d 688, 689 (1968); see also Employers Insurance of Wausau v. Certain Underwriters Lloyd's London, 202 Wis. 2d 673, 691, 552 N.W.2d 420, 427 (Ct. App. 1996). Under this test, a court applies the law of the state with which the contract has the most significant relationship. See Schlosser v. Allis-Chalmers Corp., 86 Wis. 2d 226, 239, 271 N.W.2d 879, 885 (1978).

In this case, although the accident occurred in Wisconsin, the insurance policy itself has its most significant contacts with Oklahoma. It is where the policy was negotiated and issued and where Subscriptions Plus and Karleen Hillery were located. Therefore, the interpretation of the contract must be governed by Oklahoma law.

As Wisconsin does, Oklahoma recognizes that an insurance policy is a contract and the same rules of interpretation generally govern both. See Max True Plastering Co. v. U.S. Fidelity

and Guaranty Co., 912 P.2d 861, 868 (Okl. 1996). If the terms of the policy are clear and unambiguous, “they are to be accepted in their ordinary sense and enforced to carry out the expressed intention of the parties.” Phillips v. Estate of Greenfield, 859 P.2d 1101, 1104 (Okl. 1993). However, because an insurance policy is a contract of adhesion it is liberally construed to give reasonable effect to all of its provisions. See Dodson v. St. Paul Insurance Co., 812 P.2d 372, 376 (Okl. 1991).

C. Duty to Indemnify

Both Scottsdale and Acceptance are requesting a declaration from this court that they have neither a duty to defend nor indemnify Subscriptions Plus for any liability it incurs as a result of the van crash on March 25, 1999. Because the policy issued by Acceptance was an excess liability indemnity policy to Scottsdale’s policy, whether Acceptance has a duty to indemnify is controlled by whether Scottsdale’s policy affords coverage. Accordingly, Scottsdale’s and Acceptance’s duty to indemnify will be analyzed together.

Scottsdale’s insurance policy to Subscriptions Plus provides that Scottsdale “will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” . . . to which this insurance applies.” Scottsdale argues initially that its policy cannot provide coverage to Subscriptions Plus for injuries resulting from the van crash because the

policy was a commercial general liability policy rather than auto insurance. Scottsdale contends that because Subscriptions Plus could have purchased from a policy specifically for auto coverage but chose not to, there can be no coverage for any liability arising from the use of an auto under any circumstances. Accepting Scottsdale's argument would mean that the scope of insurance coverage would always be determined simply by what the policy was labeled by the provider rather than by the language of the policy. Although it is true that general liability insurance is not a “catchall” category of insurance, if the language of the policy would extend coverage in the present instance, Scottsdale cannot escape its duty to indemnify simply by arguing that general liability insurance is not auto insurance.

Failing in this argument, Scottsdale points to several provisions of its policy that it argues exclude coverage for liability arising from the van crash. These include: (a) the employee exclusion; (b) the auto exclusion; (c) the limitation of coverage to a “designated project”; and (d) the workers compensation exclusion. As explained below, I conclude that determining whether any of these exclusions apply would require the resolution of a key factual question at issue in the underlying liability suits. Therefore, the decision on Scottsdale's and Acceptance's duty to indemnify Subscriptions Plus will be stayed until liability has been decided in Wild.

The provision that the parties focus on is the employee exclusion. This provision excludes from coverage any liability of Subscriptions Plus for “bodily injury” to an “employee.”

Although Scottsdale contends that both Choan Lane and the occupants of the van were employees of Subscriptions Plus, the defendants argue that they either were independent contractors or, as Subscriptions Plus asserts, had no employment relationship of any kind with Subscriptions Plus. Scottsdale and Acceptance advance a multitude of reasons why the sales crew should be considered “employees,” going as far as utilizing tests regarding employment status from the Internal Revenue Service and case law from Minnesota and Illinois. For their part, defendants provide several tests from both Wisconsin and Oklahoma that they claim show that the sales crew were not employees of Subscriptions Plus, or at least that there is an issue of fact regarding this determination.

Regardless whether Scottsdale and Acceptance or the defendants are correct, this case is not the proper forum for resolution of this dispute. Rather, because the issue of employment status is also crucial to the determination of the liability of Subscriptions Plus, it should be determined in Wild. In that case, Subscriptions Plus is contending that it cannot be held liable because no employment relationship existed between it and the sales crew. Because an action for declaratory relief is not the proper vehicle for resolving factual issues in the underlying suit against the insured, see Old Republic Insurance Co. v. Chuhak & Tecson, P.C., 84 F.3d 998, 1003 (7th Cir. 1996), any decision regarding whether the sales crew were employees of Subscriptions Plus must be stayed until liability has been determined.

Although it is true that the analysis for determining whether the sales crew were “employees” for the purpose of coverage may not be identical to whether they were employees for the purpose of liability, the two cannot be separated. The Scottsdale policy does provide a partial definition of “employee” (“employee” includes a “leased worker,” but not a “temporary worker”), but no party has argued persuasively that this definition provides any insight into whether the sales crew fall into this definition. Therefore, the word should be given its “ordinary meaning.” See Max True Plastering, 912 P.2d at 865. Furthermore, as parties on both sides point out, the essential determination under Wisconsin or Oklahoma law will be the extent to which Subscriptions Plus exercised control over the sales crew.

However, Scottsdale and Acceptance argue that even if the sales crew are considered independent contractors rather than employees, there is no coverage because Subscriptions Plus cannot be held liable unless the sales crew were employees. Even if true, this says nothing about the scope of insurance coverage, but only whether Subscriptions Plus is liable to the injured parties for the crash. The duty to indemnify is not contingent on whether the insurer believes its insured is liable for the injuries. Obviously, if Subscriptions Plus is found not liable in the underlying suits, the insurers will not have to indemnify it, but whether this is the case must be decided in Wild.

The other provisions of the policy on which Scottsdale and Acceptance rely could result

in similar conflicts. With regard to the auto exclusion, the plain language of the policy indicates that it does not exclude coverage for all auto accidents. Rather, whether the auto exclusion applies will depend on whether the van “was owned or operated by or rented or loaned to any insured.” The parties dispute both whether Subscriptions Plus had any possessory interest in the van and whether Jeremy Holmes was an employee of Subscriptions Plus and, therefore, an “insured.” As discussed above, the employment status of the occupants of the van in relation to Subscriptions Plus is an issue crucial to the determination of liability. Furthermore, whether Subscriptions Plus had a possessory interest in the van could affect the negligent entrustment claims of the injured parties. Therefore, this issue must also wait for resolution until liability has been decided.

The Scottsdale policy also limits coverage to injuries “arising out of” the “designated project,” which is “processing magazine subscription orders and doing customer service.” Because the determination whether the accident “arose out of” these activities of Subscriptions Plus relates to whether the acts of Subscriptions Plus caused the accident, it too should not be decided until after liability is established.

Next, Scottsdale points to its exclusion for “[a]ny obligation of the insured under a Workers Compensation . . . law.” No party disputes that to the extent Subscriptions Plus is found liable under Wisconsin workers compensation statutes, neither Scottsdale nor

Acceptance will have to indemnify Subscriptions Plus for its losses. Scottsdale argues, however, that the workers compensation exclusion precludes *any* possibility of coverage under its policy. Specifically, Scottsdale contends that workers compensation will be the exclusive remedy for each of the injured parties. Therefore, because Scottsdale's policy excludes coverage for workers compensation, there is no duty to indemnify. Again, deciding the extent to which workers compensation applies involves determinations of the employment status of the sales crew in relation to Choan Lane, Y.E.S.! and Subscriptions Plus and is an issue that must be determined in the liability suits.

Finally, Scottsdale argues that there can be no coverage under its policy because the acts of Jeremy Holmes were a “supervening cause” of the accident that destroys any causal nexus between the crash and the acts of Subscriptions Plus. As with the issue whether Subscriptions Plus can be held liable if the sales crews were independent contractors, whether Jeremy Holmes was a “supervening cause” is an issue of liability, not insurance coverage. Therefore, it should be decided in Wild.

In the event that the Wild case is resolved by summary judgment, this case will be tried to a jury during the week beginning January 29, 2001. (Plaintiff Scottsdale has moved to strike the jury demand filed by Subscriptions Plus, arguing that the issues to be decided are purely equitable. As the discussion in this order shows, Scottsdale’s characterization of the issues is

inaccurate. Disputed factual issues are critical to the resolution of the litigation. These issues should be determined by a jury. See 9 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 2313 (2d ed. 1994.)

In addition to requesting a declaration that they have no duty to indemnify Subscriptions Plus at all, Scottsdale and Acceptance are both seeking a declaration that they have no duty to indemnify Subscriptions Plus for punitive damages. The language of both Scottsdale's and Acceptance's policies excludes coverage for “punitive or exemplary damages” unequivocally and Subscriptions Plus does not contend that it is entitled to indemnification for these damages. Therefore, the motions for summary judgment of Scottsdale and Acceptance on this issue will be granted.

