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

HOWARD E. STEINBERG, Plaintiff, v. SYNDICATE 212 at LLOYD'S OF LONDON, as Lead Underwriters, SYNDICATES 1007, 79,376, 2376 1207, 205, 190, and 362 at LLOYD'S OF LONDON, all SUBSCRIBING TO POLICY NO. 823/FD 9701593, and JOHN DOES 1-50, Defendants.	: OCTOBER TERM, 2002 : No. 2479 : : : :

EDWARD CHARLTON, DENNIS COSTELLO and LAWRENCE KWASNY, Plaintiffs, v. SYNDICATE 212 at LLOYD'S OF LONDON, as Lead Underwriters, SYNDICATES 1007, 79,376, 2376 1207, 205, 190, and 362 at LLOYD'S OF LONDON, all SUBSCRIBING TO POLICY NO. 823/FD 9701593, and JOHN DOES 1-50, Defendants.	: DECEMBER TERM,2002 : No. 4534 : : : : Commerce Program : Control Nos. 121084 and 032907

O P I N I O N

Albert J. Sheppard, Jr., J. ..... September 8, 2003

Plaintiffs in this consolidated action have filed Motions seeking summary judgment on two of the three Counts in their Complaints. Defendants opposed the plaintiffs' Motions and filed a cross-Motion for Summary Judgment seeking a complete dismissal of the

plaintiffs' Complaints. For the reasons discussed, partial summary judgment is granted in favor of the plaintiffs. The defendants' Motion for Summary Judgment is denied.

I. BACKGROUND

Howard E. Steinberg ("Steinberg"), Edward Charlton ("Charlton"), Dennis Costello ("Costello") and Lawrence Kwasny ("Kwasny") (collectively the "Plaintiffs") were directors of a company known as Legalguard, Inc. ("Legalguard"). Legalguard was formed in 1987 to review and analyze the services of insurance companies' outside counsel. In 1996, Reliance Insurance Company ("Reliance Insurance"), a subsidiary of Reliance Group Holdings, Inc., obtained a majority interest in Legalguard. At that time, Reliance Group Holdings, Inc. held an insurance policy, Policy No. 823/FD 9701593 (the "Policy"), for the benefit of its subsidiaries, employees and former and current officers and directors. Legalguard was eventually purchased by a company called Policy Management Systems, Inc. ("Policy Management").

A. The Dalicandro Action.

In 1996, about the time Reliance Insurance obtained a controlling interest in Legalguard, Frank Dalicandro ("Dalicandro")[1] alleges he entered into a shareholders' agreement (the "Shareholders' Agreement") with Reliance Insurance, Legalguard and other employee shareholders, including Costello, Kwasny and Charlton. Among the terms of the Shareholders' Agreement was a provision for the buyback of stock at certain pre-determined prices that were dependant upon the manner in which the employee left the company, i.e., terminated for cause, without cause or by resignation. In October of 1998,

[1] At the time, Dalicandro was an employee shareholder of Legalguard.

Dalicandro alleges that as a result of a commitment of Reliance to invest new funds in Legalguard, an agreement was reached at a Legalguard board of directors meeting that amended certain terms of the Shareholders' Agreement (the "October Agreement").

In 1998, Dalicandro alleges that Legalguard was involved in negotiations to either merge with a company called Examen, Inc. ("Examen") or be sold to Policy Management. Dalicandro believes the Plaintiffs not only actively concealed these negotiations from him, but deliberately misled him regarding the company's plans. Policy Management purchased Legalguard in December of 1998.

In December of 1998, prior to the sale, Dalicandro resigned from Legalguard and in February of 1998, exercised his rights under the Shareholders' Agreement by selling his Legalguard stock. Dalicandro alleges that his resignation was prompted by a breach of the October Agreement by Reliance Insurance, with the participation of Costello and Charlton. Reliance Insurance, through Costello and Charlton, is alleged to have insisted that Dalicandro execute an agreement that would have lowered the price at which his stock would be bought back in the event of voluntary termination or termination without cause. Dalicandro also alleges that he would not have resigned had he known of the sale and/or merger plans of the company.

