

# Court Holds That Recklessness Can Constitute Negligence for Purpose of Duty to Defend

---

December 1999

A federal district court, applying New York law, has granted summary judgment to a policyholder, holding that a professional liability insurer owed a duty to defend the policyholder in an action for alleged violations of the federal Driver's Privacy Protection Act and for alleged outrageous conduct causing emotional distress. *Cowan v. Codelia, et al.*, 98 Civ. 5548 (JGK), 1999 U.S. Dist. LEXIS 17606 (S.D.N.Y. Nov. 5, 1999).

An Assistant District Attorney in New York City brought an action against a law firm and three attorneys individually for asserted violations of the Driver's Privacy Protection Act and for outrageous conduct causing emotional distress in connection with their representation of a criminal defendant in a murder trial that she was prosecuting. The prosecutor alleged that the defendants obtained her unlisted home address and sent her an empty envelope during the murder trial in an attempt to intimidate her and send a "message" that the individual she was prosecuting for murder knew where she lived. The defendants requested defense and indemnity from their professional liability insurer, which disclaimed on the basis that the claims were barred by the policy's dishonesty exclusion.

On cross motions for summary judgment, the district court held that the insurer was obligated to provide a defense to the policyholder for the claim. Relying on *Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 575 N.E.2d 90 (1991), the court held that an insurer is required to consider facts extrinsic to the underlying complaint if those facts support the reasonable possibility of coverage, and therefore the duty to defend. The court noted, however, that an insurer has no duty to defend where it can be determined from the inherent nature of the facts alleged in the complaint that no basis for recovery within the coverage of the policy is stated in the complaint. Thus, an insurer is required to focus on the factual allegations in a complaint as opposed to any conclusory legal allegations. *Allstate Insurance Co. v. Mugavero*, 79 N.Y.2d 153, 589 N.E.2d 365 (1992).

Based on these principles, the court determined that a duty to defend existed because the complaint alleged "reckless conduct" on the part of the defendants. The court reasoned that claims of recklessness can be understood as a variant of negligence, which is covered by the policy. In reaching this decision, the court distinguished between intentional acts and intentional injuries, noting that intentional acts may result in unintended injuries, and such injuries may be covered, even though the act that caused the injury was intentional.

The court also rejected the insurer's argument that because public policy bars indemnification for intentional injuries and criminal acts, the defendants cannot demand indemnification for liability arising from conduct alleged to have been criminal and intentionally injurious. The court noted that neither criminality nor intent to injure had yet been proven, and that criminality, even if proven, would not be an absolute bar to coverage. The court reasoned that insurance indemnification is barred only if the policyholder acted with the intent to injure. Because a material dispute existed regarding whether the defendants acted with intent to injure, the court held that the insurer could not avoid its duty to defend on the basis of public policy.

Lastly, the court rejected the argument that claims for damages for emotional distress were not covered because indemnification for liability arising from the infliction of emotional distress was barred by the "bodily injury" exclusion. The court noted that the policy contained no definition of the phrase "bodily injury." Applying the rule that ambiguous terms are construed against the insurer, the court concluded that emotional distress is, for purposes of the exclusion, not a form of "bodily injury" and therefore is not excluded from coverage.