IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

D. Hollman

CHARTER OAK FIRE INSURANCE CO., Plaintiff,	)	
v.	)	Civil Action No.86-0366-R
LPC INVESTMENT ASSOCIATES, Defendant.	)	

MEMORANDUM OPINION

Plaintiff Charter Oak filed this action seeking a declaration that the insurance policy it issued to LPC Investment Associates on March 25, 1985 does not require it to defend or indemnify LPC in an action brought by Richmond Gravure, Inc. against LPC and others in Henrico Circuit Court. LPC has asserted a counterclaim to the allegations of the complaint on the ground that Charter Oak breached its contractual duties to LPC under the policy by refusing to defend or indemnify LPC in the Richmond Gravure action.

The insurance policy issued by Charter Oak provides LPC with broad form comprehensive liability coverage. The policy states that Charter Oak "will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence . . . ." An occurrence is defined by the policy as "[1] an accident, including continuous or repeated exposure to conditions, [2] which results in

bodily injury or property damage [3] neither expected nor intended from the standpoint of the Insured." The policy further provides that Charter Oak "shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage even if any of the allegations of the suit are groundless, false or fraudulent . . ."

The policy provides additional coverage for personal injury or advertising injury liability. It states that Charter Oak "will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the Named Insured's business, within the policy territory, and [Charter Oak] shall have the right and duty to defend any suit against the Insured seeking damages on account of such injury, even if any of the allegations of the suit are groundless, false or fraudulent . . . ."

The suit filed by Richmond Gravure against LPC stems from the organization and operation of Gravure Packaging. The suit seeks injunctive relief, compensatory damages, and punitive damages against LPC and the other defendants based upon several different theories. Defendants Robinson, Richie, Lynch, Cooke, and Vermillera were employees of Richmond Gravure prior to the organization of Gravure Packaging. The other defendants in the suit are Gravure Packaging and LPC. LPC is a Virginia partnership consisting of three general partners, George Little, Terry Parsley, and James Cluverius. LPC is a shareholder in Gravure

Packaging and is alleged to have been the vehicle used by the individual defendants to purchase land and build and equip a gravure printing plant so that the individual defendants could leave Richmond Gravure and begin competing with it immediately upon their departure.

The underlying suit was filed in Henrico County Circuit Court on January 14, 1986. An amended complaint was filed in the suit on August 14, 1986. There are eleven counts in the amended complaint and LPC is named in counts 1-7, and 10. The counts in the amended complaint are: I - Breach of Implied Contract; II - Breach of Fiduciary Duty; III - Fraud; IV - Willful Interference with Advantageous Relations; V - Wrongful Appropriation; VI - Conspiracy; VII - Unfair Competition; VIII - Breach of Express Contract; IX - Breach of Fiduciary Duty as Officer and Director; X - Conspiracy to Induce Breach of Contract; XI - Conversion.

Charter Oak's position in this declaratory judgment action is that the amended complaint fails to allege facts which if proven, would fall within the risks covered by the policy. This position is based on two arguments: (1) that the amended complaint fails to set forth facts demonstrating an "advertising injury" as that term is defined by the policy; and (2) that Richmond Gravure's allegations against LPC preclude entry of judgment against LPC based upon an "occurrence" as that term is defined by the policy. Thus, Charter Oak contends that it owes LPC no duty to defend and no duty to indemnify. The Court agrees with Charter Oak regarding their first argument, but does not agree with the second.

Virginia law is clear with regard to certain rules that apply in cases such as this. The duty to defend must be gauged by the pleadings filed in the underlying lawsuit, including the facts and circumstances alleged in the complaint. Lerner v. General Insurance Co. of America, 219 Va. 101, ___, 245 S.E.2d 249, 251 (1978). An insurer is obligated to defend its insured when the allegations, if proven, support a judgment on a cause of action within the ambit of the policy. Reisen v. Aetna Life and Casualty Co., 225 Va. 327, 302 S.E.2d 529 (1983). Where a lawsuit asserts multiple theories of recovery, such a duty exists if any of the allegations fall within the coverage of the policy. Lerner, 219 Va. at ___, 245 S.E.2d at 251. The insurer's duty to defend, however, does not arise when it clearly appears that the insurer would not be liable under any judgment based upon the allegations. Reisen, 225 Va. at ___, 302 S.E.2d at 531; Travelers Indemnity Co. v. Obenshain, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978). It is also clear that the duty to defend is broader than the duty to indemnify. Jefferson-Pilot Fire & Casualty Co. v. Boothe, Prichard & Dudley, 638 F.2d 670, 674 (4th Cir. 1980); Lerner at 251.

