

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

HARRISE YARON and JODI GOLDBERG,	:	April Term 2010
Plaintiffs,	:	
v.	:	No. 502
DARWIN NATIONAL INSURANCE COMPANY :	:	
and PHILADELPHIA INDEMNITY INSURANCE:	:	C OMMERCE PROGRAM
COMPANY,	:	
Defendants.	:	Control Nos. 11012209/10122559
	:	

**ORDER**

**AND NOW**, this 5<sup>th</sup> day of July, 2011, upon consideration of Defendant Philadelphia Insurance Company's Motion for Summary Judgment (cn 11012209) and Defendant Darwin National Insurance Company's Motion for Summary Judgment (cn 10122559) and Plaintiffs' responses in opposition, it hereby is **ORDERED** that the Motions for Summary Judgment are **Granted** and Plaintiffs' amended complaint is dismissed in its entirety.

It is further declared that Philadelphia Indemnity Insurance Company and Darwin National Insurance Company have no duty to pay plaintiffs' independent counsel's attorney fees or expenses.

**BY THE COURT,**

\_\_\_\_\_  
**ARNOLD L. NEW, J.**

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

HARRISE YARON and JODI GOLDBERG,	:	April Term 2010
Plaintiffs,	:	
v.	:	No. 502
DARWIN NATIONAL INSURANCE, COMPANY:	:	
and PHILADELPHIA INDEMNITY INSURANCE:	:	C OMMERCE PROGRAM
COMPANY,	:	
Defendants.	:	Control Nos. 11012209/10122559
	:	

**OPINION**

This is an action for declaratory judgment. On April 6, 2010, Plaintiffs Harisse Yaron and Jodi Goldberg (hereinafter “Plaintiffs”) filed the instant action seeking a declaration that defendants Philadelphia Indemnity Insurance Company (hereinafter “PIIC”) and Darwin National Insurance Company (hereinafter “Darwin”) are obligated under their respective policies of insurance to pay the fees and expenses of Yaron’s and Goldberg’s chosen defense counsel in connection with an underlying action filed in federal court and state court.

Plaintiffs herein, along with others, were named as defendants in an action filed by six Pennsylvania dog breeders on February 19, 2010 in the United States District Court for the Eastern District of Pennsylvania (hereinafter referred to as the “Myer’s action”). The federal action was voluntarily dismissed, without prejudice, and was filed in the Court of Common Pleas of Lancaster County on April 12, 2010. The named defendants in the Myer action are The Pennsylvania Society for the Prevention of Cruelty to Animals (hereinafter “PSPCA”), Yaron, President of the PSPCA Board of Directors, Goldberg, member of the PSPCA Board of Directors, and Kristen Sullivan (hereinafter “Sullivan”), humane society officer and agent of the PSPCA. The action asserts three causes of action against each of the defendants, malicious

prosecution, common law conspiracy and invasion of privacy in connection with the investigation and filing of animal cruelty charges against the six dog breeders.

At the time the federal and state complaints were filed, PSPCA, Yaron, Goldberg, and Sullivan were insured under policies of insurance issued by PIIC and Darwin.

The PIIC policy includes coverage for “Not-for-Profit Organization Directors & Officers Liability Insurance”. The Darwin policy is a “Police Professional Liability Insurance Policy”.

Darwin determined that PSPCA, Yaron, Goldberg and Sullivan were all insureds under its policy and determined the underlying actions were claims there under. Darwin appointed Joseph J. Santarone, Esquire and the law firm of Marshall Dennehy Warner Coleman and Goggin to defend PSPCA and Sullivan and appointed Tracy A. Walsh, Esquire and Weber Gallagher Simpson Stapleton Fires & Newby to defend Yaron and Goldberg. Darwin later determined that the interests of Yaron and Goldberg may become adverse to each other and appointed Robert G. Hanna, Jr., Esquire to defend Yaron, while Walsh and Weber Gallagher continued to defend Goldberg. According to Darwin, Walsh and Hanna were selected to defend the insureds because of their experience and expertise in the defense of public, government and non-profit entities in civil rights actions, including claims for wrongful arrest and malicious prosecution.

In addition to the counsel appointed by Darwin, Yaron and Goldberg retained the law firm of Spector, Gadon and Rosen (hereinafter “SGR”) to also represent them in the Myer actions. Yaron and Goldberg filed the instant action seeking payment of SGR attorney fees and expenses from defendant insurers.

