

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

SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

v.

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,

ORDER

99-C-539-C

Intervening Defendant.

In an opinion and order entered on November 9, 2000, I declared that plaintiff Scottsdale Insurance Company had a duty to defend defendants Subscriptions Plus, Inc. and Karleen Hillery for claims arising out of the March 25, 1999 van crash that killed or injured thirteen salespeople. In addition, I stayed the decision on whether plaintiff Scottsdale has a duty to indemnify defendants Subscriptions Plus and Hillery until after the question of liability against those defendants had been decided in Wild v. Subscriptions Plus, Inc., 00-C-67-C. Presently before the court are two motions by plaintiff Scottsdale to reconsider the declaration regarding the duty to defend and to “clarify” the decision regarding the duty to indemnify.

In its motion for reconsideration, plaintiff Scottsdale contends that there are no circumstances in this case in which it would have a duty to defend defendants Subscriptions Plus and Hillery. If members of the salescrew were employees of Subscriptions Plus, the auto exclusion applies and there is no coverage and therefore no duty to defend. Alternatively, plaintiff argues that even if the auto exclusion does not apply, there is still no duty to defend. Plaintiff points to an amendment of the insurance policy that provides:

b. Excess Insurance

This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis:

* * *

(3) If the loss arises out of the maintenance or use of aircraft, "auto" or watercraft to to the extent not subject to Exclusion g. [the auto exclusion]

* * *

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." If no insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

From this, plaintiff argues that if the auto exclusion does not apply, its insurance becomes excess and under the language of the policy it has no duty to defend if another insurer has a duty to defend. Further, plaintiff contends that because Progressive Northern Insurance Company is providing a defense to defendants Subscriptions Plus and Hillery, its own duty to defend is extinguished.

I disagree with plaintiff's assessment. First, I note that plaintiff raised this argument for the first time in its reply brief, and only in the last page of that brief in a footnote. Thus, plaintiff has waived this argument. See [Washington v. Indiana High School Athletic Association, Inc.](#), 181 F.3d 840, 846 n.9 (7th Cir. 1999) (court will not consider arguments raised for the first time in reply brief). More important, the fact that another insurer is providing a defense to defendants Subscriptions Plus and Hillery does not mean plaintiff's own duty disappears. The policy itself states only that plaintiff will not provide a defense if another

insurer both has a *duty* to defend and actually *is* providing a defense. Although Progressive may be providing a defense to defendants Subscriptions Plus and Hillery, it has never conceded that it has a duty to do so. In fact, Progressive is requesting a declaration in the Wild case that it has no duty to defend defendants Subscriptions Plus and Hillery. Therefore, I cannot be say at this time that the quoted provision of plaintiff Scottsdale's policy applies. Although I am willing to revisit this issue after Progressive's duty to defend has been determined, the November 9 order will not be altered at this time.

Regarding its motion for clarification, plaintiff Scottsdale states that it is confused over whether the decision on its duty to indemnify has been stayed until after the resolution of Wild or until after all the other liability actions have been decided. If I was not clear enough in the November 9 order I will state it unequivocally here: the decision on indemnification has been stayed only until liability is decided in Wild.

ORDER

IT IS ORDERED THAT plaintiff Scottsdale Insurance Company's motion for

reconsideration is DENIED.

Entered this 6th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge