

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

GE AQUARIUM, INC. d/b/a ZOOS	:	June Term 2003
PET CENTER and GEORGE	:	
STRICKLAND,	:	No. 000038
Plaintiffs,	:	
v.	:	Commerce Program
HARLEYSVILLE MUTUAL INSURANCE:	:	
COMPANY, MARYLAND CASUALTY	:	Control Numbers 050332, 050899,
COMPANY, MERCHANTS &	:	061831
BUSINESSMEN'S INSURANCE	:	
COMPANY and THOMAS and RUTH	:	
COELHO, H/W,	:	
Defendants.	:	

OHIO CASUALTY INSURANCE	:	October Term, 2003
COMPANY,	:	
Plaintiff,	:	No. 3375
v.	:	
GUROTZIAN ENTERPRISES and	:	Commerce Program
GE AQUARIUM,	:	
Defendants.	:	

ORDER

AND NOW, this day of December, 2004, upon consideration of the Preliminary Objections of Defendant Maryland Casualty Company's (cn 050332) and Defendant Merchants & Businessmen's Insurance Company (cn 061831) to Plaintiff's amended complaint and the Motions for Summary Judgment of Defendant Harleysville Mutual Insurance Company (cn 050899), all responses in opposition, memorandum, all matters of record and in accord with the contemporaneous Memorandum Opinion to be filed of record, it hereby is **ORDERED** and **DECREED** that

1. Defendant's Maryland Casualty Company's Preliminary Objections (cn 050332) are **Sustained**.

2. Defendant's Merchants & Businessmen's Preliminary Objections (cn 061831) are **Sustained**.
3. Defendants Harleysville Mutual Insurance Company's (cn 050899) Motion for Summary Judgment is **Granted**.

It is further **ORDERED** and **DECREED** that the amended complaint is dismissed against these Defendants and Defendants have no further duty to defend or indemnify Plaintiffs in the action filed in the Court of Common Pleas for Philadelphia County at docket number 2551 April Term 2003.

BY THE COURT,

C. DARNELL JONES, II, J.

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

GE AQUARIUM, INC. d/b/a ZOOS	:	June Term 2003
PET CENTER and GEORGE	:	
STRICKLAND,	:	No. 000038
Plaintiffs,	:	
v.	:	Commerce Program
HARLEYSVILLE MUTUAL INSURANCE:	:	
COMPANY, MARYLAND CASUALTY	:	Control Numbers 050332, 050899,
COMPANY, MERCHANTS &	:	061831
COMPANY and THOMAS and RUTH	:	
COELHO, H/W,	:	
Defendants.	:	

OHIO CASUALTY INSURANCE	:	October Term, 2003
COMPANY,	:	
Plaintiff,	:	No. 3375
v.	:	
GUROTZIAN ENTERPRISES and	:	Commerce Program
GE AQUARIUM,	:	
Defendants.	:	

MEMORANDUM OPINION

JONES, II, J.

Presently before the court are the Preliminary Objections of Defendant Maryland Casualty Company (cn 050332) and Defendant Merchants & Businessmen's Insurance Company(cn 061831) and the Motion for Summary Judgment of Defendant Harleysville Mutual Insurance Company (cn 050899). For the reasons discussed below defendants Maryland Casualty Company and Merchants & Businessmen Insurance Company's Preliminary Objections are Sustained and defendant Harleysville Mutual Insurance Company's Motion for Summary Judgment is Granted.

BACKGROUND

Plaintiffs GE Aquarium Inc. d/b/a Zoos Pet Center and George Strickland (“GE Aquarium” or “plaintiffs”) instituted this declaratory judgment and bad faith action seeking insurance coverage for Thomas and Ruth Coelho v. GE Aquarium, Inc. d/b/a Zoos Pet Center, April Term 2003 No. 2551 (“Underlying Action”). Thomas and Ruth Coelho (“Coelho”), instituted a purported class action lawsuit against GE Aquarium, Inc. d/b/a Zoos Pet Center, George Strickland and Gerzozian Enterprises, Inc. d/b/a Zoo’s Pet Center. The Coelho’s allege that the defendants in the underlying action (plaintiffs herein) sold dogs in their Philadelphia and New Jersey pet stores in poor health and with numerous health problems between 1996 to the present. The Coelho’s allege that as a result of their pet’s illnesses they suffered monetary loss and emotional distress. The underlying complaint alleges causes of action for violation of the Unfair Trade Practices and Consumer Protection Act (“UTPCPL”) 75 Pa. C.S.A. § 201-2, 201-3, 201-9.2 (a), violations of the New Jersey Consumer Fraud Act, N.J.S.A. § 58: 8-2, Breaches of Express and Implied Warranties, Intentional Misrepresentation, Negligent Misrepresentation, Negligence and Gross Negligence. On February 13, 2004, the negligence counts were dismissed as well as all claims for punitive damages in the underlying action.