D. Duty to Defend

Unlike the duty to indemnify, the duty to defend of Scottsdale and Acceptance can be determined without resolving any factual disputes at issue in the liability suits. It is commonly noted that the duty to defend is separate from, and broader than, the duty to indemnify. See First Bank of Turley v. Fidelity and Deposit Insurance Co. of Maryland, 928 P.2d 298, 303 (Okl. 1996). The duty to defend is not determined by the outcome of the liability suits but rather by “the presence of facts that give rise to the potential of liability under the policy.” Id.

Therefore, whenever the allegations in the complaints of the injured parties state a cause of action that gives rise to the possibility of recovery under the policy, the duty to defend is triggered. See id. at 303 n.14. Furthermore, the duty is not limited by the precise language of the pleadings; the insurer has the duty to look behind the injured parties' allegations to analyze whether coverage is possible. See id. at 303 n.15.

In this case, the excess policy issued by Acceptance does not provide for a duty to defend and Subscriptions Plus has not argued that Acceptance has such a duty. Accordingly, Acceptance's motion for summary judgment on this issue will be granted. In contrast, Scottsdale's policy provides expressly for a duty to defend Subscriptions Plus against suits "to which this insurance applies." Therefore, if there is a "possibility" that Scottsdale's policy could provide coverage for the claims against Subscriptions Plus, its duty to defend is triggered.

As the discussion above regarding the duty to indemnify shows, there is a possibility that if the allegations of the complaint are proven, Scottsdale's policy could provide coverage to Subscriptions Plus. The allegations in the complaints state that the negligent acts of Subscriptions Plus caused bodily injury to the plaintiffs. Scottsdale's policy could provide coverage for these claims, so long as it is determined that the occupants of the vehicle were not employees of Subscription Plus and Subscriptions Plus had no possessory interest in the van when it crashed.

Again, the fact that Subscriptions Plus may not be liable for the accident if it is determined that the sale crew were independent contractors is irrelevant in deciding whether Scottsdale has a duty to defend. For the purpose of determining *coverage*, all that will matter is that the sales crew were *not* employees. Coverage would be provided if the sale crew were independent contractors. Although this could also mean that Subscriptions Plus would not be liable for the sales crew's injuries, this has no bearing on Scottsdale's duty to defend. Scottsdale must defend Subscriptions Plus even from groundless suits. See id. at 303 n.10.

Although some of the underlying complaints refer to Choan Lane and the sales crew as “employees” of Subscriptions Plus, this does not mean that Scottsdale has no duty to defend Subscriptions Plus against these claims. If there are sufficient facts alleged in the complaint to bring the case within the policy coverage, statements of conclusion have no effect on whether the insurer has a duty to defend. See Turley, 928 P.2d at 303 n. 15; 14 COUCH ON INSURANCE § 200:27 (3d ed.). The facts alleged are sufficient to create the possibility that coverage is provided, so Scottsdale's duty to defend is triggered.

ORDER

IT IS ORDERED that:

1. The motions of plaintiff Scottsdale Insurance Company and Acceptance Insurance

Companies for summary judgment on their contention that they have no duty to indemnify defendants Subscriptions Plus, Inc. and Karleen Hillery are GRANTED on the claims for punitive damages and STAYED on all other claims until liability has been determined in Wild v. Subscriptions Plus, Inc., 00-C-67-C.

2. The motion for summary judgment of intervening defendant Acceptance Insurance Companies on its contention that it has no duty to defend defendants Subscriptions Plus, Inc. and Karleen Hillery is GRANTED.

3. Plaintiff Scottsdale Insurance Company's motion for summary judgment on its contention that it has no duty to defend Subscriptions Plus, Inc. is DENIED.

4. Plaintiff Scottsdale Insurance Company's motion to strike the jury demand is DENIED.

IT IS DECLARED that both plaintiff Scottsdale Insurance Company and intervening defendant Acceptance Insurance Companies have no duty to indemnify defendants Subscriptions Plus, Inc. or Karleen Hillery for punitive damages for claims arising out of the March 25, 1999 van crash. Intervening defendant Acceptance Insurance Companies has no duty to defend defendants Subscription Plus, Inc. or Karleen Hillery. Plaintiff Scottsdale Insurance Company must defend defendants Subscription Plus, Inc. and Karleen Hillery for claims arising out of the March 25, 1999, van crash.

Entered this _____ day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge