

November 30, 2022

Dora Marquez
Golden Fleece Insurance Company

RE: Claimant: Carla Palmer
Insured: Regina Lake
D/S: December 29, 2020

Dear Ms. Marquez:

The purpose of this letter is to provide you with our opinion on whether we must defend and/or indemnify Regina Lake for the claims asserted against her in this suit, or whether we can simply permissibly deny coverage altogether, under Golden Fleece Insurance Company Homeowner's Policy No. Q86-75309, issued to Greg Lake which Regina Lake was a named insured under and was in effect at all times pertinent to the allegations of this suit.

Statement of Facts

Golden Fleece received notice of the filing of a suit by Carla Palmer, in which Ms. Lake is a named Defendant, on December 31, 2020 – two days after Ms. Lake was served with the suit papers. The question presented is whether we have a duty to defend and/or indemnify Ms. Lake in this action based upon the language of the policy and Ms. Lake's conduct that has given rise to the claim against her.

Relevant to this question, the Golden Fleece policy expressly states that it is an occurrence-based policy which provides liability coverage for Bodily Injury & Property Damage ("Coverage A") and Personal Injury ("Coverage B"), stating in pertinent part that:

OUR PROMISE—Bodily Injury and Property Damage Liability Coverage

We will pay all sums up to the amount shown on the **Declarations** which **anyone we protect** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** caused by an **occurrence** during the policy period.
We will pay for only **bodily injury** or **property damage** covered by this policy.

* * *

OUR PROMISE—Personal Injury Liability Coverage

"We" will pay all sums up to the amount shown on the "Declarations" which "anyone we protect" becomes legally obligated to pay as damages because of

“personal injury” caused by an offense committed during the policy period. “We” will pay for only “personal injury” covered by this policy.

Furthermore, the Golden Fleece Policy expressly defines the following terms and/or phrases, which provide in pertinent part that:

"bodily injury" means physical harm, sickness or disease, including mental anguish or resulting death, but does not include:

1. any communicable disease or condition transmitted by anyone we protect to any other person through a parasite, virus, bacteria or any other organism.
2. the exposure to or transmission of any disease, parasite, virus, bacteria or other organism by anyone we protect to any other person.

* * *

"occurrence" means an accident, including continuous or repeated exposure to the same general harmful conditions.

"personal injury" means injury arising out of:

1. Libel, slander or defamation of character;
2. False arrest, wrongful detention or imprisonment, malicious prosecution, racial or religious discrimination, wrongful entry or eviction, invasion of privacy, or humiliation caused by any of these.

Finally, the Golden Fleece Policy expressly states that certain events will not fall within coverage. This exclusion(s) provision provides in pertinent part that:

We do not cover under *Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage and Medical Payments To Others Coverage*:

1. **Bodily injury, property damage or personal injury** expected or intended by anyone we protect even if:
 - a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
 - b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended

* * *

9. Except as provided in paragraph 2. C. under “*What We Do Not Cover – Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage and Medical Payments To Others Coverage*” **bodily injury, property damage or personal injury** which arises out of the sexual molestation, corporal punishment or physical or mental abuse by **anyone we protect**

* * *

10. Personal injury arising out of a willful violation of a law or ordinance by anyone we protect.

* * *

12. Punitive or exemplary damages and related defense costs.

None of these provisions specifically incorporate the application by reference, and the application is not physically annexed to or incorporated in the policy document.

Applicable Law

In Ohio, the Supreme Court has adopted the so-called expanded scope of the allegations test to determine whether an insurer has a duty to defend an insured against a third-party claim, which provides: “[w]here the insurer’s duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim.” *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177 (1984). It follows that an insurer’s duty to defend permissibly terminates when no claim remains which is, arguably, potentially within the scope of coverage. Thus, the duty to defend is broader than the duty to indemnify.

Occurrence-based policies, like the policy here, trigger an insurer’s duty to indemnify (provide coverage) when the event giving rise to liability occurred during the policy, regardless of when the act or neglect was discovered or when the claim was filed with the insurer, as measured from the date that the damage resulted. Here, the policy provides that an occurrence means “an accident, including continuous or repeated exposure to the same general harmful conditions”, but does not define what an “accident” means in this context. Generally, if the language in an insurance policy is ambiguous, then the doctrine of reasonable expectations applies. *State Bancorp, Inc. v. U.S.F. & G. Co.*, 199 W. Va. 99 (1997) at 104. In Ohio, courts have reasoned that “[o]rdinarily, “accident” is defined as “an event occurring by chance or arising from unknown causes.” ” *Id.* at 105. Specifically, “[a]n ‘accident’ generally means an unusual, unexpected and unforeseen event.... An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage.... To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual.” *Id.* The operative question regarding our duty to indemnify against Carla’s bodily injury claim therefore is whether Ms. Lake’s conduct constitutes an “accident,” as discussed below.

In Ohio, courts have generally held that that the term “bodily injury” does not encompass claims of emotional distress in the absence of some physical harm. *Snell v. Katafias*, 1999 Ohio App. LEXIS 997 (2d Dist.) at 3. However, courts have also held that nothing prevents insurance companies from enlarging the definition of bodily injury to include emotional distress. *Id.* Thus, Ohio courts have held that where bodily injury is defined to include “mental anguish”, and no explicit restriction confining the interpretation of that term to mean physical injury is provided, an ambiguity is created that must be resolved in favor of the insured. *Id.* at 4. Here, the policy

defines “bodily injury” to include “mental anguish” without any, explicit, qualifying restrictions as to the scope of interpretation for coverage purposes. Therefore, notwithstanding whether Ms. Lake’s conduct constituting an “accident”, Golden Fleece arguably is liable for Carla’s claim of I.I.E.D. as the result of Ms. Lake’s injurious conduct.

