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FIRST DIVISION  
April 14, 2014

No. 1-13-2107  
2014 IL App (1st) 132107-U

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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NORTH RIVER INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CH 2066
	)	
GUARANTEE TRUST LIFE INSURANCE	)	Honorable
COMPANY, VANTAGE AMERICAN	)	Diane J. Larsen,
SOLUTIONS, INC., CENTURY SENIOR	)	Judge Presiding.
SERVICES, JEFFREY BURMAN,	)	
BARBARA TAUBE, RICHARD	)	
HOLSON III,	)	
	)	
Defendants-Appellants.	)	

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PRESIDING JUSTICE CONNORS delivered the judgment of the court.  
Justices Hoffman and Delort concurred with the judgment.

**ORDER**

*Held:* Plaintiff insurance company has duty to defend insured in underlying lawsuit because allegations in lawsuit potentially fall within policy's coverage.

¶ 1 Plaintiff North River Insurance Company sought a declaration that it had no duty to defend its insured, who are the defendants in this case, in a consumer-fraud

action filed against them by the Federal Trade Commission (FTC). The circuit court granted summary judgment to plaintiff. We reverse.

¶ 2 In 2010, the FTC sued defendants (along with quite a few other companies and individuals) over an allegedly fraudulent telemarketing scheme. According to the amended FTC complaint, defendants were involved in the marketing and sale of a medical-discount plan to consumers in the New York area. The plan purportedly allowed customers to get access to various discounts on healthcare and related products. This is very different than what the complaint termed “major medical health insurance,” which it defined as an agreement where an insurance company “agrees to pay a substantial portion of the healthcare expenses that the consumer might incur in exchange for payment from the customer.”

¶ 3 The complaint claimed that defendants’ representatives obtained contact information for consumers who were seeking major medical health insurance. When the representatives contacted the consumers, however, they would attempt to sell the consumers a plan that the representatives either expressly or implicitly claimed was health insurance but was in fact a medical-discount plan. The complaint alleged that the representatives used a variety of fraudulent and high-pressure tactics to get the consumers to buy the plan. Moreover, the representatives routinely misstated the discounts contained in the plan and the availability of participating providers, and they falsely represented defendants’ cancellation and refund policies. In its complaint, the FTC sought a permanent injunction and other remedies for the affected consumers.

¶ 4 After they were served with the complaint, defendants filed a claim with plaintiff under their liability-insurance policy and tendered their defense to plaintiff. After reviewing the claim, however, plaintiff denied coverage and refused to defend defendants in the FTC lawsuit. The same day that it informed defendants of the claim's denial, plaintiff filed this lawsuit, seeking among other things a declaratory judgment.

¶ 5 Defendants initially moved for judgment on the pleadings, but after this was denied by the circuit court, plaintiff filed an amended complaint and moved for summary judgment on Count I. This count sought a declaratory judgment that plaintiff had no duty to defend defendants in the FTC lawsuit based on a coverage exclusion in the insurance policy. The circuit court agreed and granted summary judgment to plaintiff on Count I. Plaintiff voluntarily dismissed the remaining counts in its complaint, and defendants appealed.

¶ 6 The only issue on appeal is whether plaintiff is obligated to defend defendants in the FTC lawsuit. Given that this case comes to us following summary judgment and involves the construction of an insurance policy, we review the issue *de novo*. See *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). The proper analysis in this type of situation is well settled:

“A court's primary objective in construing the language of the policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. [Citation.] If the terms of the policy are clear and unambiguous, they must be given their plain and ordinary

meaning. [Citation.] Conversely, if the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. [Citation.] In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. [Citation.] A court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. [Citation.]” (Internal quotation marks omitted.) *Pekin Insurance Co. v. Wilson*, 341 Ill. 2d 446, 455-56 (2010).

¶ 7 Perhaps most relevant for this case, “the insurer’s duty to defend its insured is broader than its duty to indemnify.” *Id.* at 456. The supreme court explained the difference in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125 (1992), where it noted that “[i]n order to determine whether the insurer's duty to defend has arisen, the court must compare the allegations of the underlying complaint to the policy language. [Citations.] The allegations in the underlying complaint must be liberally construed in favor of the insured. [Citations.] If the court determines that these allegations fall within, *or potentially within*, the policy's coverage, the insurer has a duty to defend the insured against the underlying complaint.” (Emphasis added.) In contrast, “[a]n insurer's duty to indemnify is narrower than its duty to defend its insured. [Citations.] The duty to indemnify ‘will not be defined until the adjudication of the very action which [the insurer]

should have defended.’ [Citations.] In other words, the question of whether the insurer has a duty to indemnify the insured for a particular liability is only ripe for consideration if the insured has already incurred liability in the underlying claim against it. [Citations.] If so, the duty to indemnify arises if the insured's activity and the resulting loss or damage actually fall within the \*\*\* policy's coverage.” *Id.* at 127-28.

¶ 8 In Count I of its amended complaint for declaratory judgment, plaintiff sought a declaration that it is not obligated to defend defendants in the FTC action.<sup>1</sup> Plaintiff based its position on exclusion A(6)(c) of the policy, which states that plaintiff “shall not be liable to make any payment for *Loss* resulting from any *Claims*” that are based on an actual or alleged

“violation of the Interstate Commerce Act of 1887, the Sherman Antitrust Act of 1890, the Clayton Act of 1914, the Robinson-Palman Act of 1936, the Cellar-Kefauver Act of 1950, the Competition Act, *the Federal Trade Commission Act of 1914*, amendments thereto, or any

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<sup>1</sup> There is a procedural-history point that is worth noting here. Plaintiff’s original complaint sought a declaratory judgment on the effect of the exclusion, though the count is very unclear whether plaintiff thought the exclusion affected both its duty to defend and indemnify or merely its duty to indemnify. (The count claimed only that the exclusion precludes “coverage”.) Regardless, when the circuit court denied defendants’ motion for judgment on the pleadings, it issued an extensive memorandum order analyzing the issue of “coverage” but not the duty to defend. But when plaintiff amended its complaint, plaintiff switched theories. The amended complaint specifically sought a declaratory judgment on only the exclusion’s effect on plaintiff’s duty to defend. A different judge of the circuit court ruled on plaintiff’s motion for summary judgment, however, and it appears that neither the parties nor the court recognized that the duty to defend requires a different analysis than the duty to indemnify. The new judge simply adopted (without a written opinion) the analysis that the previous judge used when resolving the motion for judgment on the pleadings, and so the circuit court did not employ the analysis that must be used for duty-to-defend issues when it granted summary judgment to plaintiff. The circuit court’s rationale is therefore not especially helpful to us, and plaintiff’s heavy reliance in its brief on the circuit court’s opinion is misplaced.

other federal, state, provincial, local, or foreign statutory or common law designed to prevent monopoly, preclude price fixing, or otherwise protect competition.” (Emphasis added.)

Given that the defendants faced a lawsuit by the FTC, that the exemption clearly covers violations of the Federal Trade Commission Act, and that a “loss” is defined by the policy to include defense costs, plaintiff contends that it is not obligated to defend defendants in the action.

¶ 9 There are two problems with plaintiff’s position. First, plaintiff does not account for the actual allegations contained in the underlying FTC complaint.<sup>2</sup> The FTC complaint contains six counts. While Count I alleges that defendants violated section 5 of the FTC Act (15 U.S.C. § 45(a) (eff. Dec. 22, 2006)), Counts II through VI allege various violations of the Telemarketing Sales Rule (16 C.F.R. pt. 310 (eff. Sep. 27, 2010)). While it can plausibly be argued that Count I falls under the coverage exclusion because it is based on a violation of the FTC Act, the same cannot be said for the remaining counts. This is crucial here because if a duty to

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<sup>2</sup> Indeed, plaintiff’s brief on appeal completely fails to even mention the rules of construction related to the duty to defend. More egregiously, however, plaintiff blatantly misstates a key principle of law. Citing to *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007), plaintiff states that “[i]f the words used in the insurance policy are reasonably susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against *the insured.*” (Emphasis added.) (Pl.’s Br. at 14-15). Yet *Rich* says precisely the opposite: “If the words used in the insurance policy are reasonably susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against *the insurer who drafted the policy.*” (Emphasis added.) *Rich*, 226 Ill. 2d at 371. The misstatement is especially troubling in the context of this case because *Rich* goes on to state in the very next sentence, “This is especially true with respect to provisions that limit or exclude coverage.” *Id.* We will assume that the misstatement was inadvertent and trust that plaintiff’s counsel will check citations more carefully in the future.

defend arises as to at least one count in a lawsuit, then the insurer has a duty to defend on all counts of the suit. See *Pekin*, 237 Ill. 2d at 453 n.2.