Two other Virginia rules apply in insurance coverage cases generally. As noted by the Fourth Circuit,

> [1] [W]here language in an insurance policy is susceptible of two constructions, it is to be construed liberally in favor of the insured and strictly against the insurer. [Citation omitted]. [2] [W]here two interpretations equally fair may be made, the one which permits a greater indemnity will prevail.

Jefferson-Pilot, 638 F. 2d at 674.

Regarding Charter Oak's first argument relating to the advertising injury coverage, the Court agrees with Charter Oak that the amended complaint fails to set forth facts demonstrating "advertising injury" as that term is defined by the policy. An advertising injury is one "occurring in the course of the Named Insured's advertising activities . . . ." LPC, the named insured, is a shareholder in Gravure Packaging but the allegations in the amended complaint do not refer to LPC's advertising activities but to those of Gravure Packaging. Therefore, the policy provides neither a duty to defend nor a duty to indemnify pursuant to the advertising injury endorsement.

Regarding Charter Oak's second argument, relating to the insuring clause of the policy that obligates Charter Oak to defend any suit against LPC seeking damages for property damage neither expected nor intended from LPC's standpoint caused by an occurrence, the Court concludes as a matter of law that the allegations in the amended complaint fall within the meaning of "occurrence" as it is defined within the policy. The definition of "occurrence" requires "[1] an accident, including continuous or repeated exposure to conditions, [2] which results in bodily injury or property damage [3] neither expected nor intended from the standpoint of the insured."

The first clause requires that there be an "accident." The term is not defined in the policy nor has it been defined by the Virginia Supreme Court, but it has been given broad interpretation by other courts. Quincy Mutual Fire Insurance Co. v. Abernathy, 393 Mass. 81, 469 N.E.2d 797 (1984). An accident does

not have to result from a sudden happening. Continuous or repeated conduct, spanning a period of time, may be an accident. Boggs v. Aetna Casualty & Surety Co., 252 S.E.2d 565, 567 (S.C. 1979). The Massachusetts court cited above included "reckless" conduct as "accidental" and noted that an accident occurs "if the insured does not specifically intend to cause the resulting harm or is not substantially certain that such harm will occur." 393 Mass. at ___, 469 N.E.2d at 799. Negligent acts are also within the ambit of "accident." Boggs, 252 S.E.2d at 567; United States Fidelity & Guaranty Co. v. Bonitz Insulation Co., 424 So.2d 569, 571 (Ala. 1982). Therefore, based on [1] the insurer's failure to define "accident," and [2] the broad construction given by other courts in the absence of an interpretation by the Virginia Supreme Court, this Court concludes that the activities of the insured, or those of co-defendants through whom vicarious liability may be imposed on LPC, are within the meaning of the word "accident" as it is used in the definition of "occurrence."

The second clause requires that bodily injury or property damage have resulted from the insured's conduct. The allegations of the amended complaint in Henrico County clearly assert that Richmond Gravure has suffered property damage. This assertion is apparently not contested by the insurer, Charter Oak.

The third clause requires that the damages resulting from the actions of the insured be neither expected nor intended from the standpoint of the insured. Judge Clarke considered this issue in City of Virginia Beach v. Aetna Casualty & Surety Co., 426 F. Supp. 821 (E.D. Va. 1976). In that case, the City sought

coverage under its liability policy for fees, costs, and the judgment resulting from litigation brought by landowners alleging that their property was damaged by the City's dredging and subsequent erosion that occurred. The insurer contended that an occurrence had not taken place because the City expected that damage to the landowners would occur when it agreed to dredge the waterways. The City argued that the damage caused by the dredging was unexpected from their standpoint and was therefore covered by the policy. The Court agreed, stating, "[W]e do agree with the City that from its standpoint it had not expected or intended the scouring currents which damaged the bulkheads and eroded the land, and that, therefore, the injuries for which City was held liable . . . did fall within the definition of "occurrence" in the policy. 426 F. Supp. at 825. Thus, the rule in Virginia seems to be that the insured must expect or intend the precise injury that results from its actions for there to be no coverage based on the "neither expected nor intended" clause.

