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NO. 67471-4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

OREGON MUTUAL INSURANCE COMPANY, Petitioner
v.

RAIN CITY PIZZA, L.L.C., a Washington limited liability
company; EDWARD TALIAFERRO, an individual; KEVIN
SONNEBORN, an individual; ROSE CITY PIZZA, L.L.C., an Oregon
limited liability company, SEATTLE PJ PIZZA, L.L.C., a Washington
limited liability company, PAPA WASHINGTON L.L.C., a Washington
limited liability company, PAPA WASHINGTON II, L.L.C., a
Washington limited liability company,

Respondents.

**REPLY BRIEF OF PETITIONER
OREGON MUTUAL INSURANCE
COMPANY**

Larry Gottlieb, WSBA #20987
Daniel L. Syhre, WSBA #34158
Attorneys for Oregon Mutual
Insurance Company
Betts Patterson & Mines
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053

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I. INTRODUCTION

The respondents point to no covered damages sought either in the underlying lawsuit or even in their own separate version of the facts. The complaint seeks damages based on acts or omissions alleged to violate statutes that prohibit certain types of advertising communications. This is exactly what the “distribution of materials” exclusion excludes. In the respondents’ version, Kevin Sonneborn and an outside contractor engage in acts or omissions that fall within the exclusion. Both versions are excluded and may not even come within the grant of coverage at all.

II. ARGUMENT

A. What the Respondents “Reasonably Believed” About Coverage Is Irrelevant

The respondents claim they “reasonably believed” that the policy would cover “legal expenses they might incur in defending against unfounded lawsuits.” Resp. Brief p. 1. The policy does defend against unfounded lawsuits, but only if the lawsuits seek covered damages. The actual contract states:

A. Coverages

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury”, “property damage” or “personal and advertising injury” 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”, “property damage” or “personal and advertising injury”, to which this insurance does not apply.***

CP 212-213 (emphasis added). An exclusion unambiguously states that “this insurance does not apply” to bodily injury, property damage, or personal injury of the kind the underlying class action lawsuit seeks. Thus, Oregon Mutual has no duty to defend.

B. The Distribution of Materials Exclusion Unambiguously Applies to Vicarious Liability For The Acts and Omissions of Others

Whether the respondents’ potential liability is direct or vicarious makes no difference under the policy language. They do not point to any language that supports a distinction between direct and vicarious liability. The argument would make sense if the endorsement excluded coverage for “*insureds who engage in actions or omissions.*” When such a meaning is intended, the policy so states. For example, one of the exclusions applies to injury “expected or intended from the standpoint of *the insured.*” CP 214. In the above example, the exclusion only applies to those insureds who had the requisite mental state and not to other insureds. This is not how the endorsement works. It excludes *injury* (“bodily injury,”

“property damage,” or “personal and advertising injury”) arising out of “any action or omission” of the type described in the exclusion. Instead of saying “the insured’s action or omission” it says “*any* action or omission.” The action or omission of another insured or of a non-insured would be included in “any.” The purpose of the exclusion is not to single out bad actors while preserving coverage for the innocent; it is to prevent the type of litigation that occurs under unmodified policy forms by removing any argument for coverage.

The respondents’ argument for ambiguity is similar to the argument this Court rejected in *State Farm Fire & Cas. Co. v. English Cove Ass’n, Inc.*, 121 Wn. App. 358, 367, 88 P.3d 986, 991 (2004). In *English Cove*, the insured argued that the word “own” was ambiguous:

[the insured argued that if] State Farm meant to exclude from coverage property that the insured “co-owned” or “owned in whole or in part,” it should have so stated in the policy rather than just relying on the word “own.” . . .

This Court explained that such needless “clarifications” were not necessary to render the policy unambiguous:

Just because State Farm could have further clarified or expressly defined the term in the manner that ECA asserts, does not make “own” ambiguous. Rather, we conclude that the word includes the undivided ownership interest in the common elements of the condominium and is not fairly susceptible to two reasonable interpretations in this context.

English Cove, 121 Wn. App. at 367, 88 P.3d at 986.