On April 5, 2004, as a result of preliminary objections, GE Aquarium was directed to file an amended complaint to join the Coelho’s in the underlying action as additional defendants. On May 4, 2004, GE Aquarium, Inc. et. al. v. Harleysville Insurance Company, June Term 2003 No. 0038 was consolidated with Ohio Casualty Insurance Company v. Gurotzian Enterprise, October Term 2004 No. 3375. Thereafter

defendants herein filed the instant preliminary objections and motion for summary judgment.¹

DISCUSSION

I. Legal Standard

To discern an insurer's duty to tender a defense under the terms of an insurance contract, a reviewing court must ascertain the scope of coverage stated in the contract and analyze the allegations of the insured's complaint. Mistick, Inc. v. Northwestern National Casualty Company, 806 A.2d 39, 41(Pa. Super. 2002). "The obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy." Id (quoting Britamco Underwriters, Inc. v. Weiner, 431 Pa. Super. 276, 636 A.2d 649, 651 (Pa. Super. 1994). "Where an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such defense." Id (quoting Madison Constr. Co. v. Harleysville Mut. Inc. Co., 557 Pa. 595, 735 A.2d 100, 106 (Pa. 1999). Thus, unless the insurer establishes that the allegations of the insured's complaint fall within the stated scope of the exclusion, the court must deny its demurrer and require the insurer to tender a defense under the policy. Id.

Similarly, summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, to show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pa. R. Civ. P. 1035 (b). Whether a particular loss falls within the coverage of an insurance policy is a question of law to be decided by a court

¹ Ohio Casualty Insurance Company has also filed a Motion for Summary Judgment. This motion will be the subject of a separate order and memorandum opinion.

on a motion for summary judgment in a declaratory judgment action. Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 533 A.2d 1363 (1987)

II. Defendants Maryland Casualty Company and Harleysville Mutual Insurance Company do not owe Plaintiffs a Duty to Defend in the Underlying Action since the Underlying Action Fails to Allege “Bodily Injury” or “Property Damage”.

Maryland Casualty Insurance Company issued Portfolio Policy No. PAS 34217449 to G.E. Aquarium, Inc. t/a Zoos providing coverage for liability arising out of G.E. Aquarium’s pet stores located in Millville and Turnersville, New Jersey. Plaintiffs seek coverage for the allegations contained within the underlying action under the commercial general liability portion of the policy.

The commercial general liability portion of the Maryland Casualty Company policy provides in part as follows:

**SECTION 1-COVERAGES
COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE
LIABILITY**

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies...However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply...

(Exhibit “A” of Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Preliminary Objections p.1).

The Maryland policy defines bodily injury as “bodily injury, sickness or disease sustained by a person. This includes mental anguish, mental injury, shock, fright or death resulting from bodily injury, sickness or disease.” (Exhibit “A” of Plaintiffs Response to Preliminary Objections Section V p. 13) (emphasis added).

Similarly, Harleysville Mutual Insurance Company issued a Business Owners Liability insurance policy with commercial general liability coverages from Penn Mutual with a policy period of June 23, 2002 through June 23, 2003. Harleysville Insurance Company is the successor in interest to the Penn Mutual Policy. The Penn Mutual Policy issued to GE Aquarium provides in part as follows:

“We” pay all sums which an “insured” becomes legally obligated to pay as “damages” due to “bodily injury” or “property damage” to which this insurance applies. The “bodily injury” or “property damage” must be caused by an “occurrence” which takes place in the “coverage territory”, and the “bodily injury” or “property damage” must occur during the policy period.

(Harleysville Mutual Insurance Co. Preliminary Objection Exhibit “A” p. 29).

“Bodily injury” is defined in the Penn Mutual Policy as

Bodily harm, sickness, or disease sustained by a person and includes required care and loss of services. “Bodily injury” includes death that results from bodily harm, sickness, or disease. “Bodily injury” does not include mental or emotional injury, suffering, or distress that does not result from physical injury. (Id. p. 25)

Absent from the underlying complaint are any allegations that the plaintiffs suffered “bodily injury” as defined by the Maryland and Penn Mutual policies. Arguably, the only allegation of bodily injury alleged in the underlying action is emotional distress. (Amended Complaint ¶10 (e)). This allegation of emotional distress however is insufficient to spark the duty to defend under the Maryland and Penn Mutual Policies.