A Virginia case, Parker v. Hartford Fire Insurance Co., 222 Va. 33, 278 S.E.2d 803 (1981), is also instructive. In Parker, the issue was whether an insurer had a duty to defend insureds in actions brought by a third party for alleged desecration of and trespass on a family burial ground. The complaint alleged that Parker "knew or should have known" of the burial lot when he bought the property and that later he obtained "actual knowledge of the existence of the burial lot." The trial court concluded that the bill of complaint alleged an intentional trespass and thus the cause of action fell within the exclusions of the policy

which relieved Hartford of its duty to defend if the "property damage was caused intentionally by or at the direction of the insured."

The Virginia Supreme Court stated, "We cannot say that Turpin's pleadings clearly show that any recovery against the Parkers would not have been covered by the insurance policy. While some of the language of the pleadings is couched in terms of intentional trespass, the pleadings, without amendment, could have supported a judgment of unintentional trespass." Id. at 804. This case supports LPC's argument that Charter Oak has a duty to defend LPC in the Henrico County action if any of the allegations in the amended complaint could support a judgment based on the insured's actions or those of co-defendants that resulted in damages that the insured neither expected nor intended.

Upon examination of the amended complaint, it appears that some of the allegations could support a judgment based on LPC's actions, or the actions of co-defendants which could result in the imposition of vicarious liability on LPC, that resulted in damages to Richmond Gravure that LPC neither expected nor intended. Specifically, the Court notes that Counts II and III, and possibly others, could support a judgment for damages to Richmond Gravure that LPC neither expected nor intended.

In Old Hickory Products Co. v. Hickory Specialties, Inc., 366 F. Supp. 913 (N.D. Ga. 1973), the district court considered this issue in a suit for unfair advertising and marketing. The court noted that the complaint in the underlying suit "containing stylized allegations of willfulness, does not establish on

its face that Hickory's conduct was excluded from coverage." Id. at 923. The court cited a Florida Court of Appeals case which stated, "[T]otal reliance upon any statement or accusation, oral or written, in a judicial proceeding is hardly warranted or justified. It is, at best, a most risky business." Id. (quoting St. Paul Fire & Marine Insurance Co. v. Icard, Merrill, Cullis & Timm, 196 So.2d 219, 221-222 (Fla. App. 1967)).

If courts looked only superficially at the allegations made by a plaintiff suing an insured when determining the insurer's duty to defend, plaintiffs in underlying suits could structure their allegations in such a way as to preclude attachment of the duty to defend, thereby potentially handicapping the insured. It seems a better policy to look beyond the stylized allegations in the underlying suit to the facts and circumstances included in the complaint when making a determination regarding the insurer's duty to defend. This policy is consistent with Parker and other legal rules that Virginia courts have applied in insurance litigation cases.

For these reasons, the Court DECLARES as follows:

1. Plaintiff Charter Oak owes no duties to the insured, LPC, under the advertising injury endorsement of the policy.

2. Plaintiff Charter Oak owes a duty to defend LPC under the general liability coverage extended by the policy.

3. The Court DISMISSES WITHOUT PREJUDICE plaintiff's complaint as to its duty to indemnify based on the general liability coverage as there is no case or controversy between the litigants

at this time that is cognizable in a declaratory judgment proceeding.

4. The Court GRANTS defendant LPC's motion for summary judgment as to Count I of its counterclaim - that plaintiff Charter Oak owes a duty to defend the action now pending in the Circuit Court in Henrico County.

5. In view of the Court's disposition of Count I of the counterclaim and the original complaint in its entirety, Counts II and III of the counterclaim are DISMISSED WITHOUT PREJUDICE as being premature.

An appropriate order shall enter.

Richard L. Williams

DATE

UNITED STATES DISTRICT JUDGE