



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

JOHN FRAZIER HUNT,	:	DECEMBER TERM, 2004
	:	
Plaintiff,	:	No. 2742
	:	
v.	:	(Commerce Program)
	:	
NATIONAL UNION FIRE INSURANCE	:	Control No. 072153
COMPANY OF PITTSBURGH, PA, and	:	
CAPITAL CARE CORP.,	:	
	:	
Defendants.	:	

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**OPINION**

**Albert W. Sheppard, Jr., J.....November 8, 2005**

This declaratory judgment action involves a Directors’ and Officers’ Liability Policy (the “Policy”) issued by defendant, National Union Fire Insurance Company of Pittsburgh, Pa (“NUFIC”), to Lifetime Corporation (“Lifetime”) and its subsidiaries.<sup>1</sup> Plaintiff, John Frazier Hunt (“Hunt”), is an attorney, and was also an officer and director of Lifetime. *See* Amended Complaint, ¶¶ 1-2. In 1986, Lifetime acquired the operating assets of nominal defendant, Capital Care Corporation (“Capital”). *See id.*, ¶¶ 14-15. In 1988, Capital sued Lifetime, Hunt, Hunt’s

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<sup>1</sup> The Policy was a claims-made policy covering the period from January 12, 1988 to January 12, 1989. *See* Amended Complaint, Ex. A.

law firm, and various other persons and entities affiliated with Lifetime for wrongdoing in connection with that transaction (“Underlying Action”).<sup>2</sup> *See id.*, Ex. B.

In the present action, Hunt asks the court to enter judgment declaring that NUFIC had a duty to defend and indemnify him in the Underlying Action under the terms of the Policy. NUFIC has filed a Motion for Judgment on the Pleadings, arguing that it has no duty to defend or indemnify Hunt because he was sued as an attorney in the Underlying Action and not in his capacity as a director of Lifetime.

“A court’s first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy’s coverage.” General Accident Insurance Co. of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997). Here, the Policy covers any

Loss (as [t]herein defined) arising from any claim or claims which are first made against [Directors or Officers] during the policy period by reason of any Wrongful Act (as [t]herein defined) in their respective capacities as Directors or Officers.

Amended Complaint, Ex. A, ¶1. “Loss” is defined to include defense and indemnification amounts. *See id.*, ¶ 2(c). “Wrongful Act” is defined as

any breach of duty, neglect, error, misstatement, misleading statement, omission or other act done or wrongfully attempted by the [Directors or Officers] or any of the foregoing so alleged by any claimant or any matter claimed against them solely by reason of their being such Directors or Officers of the Company.

*Id.*, ¶ 2(d).

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<sup>2</sup> Capital originally brought its claims against Hunt and others in the United States District Court for the Eastern District of Pennsylvania. *See* Amended Complaint, ¶18. The federal court dismissed the federal claims and some of the state law claims. *See id.*, ¶ 19; Capital Care Corp. v. Fleming, 1990 U.S. Dist. LEXIS 13794 (E.D.Pa. Oct. 16, 1990). The remaining state law claims were filed in the Pennsylvania Court of Common Pleas for Philadelphia County. *See* Amended Complaint, ¶ 21; Ex. B. This state court action is currently on appeal to the Superior Court from the trial judge’s Order granting Hunt a new trial on the issue of damages. *See* Capital Care Corp. v. Lifetime Corp., Phila. C.C.P., November Term, 1990, No. 01610. These actions are collectively referred to as the “Underlying Action.”

The Policy also contains several exclusions upon which NUFIC relies. Those exclusions bar coverage for any “Loss”:

brought about or contributed to by the fraudulent, dishonest or criminal acts of the Insureds; however the provisions of this exclusion shall not apply unless a judgment or other final adjudication thereof adverse to the Insureds shall establish fraud, dishonesty or criminal acts. *Id.*, ¶ 4(d) (the “Fraud Exclusion”)

which is insured by any other policy or policies, except in respect of any excess beyond the amounts of the limits of liability of such other policy or policies. *Id.*, ¶ 4(g) (the “Other Insurance Exclusion”).

in connection with any claim or claims made against the Insureds and arising out of medical or professional malpractice including but not limited to the rendering or failure to render of any medical or professional service. *Id.*, Endorsement 8 (the “Malpractice Exclusion”).