As provided above, to qualify for Personal Injury Liability coverage under the policy, the “personal injury” must arise from certain enumerated offenses. Here, the claims brought by Carla in her complaint do not *clearly* trigger our duty to indemnify and/or duty to defend (e.g., she didn’t bring a false imprisonment claim for example) under this provision. However, the allegations involved in the matter are of a nature that coverage may, arguably, extend due to the inclusion of the language “invasion of privacy, or humiliation caused by any of these” in the definition of “personal injury” under the policy provision.

Perhaps the most significant factor in the disposition of this matter, the policy included an Intentional Act(s) Exclusion. In Ohio, courts apply the majority rule to interpret exclusion provisions generally, which provides that the exclusion *will* apply if the insured intended both the conduct in question and intended, or expected, some damage to result. *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34 (1996). Under this rule, Ohio courts measure intent objectively when injury is substantially certain to result.¹ Therefore, in the case of inherently wrongful conduct – such as, a claim of sexual molestation of a minor – the inferred intent doctrine will apply. *Id.* That rule provides as follows: where there exists a volitional act which is inherently wrongful, under such circumstances, there is no coverage regardless of insured’s subjective intention(s), or belief(s), about whether injury would result from their conduct. *Id.*

Finally, should the court find Golden Fleece obligated to indemnify the loss resulting from Ms. Lake’s injurious conduct, the exposure regarding covered damages would be limited as follows. If you recall, Carla’s complaint in pertinent part requests the award of compensatory damages, punitive damages, and attorney fees. Regarding compensatory damages, Carla’s complaint in pertinent part alleges facts regarding Ms. Lake’s alleged breach of “the Agreement,” which – although not pled in the complaint – could be the catalyst for a breach of contract action. Significantly, courts have held that coverage extends to liability that results from a breach of contract. Regarding the award of punitive damages, both the policy itself, and controlling Ohio caselaw, provide that punitive damages fall outside the scope of coverage. *See Casey v. Calhoun*, 40 Ohio App.3d 83 (1987). However, regarding the award of attorney fees, Ohio courts have held that “[a]ttorney fees are distinct from punitive damages, and public policy does not prevent an insurance company from covering attorney fees on behalf of an insured when they are awarded solely as a result of an award for punitive damages.” *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327 (2010) at Syllabus.

¹ See *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34 (1996) at 39 (finding “in those cases where an intentional act is substantially certain to cause injury, determination of an insured’s subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage ... [r]ather, an insured’s protestations that he ‘didn’t mean to hurt anyone’ are only relevant where the intentional act at issue is not substantially certain to result in injury”).

Conclusion

In summary, whether Golden Fleece has a duty to defend and/or indemnify Ms. Lake in this action based upon the language of the policy, and Ms. Lake's conduct that has given rise to the claim against her, can be recapitulated as follows.

Coverage A: Regarding coverage under the Bodily Injury and Property Damage provision, Golden Fleece has a duty to defend, but will likely not have a duty to indemnify. Golden Fleece's duty to defend exists due to the ambiguity of certain policy provision(s) that arguably create(s) coverage under the policy, thereby creating a duty to defend the insured under Ohio law. Consequently, Golden Fleece therefore should issue a Reservation of Rights Letter outlining our agreement to defend Ms. Lake in the matter, but reserve our right to contest coverage contingent on the facts subsequently elucidated during discovery and trial relevant to the following averments/defenses regarding our obligation to indemnify:

First Averment: Coverage does not apply because Ms. Lake's conduct does not qualify as an "occurrence." As provided above, to qualify as an occurrence, Ms. Lake's conduct must have been unintentional, and therefore the injury must have been the result of an "accident." Under the Ohio standard discussed above, a jury will more than likely conclude that Ms. Lake's conduct does not constitute an "accident." Therefore, coverage is precluded.

Second Averment: Coverage does not apply because it is precluded by an Intentional Act(s) Exclusion. Given Ms. Lake's intimate involvement with, and direct knowledge of, criminal conduct that constitutes inherently wrongful conduct, the Intentional Act(s) exclusion to Bodily Injury coverage applies. Ms. Lake will likely counter-argue that the resulting damage was not her subjective intent. In response, Golden Fleece should argue that the Inferred Intent Doctrine applies given Ms. Lake's knowledge of, and involvement in, inherently wrongful acts. Thus, coverage is precluded.

Coverage B: Regarding coverage under the Personal Injury provision, Golden Fleece has a duty to defend, but (again) will likely not have a duty to indemnify – and should therefore issue a Reservation of Rights Letter outlining the following defenses to our obligation to provide coverage.

First Averment: Coverage does not apply because it is precluded by an Intentional Act(s) Exclusion. Again, given Ms. Lake's intimate involvement with, and direct knowledge of, criminal conduct that constitutes inherently wrongful conduct, means that the Intentional Act(s) exclusion to Personal Injury coverage applies. Therefore, coverage is precluded.

Second Averment: Ms. Lake's conduct constitutes a "willful violation of a law or ordinance" that precludes coverage as expressly provided by the following policy provision: WHAT WE DO NOT COVER -- EXCLUSIONS , Bodily Injury Liability Coverage, Exclusion No. 10. Thus, coverage is precluded.

As always, if you have any questions or comments, please do not hesitate to call.

Respectfully,

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“No unpermitted aid given, received, or witnessed”