As a result of the alleged actions of the Plaintiffs and Reliance, Dalicandro believes he suffered significant monetary damages. On or about January 16, 2002, Dalicandro filed a second amended Complaint in the United States District Court for the Eastern District of Pennsylvania (the "Dalicandro Action") against Legalguard, Reliance Insurance, Steinberg, Charlton, Costello and Kwasny. Dalicandro's Complaint alleged violations of various securities laws, breach of contract and fraud.

B. The Request For Coverage.

As a result of Dalicandro's lawsuit, Plaintiffs sought coverage under the Policy and notified the Policy's insurers, Syndicate 212 at Lloyd's of London, as Lead Underwriters, Syndicates 1007, 79, 376, 2376, 1207, 205, 190, and 362 at Lloyd's of London, all subscribing to the Policy, and John Does 1-50 (collectively the "Insurers") of Dalicandro's claims.

After a lengthy period of time, and numerous communications, the Insurers advised the Plaintiffs of their coverage position through a reservation of rights letter. The Insurers took the position that while the Plaintiffs are assureds under the Policy, certain Policy exclusions preclude coverage of some, or all, of any judgment in the Dalicandro Action. In addition to the litany of coverage defenses asserted, the Insurers also took the position that since multiple coverage sections of the Policy may be implicated, the Plaintiffs must pay a one million dollar retention before any payments under the Policy are required.[2]

The Plaintiffs dispute the Insurers' interpretation of the Policy and believe that the Policy requires the application of a zero retention. Steinberg was the first to commence suit against the Insurers when he filed a civil action Complaint in October of 2002. Steinberg's Complaint (the "Steinberg Complaint") contained the following three Counts: breach of contract, bad faith and declaratory judgment. Charlton, Costello and Kwasny

[2] A retention is similar to a deductible that must be paid by the assured before the insurance company steps in to make payments. In this case, the Insurers believe the Plaintiffs must pay the first one million dollars of any covered loss under the Policy before they are required to make payments.

followed Steinberg's lead and commenced suit in December of 2002 (the "Charlton Complaint"). The Charlton Complaint, although slightly different factually, essentially contains the same allegations and Counts as set forth in the Steinberg Complaint. The cases were subsequently consolidated by request of the parties and order of the court.

II. SUMMARY JUDGMENT

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a *prima facie* cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). To succeed, a defendant moving for summary judgment must make a showing that the plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa. Super. Ct. 2001). To avoid summary judgment, the plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the plaintiff. McCarthy, 724 A.2d at 940.

In addressing the issue, this court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The plaintiff, must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989). The parties agree that there is no dispute as to a genuine issue of material fact and that summary judgment is appropriate at this time. The parties further

agree that Pennsylvania law is applicable for the purposes of the cross motions for summary judgment.

III. DISCUSSION

Plaintiffs' seek payment of their Costs, Charges and Expenses (the "Defense Costs") that they have incurred, and continue to incur, in the Dalicandro Action.[3] Plaintiffs assert that considerable Defense Costs have been expended in the Dalicandro Action this past year. Plaintiffs are not requesting that the court determine the applicable retention or coverage for any judgment that may be entered in the Dalicandro Action. Therefore, the issue before the court is limited solely to the Defense Costs and what is the applicable retention under the Policy.

The Insurers argue that because the Dalicandro Action may involve multiple coverage sections of the Policy, the Plaintiffs must pay the highest single retention among the implicated coverage sections. The Insurers do **not** assert that any of the Defense Costs are outside the scope of the Policy's definition of Costs, Charges and Expenses or that the Defense Costs are not covered by the Policy as a result of any coverage

[3] Costs, Charges and Expenses are defined in the Policy as "reasonable and necessary legal fees and expenses incurred by the Assureds in the defense or investigation of any Claim and cost of attachment or similar bonds . . . ." See Steinberg Complaint, Exhibit B, General Terms and Conditions, ¶ F.

exclusions.[4] In response, the Plaintiffs urge that there is only one coverage section implicated, and the applicable retention for that coverage section is zero.[5]

[4] In the Insurers' answers to the plaintiffs' Complaints, they reserved certain coverage defenses in their reservation of rights letter based upon exclusions within the Policy (the "Coverage Defenses"). But, the Insurers incorporated and reserved the Coverage Defenses only to the extent that the plaintiffs were seeking coverage as to the liabilities being asserted against them by Dalicandro. Regarding the Defense Costs, the Insurers plead that the plaintiffs must pay a one million dollar retention prior to any payments under the Policy. Therefore, the Insurers have drawn a distinction before their coverage defense of any judgment in the Dalicandro Action and the Defense Costs.

Since it is evident from the pleadings that the plaintiffs are only seeking coverage and payment of the Defense Costs, the Coverage Defenses, as set forth in the reservation of rights letter, are not before the court. Moreover, the Insurers did not raise the Coverage Defenses in their summary judgment pleadings. For those reasons, the Coverage Defenses are waived as to the Defense Costs. See Armon v. Aetna Casualty & Surety Co., 369 Pa. 465, 468, 87 A.2d 302, 304 (1952) (holding that exclusions and exceptions to coverage are affirmative defenses that must be raised by the defendant).

[5] Steinberg also argued that under Pennsylvania law, insurers must defend an action or pay defense costs whenever there is the potential for coverage. It is true that Pennsylvania law does require that an insurer provide for a defense so long as there are claims in the underlying suit that are potentially covered. See Cadwaller v. New Amsterdam Casualty Co., 396 Pa. 582, 152 A.2d 484 (1959).

However, in such instances, the policies contain clauses requiring the insurer to provide a defense, thus imposing a duty. In the present case, the Policy specifically relieves the Insurers of any duty to defend or investigate and treats Defense Costs as any other loss covered by the Policy. See Steinberg Complaint, Exhibit "B", Policy, Page 5. Moreover, the Insurers are not refusing to pay the Defense Costs, instead, they are asserting that a retention be paid before they make any payment.

This court finds in favor of the Plaintiffs and against the Insurers. Although Dalicandro's claims appear to implicate two of the four coverage sections of the Policy, only a single Policy section provides actual coverage. As a result, the court finds that the applicable retention in this case is zero. Because the court finds coverage under single coverage section, there is no need to address the issue of what retention the Policy requires if there is coverage under multiple sections.

A. <u>The Policy.</u>

The court begins its analysis with the primary source of contention, the Policy itself. Although the Insurers do not argue that the Defense Costs are not covered by the Policy, it is necessary to examine the Policy's coverage sections in order to determine the applicable retention. The Policy itself consists of a General Terms and Conditions section (the "General Terms Section"), followed by certain endorsements and four separate individual coverage sections. The four individual coverage sections are: (1) a Directors, Officers and Company Liability Section (the "D&O Section"), (2) an Errors and Omissions Coverage Liability Section, (3) a Fiduciary Liability Coverage Section and (4) the Employment Practices Liability Coverage Section (the "EPL Section").

Each of the individual coverage sections contain a declarations page and specific terms and conditions governing coverage under the section. Each section also has its own retention to be applied when that section provides coverage. The definitions in the individual coverage sections supercede the definitions in the General Terms Section in the event there is a conflict. Furthermore, except as specifically provided, the terms and conditions in each coverage section do not apply to other coverage sections. The dispute between the Plaintiffs and the Insurers involves the interpretation of the Policy's D&O, EPL

and the General Terms Sections, along with Dalicandro's Complaint.

As a matter of law, this court may determine the construction of a contract. Osial v. Cook, 803 A.2d 209, 214 (Pa. Super. Ct. 2002). Additionally, the proper construction of an insurance contract may be determined as a matter of law in a declaratory judgment action. Aetna Casualty and Surety Company v. Roe, 437 Pa.Super. 414, 420, 650 A.2d 94, 97 (1994). As a threshold inquiry, the court must determine whether the language of the contract is ambiguous. Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 200-01, 519 A.2d 385, 390 (1986). A contract is ambiguous when the contract language is indefinite and reasonably susceptible to more than one meaning. Commonwealth of Pa. v. Brozzetti, 684 A.2d 658, 663 (Commonwealth Ct. 1996). When interpreting a contract of insurance, any ambiguities must be construed against the insurer. Lititz Mutual Insurance Co. v. Steely, 567 Pa. 98, 785 A.2d 975 (2001).

1. The D&O Section

The D&O Section provides coverage tailored to the company's directors and officers.[6] The insuring clauses in the D&O Section cover claims against directors and officers based upon the section's definition of "Wrongful Act". See Steinberg Complaint, Exhibit "B", the Policy, Page 15. Wrongful Act is defined as:

> [A]ny actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by any of the Directors and Officers, while acting in their capacity as a director or officer of the Company, or any matter claimed against them by reason of their status as such, or by the Company with respect to any Securities Claim.

[6] The Insurers do not dispute that at all relevant times the Plaintiffs were directors of Legalguard.

Id.

The Plaintiffs assert that all of the claims contained in the Dalicandro Action are covered by the aforementioned definition. While the Plaintiffs concede that some of the claims are also covered by the EPL Section, they argue that the D&O Section wholly encompasses the claims also covered by the EPL Section. Hence, there are no claims covered by the EPL Section that are not covered by the D&O Section.

The Insurers believe that certain of Dalicandro's claims may not be covered by the D&O Section and, therefore, coverage is divided between the D&O and EPL Sections. In such a case, it would be necessary to refer to the General Terms Section to determine how the conflicting retentions would be applied. The Insurers do agree that if the D&O Section is the only implicated coverage section, the applicable retention is zero.

2. **The EPL Section**

The EPL Section covers claims involving an employment relationship. As a result, it covers a broader base of claims and assureds than the more narrow D&O Section. As with the D&O Section, the path to coverage under the EPL Section begins with the insuring clause. The relevant portion of the insuring clause is as follows:

> Insuring Clause:
>
> Underwriters shall pay on behalf of the Assureds **Loss** resulting from any **Claim** first made against the Assureds for **Employment Practices**. (emphasis in original)

Id. at 24. The definition of Employment Practices is defined as any Wrongful Act that

relates to a number of enumerated categories.[7] The categories of employment practices that the Insurers seem to believe are implicated by the Dalicandro Action are as follows:

> (1) wrongful dismissal or discharge or termination of employment, whether actual or constructive;
>
> (2) employment-related misrepresentations;
>
> * * *
>
> (5) wrongful deprivation of careers opportunity, employment or promotion;
>
> * * *
>
> (8) any other matter alleged against the Assured based upon any duty or obligation created by an employment relationship.

Id. There is a one million dollar retention applicable to claims under the EPL Section (the "EPL Retention").

Review of the Dalicandro's Complaint, makes clear that certain of Dalicandro's claims fall under the umbrella of coverage provided by the EPL Section. If the inquiry were to end here, there would be actual coverage under multiple sections and the court would need to turn to the General Terms Section to determine the applicable retention. Yet, the EPL Section contains an important exclusion that the Plaintiffs believe eliminates the

[7] Unlike the D&O Section, the EPL Section does not have its own definition of Wrongful Act and incorporates the definition contained in the General Terms Section. The General Terms Section defines Wrongful Act as "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by any Assured." See Steinberg Complaint, Exhibit "B", the Policy, Page 4.

possibility of coverage under the EPL Section and, therefore, leaves only the D&O Section available. The EPL Section provides for the following exclusion:

> Underwriters shall not be liable to make any payment in connection with any Claim:
>
> * * *
>
> I. For intentional acts committed by any Assureds with an intent to cause harm; or
>
> J. **that portion of Loss which is covered under any other Coverage Section of this Policy.** (emphasis added)

Id. at 27. Based upon the plain meaning of this exclusion, there can be no doubt that if any other section provides coverage, the EPL Section will not afford duplicate coverage. As an example of the exclusion in action, consider a hypothetical four Count Complaint. Counts one and two are covered solely by the EPL Section and Counts three and four are covered by the D&O and EPL Section. In such a case, Counts three and four would not be covered by the EPL Section as a result of the exclusion.