If we replace “own” with “any” the defendants’ argument is the same as the one in *English Cove*. Oregon Mutual could have said “any act error or omission, including, but not limited to, those done by other people, those done on odd numbered days of the month, those the insured knew nothing about, those to which the insured objected . . . etc.” But this would not change the meaning of the policy; it would just make it longer. Everything after the word “omission” in the above example is already captured in the word “any.” Finding ambiguity here is just as odd as finding ambiguity in “I do not like green eggs and ham” and insisting on adding:

I could not, would not, on a boat.
I will not, will not, with a goat.
I will not eat them in the rain.
I will not eat them on a train.
Not in the dark! Not in a tree!
Not in a car! You let me be!
I do not like them in a box.
I do not like them with a fox.
I will not eat them in a house.
I do not like them with a mouse.
I do not like them here or there.
I do not like them ANYWHERE!¹

The notion that the exclusion does not apply to vicarious liability would also be an absurd and impractical understanding. This is a business

¹ Dr. Seuss, *Green Eggs and Ham* (1960).

insurance policy and businesses can only act through agents and can thus in a sense, only incur vicarious liability. Under respondents' argument, only natural persons could ever be subject to the exclusion. Actions done through agents are well within the meaning of "any" action or omission.

C. The Severability Clause Does Not Help Respondents

Respondents cannot rely on the severability clause to avoid the exclusion. It states "this insurance applies: a. As if each Named Insured were the only Named Insured; and b. Separately to each insured against whom a claim is made or 'suit' is brought." CP 222. Treating each of the insureds as if they were the only insured does not change the fact that the lawsuit seeks damages against each insured for liability arising out of "any" action or omission. The identity of the "actor" is immaterial to the exclusion.

A severability of interest clause is only helpful if the identity of the actor is material under policy language and the exclusion applies only to a particular insured. This result is confirmed by a number of this Court's precedents. In *Mutual of Enumclaw Ins. Co. v. Cross*, 103 Wn. App. 52, 62, 10 P.3d 440 (2000), the court held that an exclusion for the intentional acts of "any" insured would preclude coverage for all insureds, not just the insured who engaged in the intentional act:

We agree with the cases that have held that clear and specific language in an exclusion prevails over a severability clause, i.e., that an exclusion is not negated by or rendered ambiguous by a severability clause. We hold that the MOE policy exclusion bars coverage for all insureds based on the intentional actions of any one insured.

Furthermore, as a matter of law, the MOE homeowners policy's exclusion of coverage for intentional acts by "an insured" is unambiguous. It is a reasonable stretch of the holding in *Caroff* to find that the effect of a severability clause on an intentional acts exclusion does not negate the exclusion or create an ambiguity. The facts presented do not create a genuine issue of material fact. We affirm the summary judgment.

Cross, 103 Wn. App. at 62.

By contrast, the severability clause does make a difference when the exclusion applies only to "the insured" that engaged in the excluded conduct:

When an insurance policy contains an exclusion for "the insured," each insured is entitled to read the policy as if applying only to that insured.

Truck Ins. Exch. v. BRE Properties, Inc., 119 Wn. App. 582, 592, 81 P.3d 929 (2003).

But under the exclusion at issue here, the actor's identity is not relevant at all. The exclusion is not "silent and ambiguous" as to whether the insured must have "engaged in a prohibited act." (Brief of Resp. p. 26) The use of qualifying phrases such as "the insured," "an insured," or "any insured" has a narrowing effect on an exclusion because it requires

the excluded action to have some relationship to a particular insured or insureds. The Oregon Mutual exclusion is more broadly worded than the exclusion in *Cross* in order to remove all doubt about coverage for unsolicited communications lawsuits. If Oregon Mutual had used “any *insured’s* acts, errors or omissions,” the exclusion would be *narrower* and Oregon Mutual would no doubt be facing the argument that only the third party non-insured contractor (ONTIME4) was the “actor” and thus the exclusion does not apply. The phrase “any action or omission” means what it says and is in no way limited to acts or omissions that have any particular relationship to an insured. Nor is any such limitation implied. Kevin Sonneborn’s actions or omissions and those of a third party contractor fall well within the bounds of “any.” The language is simple, plain and unambiguous and should be enforced as such.