¶ 10 The Telemarketing Sales Rule (TSR) originates from the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act), which authorizes the FTC to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.” 15 U.S.C. § 6102(a) (eff. July 21, 2011). Unlike Count I, which alleges a violation of the FTC Act, the remaining counts allege violations of the TSR. Yet neither the Telemarketing Act nor the TSR are explicitly mentioned in the policy’s coverage exclusion. Moreover, they are not “designed to prevent monopoly, preclude price fixing, or otherwise protect competition.” The Telemarketing Act is designed to “offer consumers necessary protection from telemarketing deception and abuse,” and the TSR is merely the FTC’s regulatory method of enforcing the Telemarketing Act. The exclusion’s catch-all clause therefore does not apply either.

¶ 11 To be sure, violations of the TSR are in practice enforced by the FTC pursuant to the powers granted to it by the FTC Act. See 15 U.S.C. §§ 45(a), 57a. The Telemarketing Act states that a violation of the TSR “shall be treated as a violation of a rule under [15 U.S.C. § 57a] regarding unfair or deceptive acts or practices.” 15 U.S.C. § 6102(c)(1) (eff. July 21, 2011). Violations of rules promulgated under section 57a are, in turn, considered to be unlawful under the FTC Act and thus enforceable by the FTC. See 15 U.S.C. §§ 45(a), 57a. There is therefore a plausible argument to be made that violations of the TSR are in fact

violations of the FTC Act, though in an indirect way. Construed in this manner, Counts II through VI of the FTC complaint could potentially fall within the policy exclusion.

¶ 12 Yet this brings us to the second problem with plaintiff's position, which is that plaintiff fails to account for the breadth of the duty to defend. An insurer is not relieved of the duty to defend when the facts of an underlying complaint are potentially excluded from coverage. Rather, it is the other way round. An insurer's duty to defend arises when the facts potentially fall within coverage. See *Pekin*, 237 Ill. 2d at 455. Moreover, we are bound to construe provisions that limit or exclude coverage "liberally in favor of the insured and against the insurer," and "if the application of an exclusion results in denying the duty to defend, that exclusion must be clear and free from doubt." (Internal quotation marks omitted.) *United Services Automobile Ass'n v. Dare*, 357 Ill. App. 3d 955, 965 (2005). Counts II through VI of the FTC complaint allege that defendants committed "deceptive telemarketing acts or practices that violate the TSR." The TSR implements the Telemarketing Act, which is a consumer-protection statute that is not explicitly listed in the policy exclusion and is not designed to prevent monopoly, price fixing, or competition, and so a violation of the TSR does not clearly fall within the coverage exclusion. The FTC action is therefore potentially covered and plaintiff is obligated to defend defendants in the lawsuit.

¶ 13 Whether plaintiff is also obligated to indemnify defendants is an entirely different question, and it is one that we do not reach here. As we noted above, the

duty to indemnify is narrower than the duty to defend and only arises when a claim is actually covered by the policy. See *Outboard Marine*, 154 Ill. 2d at 128. The obligation to indemnify cannot be defined until the underlying action is complete (see *id.*), and so we need not decide whether a violation of the TSR is actually a violation of the FTC Act within the meaning of the policy exclusion. Moreover, the parties also dispute whether the exclusion is meant to cover *all* violations of the FTC Act, or only those that involve monopoly, price fixing, or unfair methods of competition. Those are not questions that we must resolve in this case because plaintiff sought only a declaratory judgment on its duty to defend. At least some counts of the FTC complaint potentially fall within the policy's coverage, so plaintiff is obligated to defend defendants in the lawsuit.

¶ 14 Reversed and remanded.