The Insurers do not directly address what happens when another coverage section covers all of the claims that the EPL Section covers. Yet, it is clear from their brief, the Insurers recognize that if a portion of the claim is covered by another section there cannot be coverage under the EPL Section. Certainly, if the entire claim is covered by another section, then any coverage under the EPL Section is precluded. Therefore, if all of the claims under the Dalicandro Action are covered by the D&O Section, the EPL Section would not provide coverage and the applicable retention would be zero.

B. The Multiple Coverage Clause Of The General Terms Section Does Not Require The Application Of The EPL Retention When Two Coverage Sections *Potentially* Apply.

The Insurers' assertion that the EPL Retention applies because of potential coverage under multiple sections is without merit. The crux of the Insurers argument is that because of the potential for coverage under multiple sections, Article IX of the General Terms Section (the "Multiple Coverage Clause") requires the EPL Retention to be applied. The court finds that the plain language of the Policy does not support the Insurers' argument.

Throughout their brief the Insurers argue that it is premature at this time to determine what coverage sections actually apply to Dalicandro's claims. This position is evidenced by their consistent use of the terms "potential" or "may" in describing whether there is coverage under one or both sections. Under their theory, decisions as to coverage are premature prior to trial and, in such situations, the Multiple Coverage Clause comes into play.

> Defendant insurers, however, respectfully point out that the difficulties encountered when trying to make suggested premature coverage determination are avoided, by clear and unambiguous policy provisions. The Single Retention Provision addresses this quandary, holding that when two or more coverage parts *potentially* apply, the single largest retention is utilized."(emphasis in original)

See Insurers' Memorandum in Support of Motion for Summary Judgment, Page 11.

Contrary to the Insurers' assertions, the Multiple Coverage Clause does not address the issue of *potential* coverage under multiple sections, rather it becomes activated when

there is *actual* coverage under multiple sections of the Policy.[8] The court finds no support in the plain language of the Multiple Coverage Clause that its purpose was to solve the dilemma of potential multiple coverage scenarios.[9] The clause only comes into play when it is decided that there is actual coverage under multiple sections.

Therefore, because the Policy requires a determination of what coverage sections apply before referring to the Multiple Coverage Clause, the court must not only determine what coverage sections are implicated, but what coverage sections *actually* apply. If the court determines that all of the claims of Dalicandro are covered by the D&O Section, then

---

[8] The relevant portion of the Multiple Coverage Clause is as follows:

> The Retentions shown for each Coverage Section are separate Retentions pertaining to the Coverage Section for which they are shown; the application of a Retention to Loss under one Coverage Section shall not reduce the Retention under any other Coverage Section.
>
> The Lead Underwriter and the Assureds shall use their best efforts to determine in good faith any [sic] by mutual agreement the applicability of the appropriate Coverage Section and Retention to any Claim. In the event that a single Claim or series of Claims arising from Interrelated Wrongful Acts **shall be covered**, in whole or in part, under two or more Insuring Agreements or one or more Coverage Sections, the total applicable Retention shall not exceed the largest single Retention. Such single largest Retention shall apply only once to such Claim(s). (emphasis added) Retention. Such single largest Retention shall apply only once to such Claim(s). (emphasis added)

See Steinberg Complaint, Exhibit "B", the Policy, Page 7.

[9] The court notes that the Insurers provide no underlying rationale to support their argument that only after trial can the determination of what coverage sections are applicable be made. If the Insurers are implying that the coverage defenses they reserved in their reservation of rights letter may somehow affect what coverage section is eventually applicable, any such argument was waived as to the Defense Costs.

the EPL Exclusion bars application of the EPL Section and its one million dollar retention.

C. The D&O Section Covers All Of The Claims In The Dalicandro Action And The Only Applicable Retention Is Zero.

The court finds that all of the claims alleged by Dalicandro are covered by the D&O Section of the Policy.[10] The Insurers essentially make three arguments in support of their contention that the D&O Section may not cover all of the claims of the Dalicandro Complaint. First, the Complaint contains allegations that would only be covered by the EPL Section. Second, Dalicandro alleges that the Plaintiffs acted in a manner loyal to themselves. Third, and last, the D&O Section only covers unintentional claims. Each argument is addressed in turn below.[11]

1. Dalicandro's Complaint Does Not Allege Claims That Are Not Covered By the D&O Section.

Out of over 100 paragraphs in Dalicandro's Complaint, the Insurers cite to three that they believe allege claims that may not be covered by the D&O Section. Specifically, the Insurers cite to paragraphs 106, 108 and 109 of the Complaint:

---

[10] As noted, the Insurers are not arguing that the Defense Costs are not a covered loss under the Policy.