In the underlying action, the emotional distress alleged arises “as a consequence of defendant’s conduct”, i.e. misrepresentations of the dogs health. (Id. ¶ 10 (e)). The policies provide that in order for emotional distress to fall within the definition of “bodily

injury” the emotional distress is to arise from “bodily injury” or “physical injury”. The underlying action contains no such allegation. In fact, the underlying action fails to allege any physical injury whatsoever.² The only injuries in the underlying action alleged are economic in nature related to the veterinary care provided to the puppies resulting from the pet’s illnesses or conditions. (Amended Complaint ¶ 74, Wherefore clauses). Absent any allegations of bodily injury to the pet owners themselves, this court is left with one conclusion, that under the Maryland Casualty Company policy and the Penn Mutual policy issued to plaintiffs, no duty to defend exists for the injuries alleged in the underlying lawsuit.

Moreover, the underlying complaint fails to allege any allegations that fall within the definition of “property damage” as defined under the Maryland or Penn Mutual policies. The Maryland policy defines “property damage” as follows:

“Property damage” means :

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

(Exhibit “A” Plaintiffs response to PO p. 16)

The Maryland Casualty Company policy excludes from coverage “property damage” to “your product” arising out of it or any part of it. (Id p. 5). Under the definitional section of the policy, “your product” is defined as follows”

“Your product” means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

² Plaintiffs argue that the allegation that diseases suffered by the pets are contagious to humans constitutes bodily injury. Although the diseases may be contagious to humans, no allegations exist that any pet owner in fact contracted the alleged disease.

(1) You;

(2) Others trading under your name; or

(3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

“Your Product” includes:

- a. Warranties or representations made at any time with respect to the fitness, durability, performance or use of “your product”; and
- b. The providing of or failure to provide warnings or instructions.

“Your product” does not include vending machines or other property rented to or located for the use of others but not sold.

(Id. 16).

The Penn Mutual policy contains the following exclusion regarding “property damage”:

“We” do not pay for “property damage” to “products” if the damage arises out of the “products” or their parts.

“We” do not pay for “property damage” to property that has not been physically injured or destroyed, or to “impaired property”, that arises out of:

- 1) a delay or failure by to perform a contract by “you” or one acting on “your” behalf; or
- 2) a defect, deficiency, inadequacy, or unsafe condition in “your work” or “products”. (Id. p. 37).

“Property damage” is defined under the policy as “physical destruction of tangible property” or “the loss of use of tangible property whether or not it is physically damaged.

Loss of use is deemed to occur at the time of the ‘occurrence’ that caused it”. Id. p. 28.

The Penn Mutual policy defines product as

“goods or products manufactured, sold, handled, distributed, or disposed of by “you”, others trading under “your” name, or a person or organization whose business or assets “you” have acquired.

“Products” includes:

- a. warranties or representations made at any time with respect to the fitness, quality, durability, or performance or “products”;
- b. containers (other than vehicles), materials, parts, or equipment furnished in connection with such “products”; and
- c. providing or failure to provide warnings or instructions.

“Products” does not include:

- a. vending machines or other property that is rented to or placed for the use of others, but not sold; or
- b. real property.

(Exhibit “A” Harleysville Motion for Summary Judgment p. 28).

Property damage to “your product” or “products” which arise out of it or any part of it is excluded from coverage. (emphasis added). Since the underlying action alleges the dogs were the property damage, no duty to defend exists.

Moreover, the core of the underlying complaint is that plaintiff purchasers spent money on veterinary care to treat the dogs and were deprived of the benefit of their bargain by having been misled as to the quality and health of the dogs. The property damage alleged, money spent for the care and maintenance of a dog, is an intangible economic loss which is not subject to coverage. There is no duty to defend a claim asserting solely intangible economic losses because such losses do not constitute damage or injury to tangible property. International Ins. Co. v. St. Paul Fire & Marine Ins. Co., 1988 U.S. Dist. Lexis 12215 at *18 (E.D. Pa. 1988).

Accordingly, Maryland Casualty Company and Harleysville Insurance Company do not have a duty to defend plaintiffs in the underlying action.

III. Merchants & Businessmen's Insurance Company does not Owe Plaintiff a Duty to Defend Since the Allegations within the Underlying Action do not Satisfy the Definition of an Occurrence.