## DISCUSSION

Interpretation of an insurance contract is a matter of law.<sup>1</sup> The goal in interpreting an insurance policy is to ascertain the intent of the parties as manifested by the language of the written instrument.<sup>2</sup> Where the language of the insurance contract is clear and unambiguous, a court is required to give effect to that language.<sup>3</sup> Words of common usage are to be construed in their natural, plain and ordinary sense and we may form our understanding of these terms by considering their dictionary definitions.<sup>4</sup> Contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.<sup>5</sup> Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer.<sup>6</sup> In determining what the parties intended by their contract, the law must look to what they clearly expressed. Courts in interpreting a contract, do not assume that its language was chosen carelessly.<sup>7</sup>

It is well established that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured. A carrier's duty to defend an insured in a suit

---

<sup>1</sup> Madison Construction Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100, 106 (Pa. 1999).

<sup>2</sup> The Municipality of Mt. Lebanon v. Reliance Ins. Co., 778 A.2d 1228, 1231-1232 (Pa.Super. 2001) (*quoting* Madison Construction, *supra* at 606, 735 A.2d at 106.)

<sup>3</sup> Madison Construction, *supra* at 606, 735 A.2d at 106 (*quoting* Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass'n. Inc. Co., 512 Pa. 420, 426, 517 A.2d 910, 913 (1986)) (other citations omitted).

<sup>4</sup> *Id.* at 608, 735 A.2d at 108 (citations omitted).

<sup>5</sup> *Id.* at 606, 735 A.2d at 106.

<sup>6</sup> *Id.* (*quoting* Gene & Harvey Builders, *supra* at 426, 517 A.2d at 913) (other citations omitted).

<sup>7</sup> Stewart v. McChesney, 498 Pa. 45, 444 A.2d 659, 662 (Pa. 1982)(*quoting* Moore v. Stevens Coal Co., 315 Pa. 564, 173 A. 661, 662 (Pa. 1934)).

brought by a third party depends solely upon a determination of whether the third party's complaint triggers coverage.<sup>8</sup>

### **A. The Darwin Policy**

A review of the Darwin policy clearly demonstrates that the policy does not permit reimbursement of an insured choice of counsel. The Darwin policy provides that it has “the right and duty to defend any Claim against the Insured for a Law Enforcement Occurrence” which is covered by the policy.” The Darwin policy provides the following as it pertains to defense costs:

#### **A. Defense and Settlement of Claims:**

- (1) No Insured may incur any Defense Expenses or admit liability for, or settle, or offer to settle, any Claim without the Insurer’s written consent.

According to this policy language, Darwin has the right and duty to defend claims covered by the policy. This right and duty encompasses the right to select counsel to represent the insured. As such, Darwin has the right and the duty to appoint counsel to represent plaintiffs.<sup>9</sup>

In order to overcome this unambiguous policy language, plaintiffs argue that Darwin’s interest conflicts with those of plaintiffs and therefore, plaintiffs should be permitted to select its own counsel to be paid by Darwin. After analysis of the available case law and review of the record, this court finds that plaintiffs have failed to prove the existence of an actual conflict of interest to warrant the payment of counsel of its choice by Darwin. <sup>10</sup>

---

<sup>8</sup> Mutual Benefit Insurance Co. v. Haver, 555 Pa. 534, 725 A.2d 743, 745 (Pa. 1999) *citing* General Accident Insurance Co v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (Pa. 1997).

<sup>9</sup> The record demonstrates that Darwin carefully attempted to avoid any conflict of interest as evidenced by the retention of separate counsel for the individual defendants.

<sup>10</sup> This issue has never been addressed by the Pennsylvania Appellate Court.

An insurer's duty to defend includes providing competent counsel and paying the reasonable, necessary costs of the representation.<sup>11</sup> When an insurer retains counsel to defend its insured, the insured is considered the client. If a conflict of interest arises between an insurer and the insured, the attorney representing the insured must act exclusively on behalf of and in the best interests of the insured.<sup>12</sup> A conflict of interest arises between an insured and insurer when the company's pursuit of its own best interests in the litigation is incompatible with the best interests of the insured.<sup>13</sup> Where the conflict of interest between the insurer and the insured raises a question as to the loyalty of the insurer's chosen counsel in representing the insured, the insured is entitled to choose its counsel, whose reasonable fee must be paid by the insurer.<sup>14</sup>

Plaintiffs allege that even though Darwin offered them a defense in the underlying federal court and state court lawsuits, it did so under a reservation of rights that noted specifically that claims asserted by the underlying liability plaintiffs if proven might trigger the application of the exclusion contained in Section II. A. of the Darwin policy. The referenced exclusion provides as follows:

- A. The **Insurer** shall not pay **Loss**, but shall only pay **Defense Expenses**, from any Claim brought about or contributed to in fact by:
- (1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission by any **Insured**;
  - (2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation; or

---

<sup>11</sup> See Scottsdale Ins. Co. v. The City of Hazelton, 2009 U.S. Dist. Lexis 44861 (M. D. Pa. 2009) *citing* Rector v. Am. Nat'l Fire Ins. Co., 97 Fed App'z 374, 378 (3d Cir. 2004).