D. There Is No Distinction Between “Actual” and “Alleged” Actions or Omissions at the Duty to Defend Stage

The duty to defend must be assessed based on whether the allegations in the complaint, if proved, would be covered. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 414, 229 P.3d 693 (2010) (“duty to defend is triggered when a complaint against an insured, construed liberally, alleges facts which could, if proved, impose liability upon the insured within the policy coverage.”). This rule is consistent

with the policy language, which promises to defend suits “seeking [covered] damages.” While the respondents seem to agree, based on Mr. Sonneborn’s declaration, that there really was a text messaging campaign, the actual facts are not important. The complaint seeks damages for an “actual” text messaging campaign and is premised on such a campaign’s actual existence. It therefore “seeks” damages for actual errors and omissions, even if the allegations of actual errors and omissions are false. The complaint would only seek damages for non-actual errors or omissions if it said something like “the defendants, by imaginary acts or omissions, sent imaginary text messages.” Of course, it says nothing like that, and it is premised on actual text messages.

The complaint therefore presents no reason to look outside the complaint. But even if it did, it would not reveal that the underlying plaintiffs are actually *seeking covered damages*. According to the respondents, it would only show that fewer than all of the respondents were involved in the text messaging campaign and that some were sued unjustly.

E. Respondents May Not and Need Not Litigate the Underlying Lawsuit in This Matter

The respondents quibble about whether the facts attested to in the Sonneborn declaration are “proved” or just asserted. Oregon Mutual only

wishes to clarify that the Sonneborn declaration cannot establish “the truth” about facts relating to the basis for or lack of basis for the underlying lawsuit. The only actual facts about the underlying lawsuit that matter are those ultimately found in the underlying class action litigation. Oregon Mutual is not allowed to impeach or contradict the respondents’ story about the facts of the underlying case:

The insurer “may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend,” *id.*, but it must avoid seeking adjudication of factual matters disputed in the underlying litigation because advocating a position adverse to its insured’s interests would “constitute bad faith on its part.”

Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc. 161 Wn.2d 903, 915, 169 P.3d 1 (2007). Given *Dan Paulson*, it would be unfair to say that Oregon Mutual is bound by Mr. Sonneborn’s “unrefuted” testimony when Oregon Mutual is not allowed to refute it.

Ultimately, it does not matter for the purposes of this case. Mr. Sonneborn’s testimony is nothing more than a concrete example of an excluded set of facts that is largely consistent with the complaint’s more abstract statement of excluded allegations. A judge or jury in the underlying suit may find the facts are just as Mr. Sonneborn states, or they may find a different set of facts, but no facts, consistent with the complaint, would be covered.

F. There Is No Property Damage Coverage

Respondents assert that the property damage at issue is the “monetary cost of text messages, lost and exhausted storage capacity on the plaintiff’s mobile telephone, and disruption of telephone networks.” Resp. Brief. at 18. The monetary cost of text messages is not “property damage,” because it is neither loss of use of a tangible property nor physical injury. It is purely a financial harm. The remaining harms are simply the natural result of using finite resources. There is no “accident” alleged anywhere in the complaint. The *Park University* case, cited by respondents, stands alone in this country in finding a potentially covered property damage allegation. The reasoning in *Park University* is faulty because it focuses on whether the communication could have been “welcome” when the issue is whether sending a fax, welcome other otherwise, will use up toner and paper:

When Park University sent the fax to JC Hauling, it thought it had permission to do so. Hence, from its standpoint, any resulting use of JC Hauling’s fax machine, paper, and toner could not have resulted in injury because Park University thought the fax was welcome. Unlike intentionally firing a gun into an occupied car as in *Harris* or intentionally firing a gun at an employee and forcing her to perform sexual acts as in *Spivey*, neither of which is even arguably a welcome act, JC Hauling’s injury cannot be deemed the natural and probable consequence of Park University’s act in sending the fax when Park University thought JC Hauling welcomed the transmission.