[11] The Insurers' motion and brief are almost entirely devoted to their perceived reading of the Multiple Coverage Clause of the Policy. The Insurers make only cursory and conclusive arguments in three paragraphs of their motion as to why some of Dalicandro's claims may not be covered by the D&O Section. None of those arguments are touched upon in their brief.

106. Instead, Dalicandro would have remained as an employee and retained his shares and exercised his options to purchase an additional 48,291 shares.

108. Further, but for the misrepresentations and breach of the October Agreement, Dalicandro would have continued on as an employee of Legalguard once its business was sold to Policy Management and would have been entitled to receive a salary, bonus (which represented a "back-end" payment for the value of their Legalguard shares), and a share in the royalties from the sale of Legalguard software.

109. As a result, Dalicandro has suffered further loss, as follows:

a. Loss in salary in the amount of $875,500 over five years less the severance payments made to Dalicandro;

b. Loss of bonus up to 25% of the $4.3 million bonus pool which may be paid to Costello, Kwasny, and Charlton;

c. Loss of royalties up to 25% of the $750,000 which may be paid to Costello, Kwasny, and Charlton.

The Insurers argue that these paragraphs allege claims that relate to wrongful dismissal, employment related misrepresentations, and wrongful deprivation of career opportunity; "consequently, those allegations appear to be covered by the EPL part and not the D&O part." See Insurers' Cross Motion for Summary Judgment, Page 16. The court is unable to understand how the Insurers arrive at such a conclusion. While these allegations would be covered by the EPL Section, there is no basis to conclude that the D&O Section does not also provide coverage. The Insurers fail to cite to any definitions, Policy provisions or case law in support of their assertion.

The allegations contained in these paragraphs are essentially a recitation of the damages that Dalicandro alleges to have suffered. The court agrees with the Insurers that the EPL Section would provide coverage based upon the damages alleged in these three paragraphs. But the court disagrees that coverage under the EPL Section necessarily means no coverage under the D&O Section. Provided that the D&O Section covers the alleged wrongful acts that resulted in the damages alleged, there is coverage under the D&O Section. The definition of Wrongful Acts (applicable to the D&O Section) is sufficiently broad to cover the underlying acts alleged to have caused the specified damages. Therefore, notwithstanding that paragraphs 106, 107 and 109 appear to support coverage under the EPL Section, that coverage is illusory because of the EPL Exclusion.

2. An Allegation That The Plaintiffs Acted Out Of Loyalty To Themselves Is Not Sufficient To Prevent Coverage Under The D&O Section.

The Insurers next argue that since there are allegations that the Plaintiffs acted out of loyalty to themselves, there cannot be coverage under the D&O Section. Once again, the Insurers do not provide any reasoning or documentation to support their position. The definition of Wrongful Act is defined as

> [A]ny actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by any of the Directors and Officers, while acting in their capacity as a director or officer of the Company, or any matter claimed against them by reason of their status as such . . .

See Steinberg Complaint, Exhibit "B", Policy, Page 15. In the face of such broad language, this court concludes that even if the Plaintiffs were loyal to themselves, their alleged actions are covered by the D&O Section. The motivation of the directors is not a

determinative factor when deciding what acts are covered. If, by their argument, the Insurers are asserting that the directors breached their duty of loyalty to the company and its shareholders, the definition of wrongdoing explicitly covers the breach of any duty.

At oral argument, counsel for the Insurers also made a brief reference to Count VI of Dalicandro's Complaint in support of their argument.[12] While not explicitly stated, the Insurers are perhaps asserting that a breach of the October Agreement, being an amendment to the Shareholders' Agreement, is not covered by the D&O Section. The court is not persuaded by this argument. The October Agreement was allegedly formed by the directors of Legalguard at a board of directors meeting. Additionally, at the time of the alleged breach, Costello and Charlton were undisputably directors of Legalguard. Under these circumstances, the court believes that Count VI is covered by the D&O Section.