“After determining the scope of coverage, the court must examine the complaint in the underlying litigation to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover.” General Accident, 547 Pa. at 706, 692 A.2d at 1095. The Complaint in the Underlying Action describes Hunt as “director and general counsel of [Lifetime] . . . counsel to [Hospital Capital Corporation<sup>3</sup> and ] . . . director of and counsel to [Capital],” and it includes twenty-one counts against him. *See* Amended Complaint, Ex. B. Several of the counts in the Complaint contain allegations that Hunt engaged in wrongful acts as a director of Lifetime, as well as in other capacities. Therefore, at the time that the original Complaint was filed, it was theoretically possible that Hunt would later be found liable “solely by reason of [his] being such

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<sup>3</sup> Hospital Capital Corp is related to Lifetime, and its directors are covered under the Policy. *See* Amended Complaint, Ex. A, Endorsement 12. However, Hunt is not alleged to have been one of its directors.

a director of [Lifetime].”<sup>4</sup> As a result, NUFIC initially would have had an obligation to pay Hunt’s defense costs in the Underlying Action, unless it can show that one of the Policy exclusions applies.

The Fraud Exclusion does not apply because it requires a final adjudication on the merits. The Malpractice Exclusion does not apply because the claims made against Hunt as a director are not for professional malpractice. Instead, NUFIC argues that the Other Insurance Exclusion applies because Hunt’s malpractice carrier has been paying all the defense costs he has incurred since the commencement of the Underlying Action through the present. However, this allegation of fact is not set forth in the pleadings, and is supported only by an affidavit of NUFIC’s counsel. Therefore, the court cannot rule on this issue at this juncture in the litigation, and must leave it for resolution at the summary judgment stage.

Even if NUFIC may have had a duty to pay some defense costs early in the proceedings, that does not mean that NUFIC has a duty to continue to do so. Nor does it mean that NUFIC has a duty to indemnify Hunt in the Underlying Action. Once the claims made against Hunt in his capacity as a director of Lifetime were dismissed, so that the only counts remaining against him involved acts he undertook in his capacity as an attorney, any duty NUFIC had to pay defense costs and to indemnify Hunt evaporated. That stage was reached in the Underlying Action some time ago.<sup>5</sup> The only claims remaining against Hunt in the Underlying Action are

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<sup>4</sup> However, the federal court, in its summary judgment opinion, consistently referred to Hunt and his firm as the “lawyer defendants” and apparently viewed the claims against them as based on their acts as attorneys for Capital. *See Capital Care Corp. v. Fleming*, 1990 U.S. Dist. LEXIS 13794 (E.D.Pa. Oct. 16, 1990).

<sup>5</sup> The federal law claims were dismissed by the federal court, and all pre-October, 1986 state law claims against “Lifetime and its affiliates and principals” were dismissed by both the federal court and the state court. *See Amended Complaint*, ¶¶ 19, 23; *Capital Care Corp. v. Fleming*, 1990 U.S. Dist. LEXIS 13794 \*27 (E.D.Pa. Oct. 16, 1990). The defendants other than Hunt eventually settled with Capital, so, apparently, only the claims against Hunt remain. *See Amended Complaint*, ¶ 26.

for legal malpractice and possibly also for breach of fiduciary duty.<sup>6</sup> *See* Capital Care Corp. v. Hunt, 847 A.2d 75 (Pa. Super. 2004) (reversing trial court's entry of JNOV with respect to verdict that found Hunt liable on the professional malpractice and breach of fiduciary duty claims only). Coverage for such claims is excluded under the Malpractice Exclusion in the Policy, so NUFIC has no duty to indemnify Hunt in the event that a judgment is entered against him in the Underlying Action.

### CONCLUSION

For all the foregoing reasons, NUFIC's Motion for Judgment on the Pleadings is granted, in part, and denied, in part.

In summary, NUFIC need **not** indemnify Hunt in the Underlying Action brought by Capital. Further, NUFIC need **not** pay Hunt's future defense costs in the Underlying Action.

The court will enter an Order consistent with this Opinion.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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<sup>6</sup> Apparently, a fraud claim was also submitted to the jury, but no damages were awarded with respect to it or the breach of fiduciary duty claim. *See* Plaintiff's Memorandum of Law in Opposition to Motion, p. 5. The breach of fiduciary duty claim was pled against Hunt as attorney for, and as director of, Capital. *See* Amended Complaint, Ex. B, ¶¶ 92, 93. However, Hunt does not allege that Capital is a subsidiary of Lifetime, so his wrongful acts as director of Capital, if any, are not covered under the Policy. Furthermore, it is not clear whether the breach of fiduciary duty claim is still viable, since Hunt states that the trial court's Order granting a new trial on the issue of damages was with respect to the legal malpractice claim only. *See* Plaintiff's Response to Motion, ¶ 3.