Park Univ. Enterprises, Inc. v. American Cas. Co. of Reading, PA, 442 F.3d 1239, 1246 (C.A. 10 (Kan.) 2006). The fallacy in the above reasoning is that it confuses injury as defined in the policy “loss of use of tangible property” with injury in the sense of “wrongfully harming someone.” Property damage occurred when the recipient “lost use” of toner, paper and a fax machine regardless of whether the property damage was welcome.

Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 64, 164 P.3d 454, 465 (2007), does not support plaintiffs argument because there an intentional act (a practical joke) allegedly resulted in unexpected emotional distress in the victim. Because the emotional distress was the “injury,” it could have been accidental. But here, the injury is not the message recipient’s emotional response to it or beliefs about, it is the receipt of the message itself. Receipt of a sent message is not an accident. *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 538, 150 P.3d 589, 593 (2007), is distinguishable for the same reason. The injury was “damage to the onion crop” which the insured did not expect or intend. Here, the action, “sending a message” and the injury “mere receipt” and the inevitable costs of receiving a message are practically identical.

G. The Complaint Does Not Allege Personal and Advertising Injury

As the opening and responding briefs make clear, courts around the country have reached different results on whether complaints with allegations similar to those in the underlying lawsuit trigger personal and advertising injury coverage. This is no doubt why Oregon Mutual has adopted a specific exclusion for such claims. But the results turn on whether the Court focuses on the word “privacy” in isolation or considers the word in context.

The rules of construction also require that a court read the provisions of a policy in context before reaching the conclusion that a provision is ambiguous. Looking at the relevant definition of advertising injury in context persuades us that advertising injury coverage applies only to content-based claims.

State Farm General Ins. Co. v. JT's Frames, Inc., 181 Cal. App. 4th 429, 448, 104 Cal. Rptr. 3d 573, 587 (2010). The Seventh Circuit used similar reasoning to limit the meaning of “privacy” in the advertising injury coverage:

Iowa also refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions. *Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994). We continue to read the policy’s use of the word “publication” in the advertising-injury definition to narrow the scope of the “privacy rights” referred to in the same clause. The provision provides coverage for “oral or written publication of material that violates a person’s right of privacy.” The most natural reading of this language is that it covers

claims arising when the insured publicizes some secret or personal information-not claims arising when the insured disrupts another's seclusion.

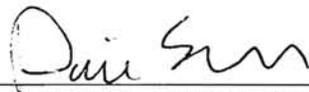
Auto-Owners Ins. Co. v. Websolv Computing, Inc., 580 F.3d 543, 550 -551 (7th Cir. 2009). This Court has emphasized that “a clause or phrase cannot be considered in isolation, but should be considered in context, including the purpose of the provision.” *Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 603, 17 P.3d 626 (2000). *See also, American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993) (“the policy is construed as a whole with the court giving force and effect to each clause in the policy”). Washington’s approach to policy language is more consistent with the approach adopted by the courts that have held that the privacy offense does not apply to “intrusion” allegations relating to unsolicited communications.

III. CONCLUSION

Because the complaints in the underlying lawsuit do not seek damages that Oregon Mutual covers, Oregon Mutual respectfully requests that the Court of Appeals reverse the trial court with instructions to grant declaratory relief to the effect that Oregon Mutual has no duty to defend the underlying lawsuit.

RESPECTFULLY SUBMITTED this 23rd day of April, 2012.

BETTS PATTERSON & MINES

By  _____
Larry Gottlieb, WSBA #20987
Daniel L. Syhre, WSBA #34158
Attorneys for Oregon Mutual Insurance
Company

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on April 23, 2012, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Reply Brief of Petitioner Oregon Mutual Insurance Company.**

Counsel for Defendants:

Miles A. Yanick
Duncan E. Manville
Savitt Bruce & Willey LLP
1425 Fourth Avenue, Suite 800
Seattle, WA 98101-2505

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of April, 2012.

Valerie D. Marsh

Valerie D. Marsh

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