3. The D&O Section Only Covers Unintentional Acts, Misstatements, Neglect Or Breach Of Duty.

Lastly, the Insurers contend that the D&O Section covers only "unintentional acts, misstatements, neglect or breach of fiduciary duty by an officer or director of the corporation." See Insurers' Cross Motion For Summary Judgment, Page 16. But, this court can find no language in the definition of Wrongful Act that would lead to the conclusion that it covers only unintentional acts and the Insurers provide no rationale or support for this argument. Therefore, the court submits that intentional as well as unintentional acts are covered by the D&O Section.

[12] Count VI applies only to Charlton, Costello and Reliance.

III. CONCLUSION

This court holds that all of the claims of Dalicandro are covered by the D&O Section of the Policy. Even though certain claims may also fall under the EPL Section, the EPL Exclusion precludes such coverage and, as a result, the applicable retention is that of the D&O Section, zero.

Thus, the court finds in favor of Steinberg, Charlton, Costello and Kwasny on their respective partial motions for summary judgment and judgment is entered against the Insurers on Counts I and III of the Plaintiffs' respective Complaints. The motion for summary judgment of the Insurers is denied. This case will proceed to trial on the remaining Count II (in each Complaint) and for an assessment of damages under the breach of contract claims.

BY THE COURT:

_____

ALBERT W. SHEPPARD, JR., J.

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

HOWARD E. STEINBERG, Plaintiff, v. SYNDICATE 212 at LLOYD'S OF LONDON, as Lead Underwriters, SYNDICATES 1007, 79,376, 2376 1207, 205, 190, and 362 at LLOYD'S OF LONDON, all SUBSCRIBING TO POLICY NO. 823/FD 9701593, and JOHN DOES 1-50, Defendants.	: OCTOBER TERM, 2002 : No. 2479 : : : :

EDWARD CHARLTON, DENNIS COSTELLO and LAWRENCE KWASNY, Plaintiffs, v. SYNDICATE 212 at LLOYD'S OF LONDON, as Lead Underwriters, SYNDICATES 1007, 79,376, 2376 1207, 205, 190, and 362 at LLOYD'S OF LONDON, all SUBSCRIBING TO POLICY NO. 823/FD 9701593, and JOHN DOES 1-50, Defendants.	: DECEMBER TERM,2002 : No. 4534 : : : : Commerce Program : Control Nos. 121084 and 032907

O R D E R

AND NOW, this 8th day of September, 2003, upon consideration of the Motions for Partial Summary Judgment of the plaintiffs Howard E. Steinberg , Edward Charlton, Dennis Costello, Lawrence Kwasny, and the cross-Motion for Summary Judgment of the defendants Syndicate 212 at Lloyd's of London, as Lead Underwriters, Syndicates 1007, 79,376, 2376, 1207, 205, 190, and 362 at Lloyd's of London, all subscribing to

Policy No. 823/FD 9701593, and John Does 1-50 (collectively the "Insurers"), the respective memoranda, all matters of record, and after oral argument, it is **ORDERED** that**:**

1. The Motions for Partial Summary Judgment of the plaintiffs are **Granted** on Counts I and III;

2. The plaintiffs are assureds under Lloyd's Policy No. 823/FD 9701593 (the Policy") and are entitled to coverage under the Policy's Directors, Officers and Company Liability Coverage Section (the "D&O Coverage Section") and subject to a retention of zero;

3. Nothing in this Order shall affect or supercede any of the terms and conditions set forth in the Agreement by and among M. Diane Koken, Reliance Group Holdings, Inc., George E. Bello and Lowell C. Freiberg and the Defendants dated May 13, 2002, regarding the payment of attorneys' fees and costs;

4. This matter will proceed to trial on Count II of the plaintiffs' respective Complaints and at that time the court will conduct an assessment of damages hearing on Count I.

BY THE COURT:

_____

ALBERT W. SHEPPARD, JR., J.