Merchants & Businessmen's Insurance Company issued a special business owner's insurance policy to plaintiffs in effect from June 23, 1989 to June 23, 2002. Upon commencement of the underlying action, Merchants & Businessmen provided a defense in the underlying action under a reservation of rights. On February 13, 2004, after the court dismissed the negligence claims, Merchants & Businessmen's withdrew its defense claiming the remaining allegations in the underlying complaint do not fall within the policy's definition of "occurrence". Merchants & Businessmen's Insurance Company has now filed preliminary objections in the nature of a demurrer arguing same.³

Merchants & Businessmen argues the complaint should be dismissed since it has no duty to defend since the remaining counts within the amended complaint do not fall within the definition of an "occurrence" as defined by the policy. Merchants & Businessmen's policy obligates it to provide coverage for claims of bodily injury or property damage only when they are caused by an "occurrence". The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same generally harmful conditions." (Merchants & Businessmen's Preliminary Objections Exhibit "D" p. 13.).

³ In response to the preliminary objections, plaintiffs argue that Merchants & Businessmen's violated its duty to defend by failing to provide conflict-free counsel and by failing to relinquish control of the defense. As stated supra, "Preliminary objections in the nature of a demurrer requires the court to resolve the issues solely on the basis of the pleadings, no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 883 (Pa. Super. 2000). In the case at bar, absent from the amended complaint are any allegations which support plaintiffs argument that Merchants & Businessmen's violated its duty to defend by failing to provide conflict free counsel. As such, the court did not take plaintiffs' arguments into consideration. By failing to consider plaintiffs' arguments, the court is not suggesting their merit or the lack thereof.

The amended complaint alleges causes of action for violation of the UTPCPL, violation of New Jersey Consumer Fraud, Breach of Warranty and Intentional Misrepresentation. This court finds that none of the allegations made to support the remaining claims involve an “occurrence” as defined under the policy. Rather, the allegations within the underlying action are for deceptive and intentional misrepresentations of the dogs’ health which do not satisfy the definition of “occurrences” as defined by the policy. *See* Sciabassi v. Nationwide Mut. Fire Ins. Co., 789 A.2d 699, 703 (Pa. Super. 2001) (intentional acts are not “occurrences”); Freestone v. New England Log Homes, Inc., 819 A.2d 550, 553 (Pa. Super. 2003) (Pennsylvania law does not recognize the applicability of a general liability policy to a breach of warranty claim); Feeney v. Disston Manor Pers. Care Home, Inc., 849 A.2d 590, 597 (Pa. Super. 2004)(The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices. One of the elements necessary to prove fraud is intent of misleading another into relying upon the misrepresentation.).

Thus, there is no duty to defend these claims since the claims do not fall within the definition of an “occurrence” as defined under the policy. Accordingly, defendant’s Preliminary Objections are Sustained.

IV. The Disclaimers of Coverage Were Not Committed in Bad Faith by the Insurers.

In Count II of the amended complaint, plaintiffs allege that the respective insurers disclaimer of coverage was done in bad faith. (amended complaint p. 57-61). To sustain a claim for insurance bad faith in Pennsylvania, an insured must establish that the insurer did not have a reasonable basis for denying benefits or engaging in a particular investigative practice and that the insurer knew of or recklessly disregarded its lack of

reasonable basis in denying the claim. O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. 1999). Because the court has determined that the respective insurance companies have no obligation to defend plaintiffs in the underlying action, the insurance companies can not be held liable to the plaintiffs for bad faith under Pennsylvania law. Pizzini v. Am. Int'l Specialty Lines Ins. Co., 249 F.Supp. 2d 569, 570-71 (E.D. Pa. 2003).⁴

Accordingly, Count II of the amended complaint is dismissed against all defendants.⁵

CONCLUSION

For the foregoing reasons, the Preliminary Objections of Defendant Maryland Casualty Company's Preliminary Objections (cn 050332) and Defendant Merchants & Businessmen's (cn 061831) are **Sustained** and Defendants Harleysville Mutual Insurance Company's (cn 050899) Motion for Summary Judgment is **Granted**.

It is further **ORDERED** and **DECREED** that the amended complaint is dismissed against these defendants and defendants have no further duty to defend or indemnify Plaintiffs in the action filed in the Court of Common Pleas for Philadelphia County at docket number 2551 April Term 2003.

⁴ Plaintiffs also argue that Merchants & Businessmen's failed to act in good faith by "steering" the case to cause the covered claims under the policy to be dismissed. Once again, the allegations of the amended complaint fail to support this contention. Since the plaintiffs' claims are not properly before the court, the court will not consider same.

⁵ Based on the court's conclusion that the underlying complaint fails to allege bodily injury and property damage as defined under the Maryland Casualty Company policy and the Harleysville Insurance Company policy, the court need not consider the parties remaining arguments. The court however notes that since all the negligence claims were dismissed no duty to defend arises since the allegations of the underlying complaint do not satisfy the definition of "occurrence".

An order consistent with this opinion will follow.

BY THE COURT,

C. DARNELL JONES, II, J.