<sup>12</sup> *Id.*

<sup>13</sup> Kvaerner U.S. Inc. v. One Beacon Insurance Company, 2005 Phila. Ct. Com. Pl. Lexis 377 (2005) (*citing* Rector supra.).

<sup>14</sup> *Id.*

- (3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** is not legally entitled.

The applicability of EXCLUSIONS A(1), A(2) AND A(3) to any specific **Insured** may be determined by an admission of such **Insured**, a finding, or a final adjudication in the proceeding constituting the **Claim** or in a proceeding separate from or collateral to the **Claim**. If any specific **Insured** in fact engaged in the conduct specified in EXCLUSIONS A(1), A(2) and A(3), such **Insured** shall reimburse the **Insurer** for any **Defense Expenses** advanced to or paid on behalf of such **Insured**.<sup>15</sup>

The existence of a reservation of rights letter does not automatically give rise to a conflict of interest between the insurer and the insured with regard to the conduct of the insured's defense.<sup>16</sup> Under Pennsylvania law, the general rule is that an insurance company may not assume the defense of a suit which entails the defendant's relinquishing to the insurer the management of the case and then later deny liability under the policy. The insurer may protect its rights under the policy by timely issuing a reservation of rights which fairly informs the insured of the insurer's position.<sup>17</sup> In issuing the reservation of rights letter, the insurer is merely putting the insured on notice of what the insurer believes are its existing rights under the policy. Whether

---

<sup>15</sup> According to plaintiffs, the exclusion referenced above as well as recoupment of defense fees and expenses previously advanced for plaintiffs' behalf if the exclusion applies will allow the insurer to construct a defense placing any damage award outside the scope of coverage.

<sup>16</sup> See Fed. Ins. Co. v. X-Rite Inc., 748 F. Supp. 1223 (W.D. Mich. 1990) (holding that conflict of interest posed by reservation of rights did not automatically entitle insured to select counsel of its choice at insurer's expense); Cardin v. Pac. Employers Ins. Co., 745 F. Supp. 330, 336-38 (D.Md. 1990) (rejecting per se disqualification where only possibility of conflict exists); Finley v. Home Ins. Co., 90 Haw. 25, 975 P.2d 1145 (Haw. 1998) (holding reservation of rights does not automatically entitle insured to counsel of its own choosing); L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co., 521 So.2d 1298 (Ala. 1987) (finding that insurer's decision to defend under reservation of rights did not create a conflict of interest so as to entitle insured at the outset to engage defense counsel of its choice at insurer's expense); Red Head Brass, Inc. v. Buckeye Union Ins. Co., 135 Ohio App. 3d 616, 735 N.E.2d 48 (Ohio Ct. App. 1999) (holding that insurer defending under reservation of rights not required to pay for independent counsel retained by insured); Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 71 Cal. Rptr. 2d 882 (1998) (finding that reservation of rights did not create automatic conflict of interest); Littlefield v. McGuffey, 979 F.2d 101 (7th Cir. 1992) (determining that possibility of conflict of interest not sufficient to trigger obligation of insurer to pay for independent counsel); Foremost Ins. Co. v. Wilks, 206 Cal. App. 3d 251, 253 Cal. Rptr. 596 (1988) (finding reservation of rights letter alone not sufficient to trigger insurer's duty to pay for independent counsel).

<sup>17</sup> Merchants Mut. Ins. Co. v. Artis, 907 F. Supp. 886, 891 (E.D. Pa. 1995) (citation omitted); see also Aetna Life and Cas. Co. v. McCabe, 556 F. Supp. 1342, 1354 (E.D. Pa. 1983).

the policy exclusion may apply to limit or preclude coverage does not create an actual conflict of interest. At best, the reservation of rights letter presents the possibility of a conflict of interest.

This court is unwilling to adopt a *per se* rule that a reservation of rights letter creates a conflict of interest between the insurer and insured. Actual proof that attorneys have disregarded their ethical duties to their clients as set forth in the professional rules of conduct is necessary to establish the conflict of interest. To hold otherwise would require this court to recognize a conclusive presumption, based on nothing more than the existence of a potential conflict between the insured and the insurer, that counsel is unable to provide independent representation. This court is not willing to implant such an unwarranted presumption into the law. Instead, there must be some evidence to suggest that the conflict between the insurer and the insured actually affected counsel's representation so that it may be said that counsel's actions elevated the interests of the insurer over those of his client, the insured. Since plaintiffs have failed to produce any evidence that counsel elevated the interests of the insurer over those of plaintiffs, Darwin's motion for summary judgment is granted.

## **II. PIIC Policy**

Plaintiffs also seek payment for their independently retained counsel from the PIIC policy specifically the "Not-for-Profit Organization Directors & Officers Liability" part. The policy provides that PIIC will pay on behalf of any Individual Insured all "Loss" resulting from claims made against an insured for D&O Wrongful Acts. The PIIC policy defines "Loss" to include "Defense Costs". "Defense Costs" are defined as follows:

### **C. Defense Costs means:**

1. Any reasonable and necessary legal fees and expenses incurred in the defense of a Claim, whether by the Insured with the Underwriter's consent or directly by the Underwriter, in the investigation, adjustment, defense and appeal of a Claim, except that Defense Cost shall not include:



- a. any amounts incurred in the defense of any Claim for which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty;...

PIIC argues that the defense costs that plaintiffs seek coverage for are not covered under the PIIC policy since the amounts do not constitute defense costs. The definition of defense costs does not include any amounts incurred in defense of any claim for which any other insurer has a duty to defend regardless of whether or not such other insurer undertakes such duty. Darwin has a duty to defend the underlying state action and has assumed the defense. As such PIIC owes no coverage.

Plaintiffs argue that the defense costs provision constitutes an unenforceable "escape clause". "Escape clauses" are clauses that purport to "relieve the insurer of any obligation to an insured if the insured has other available insurance coverage."<sup>18</sup> For instance, a clause that seeks to wholly remove a person from the policy's definition of an insured<sup>19</sup> or shift all liability to another applicable insurance policy<sup>20</sup> would be an escape clause. There is, however, a distinct difference between an escape clause that seeks to avoid all liability and an excess clause that seeks to limit the insurer's liability to the excess over any other collectible insurance.<sup>21</sup> Unlike an escape clause, an excess clause "affords protection to the insured after exhaustion of the primary coverage."<sup>22</sup> While escape clauses are viewed with disfavor by courts as they purport to relieve

---

<sup>18</sup> Fryer v. Allstate Ins. Co., 392 Pa. Super. 418, 573 A.2d 225, 226 (Pa. Super. 1990) (emphasis added); *see also* Harstead v. Diamond State Ins. Co., 555 Pa. 159, 723 A.2d 179, 181 (Pa. 1999); Hoffmaster v. Harleysville Ins. Co., 441 Pa. Super. 490, 657 A.2d 1274, 1276 (Pa. Super. 1995).

<sup>19</sup> *See, e.g.*, Fryer, 392 Pa. Super. 418, 573 A.2d 225.

<sup>20</sup> *See, e.g.*, Ins. Co. of N. Am. v. Continental Cas. Co., 575 F.2d 1070 (3d Cir. 1978) (applying Pennsylvania law).

<sup>21</sup> *See* Hoffmaster, 657 A.2d at 1276 (identifying and discussing the three general categories of "other insurance" clauses as "pro-rata" clauses, escape clauses, and excess clauses).

<sup>22</sup> Maryland Cas. Co. v. Horace Mann Ins. Co., 551 F. Supp. 907, 909 (W.D. Pa. 1982) (applying Pennsylvania law).

an insurer from any and all obligation to the insured, excess clauses are not similarly disfavored.<sup>23</sup>

Here, the definition of defense costs contained within the PIIC policy does not constitute an “escape clause”. The provision does not eliminate other components of “Loss” which would remain applicable under the policy. For instance, coverage for loss is not limited to defense costs under the policy. Loss also includes damages under the policy. Damages are defined as including monetary judgment, award or settlement including punitive, exemplary or multiple portion thereof or violence damages.<sup>24</sup> Since, PIIC does not seek to escape all liability, the defense cost provision does not constitute an “escape clause” and therefore precludes plaintiffs claim for payment of independent counsel. As such, PIIC’s motion for summary judgment is granted.

### **CONCLUSION**

For the foregoing reasons, the defendants’ respective motions for summary judgment are granted and plaintiffs’ complaint is dismissed.

**BY THE COURT,**

---

**ARNOLD L. NEW, J.**

---

<sup>23</sup> See Harstead, 723 A.2d at 182.

<sup>24</sup> Violence damages are specific to Workplace Violence Insurance.

