19-2266-cv

United States Court of Appeals

for the

Second Circuit

BROOKLYN CENTER FOR PSYCHOTHERAPY, INC.,

Plaintiff-Appellant,

– v. –

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee, Philadelphia Indemnity Insurance Company ("PIIC"), hereby certifies that PIIC is a wholly owned subsidiary of Philadelphia Consolidated Holding Corp., which itself is a privately held and wholly owned subsidiary of Tokio Marine North America, Inc. ("TMNA"), a privately held Delaware corporation. TMNA is a subsidiary of Tokio Marine and Nichido Fire Insurance Company, Ltd. ("TNMF"), a privately held insurance company organized under the Companies Act of Japan. TMNF is a subsidiary of Tokio Marine Holdings, Inc., an insurance holding company organized under the Companies Act of Japan, which is traded on the Tokyo and Osaka Stock Exchanges.

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STATEMENT OF ISSUES PRESENTED

Whether the district court properly dismissed plaintiff-appellant, Brooklyn Center for Psychotherapy, Inc.'s ("BCP") breach of contract cause of action when it concluded that allegations of intentional discrimination do not trigger PIIC's defense obligation under an insurance policy issued to BCP.

STATEMENT OF THE CASE

Fanni Goldman sued the Brooklyn Center for Psychotherapy, Inc. ("BCP"), claiming that it intentionally discriminated against her on the basis of her hearing disability. (*See* "Goldman Complaint" JA021). Philadelphia Indemnity Insurance Company ("PIIC") denied BCP insurance coverage for the Goldman Complaint and this action followed. The district court granted PIIC's motion to dismiss BCP's complaint and BCP now appeals that decision.

The Goldman Complaint alleged that BCP failed to accommodate her need for an American Sign Language ("ASL") interpreter in seeking psychiatric treatment for her minor son. Ms. Goldman alleged violations of Title III of the federal Americans With Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973 (29 USCA §794), the New York State Human Rights Law, the New York City Human Rights Law, and the New York City Administrative Code § 8-101 et. seq.

The Goldman Complaint factually alleged:

> 1. [BCP] flatly refused to serve Ms. Goldman, because of her disability, when she requested an appointment for her son . . . ." (JA021 ¶ 1).
>
> ***
>
> 14. [BCP] refused to schedule an appointment (JA023 ¶14)
>
> ***
>
> 16. [BCP was] rude, dismissive, and disrespectful (JA023 ¶16; *see also* JA024 ¶20)

Ms. Goldman asserted that BCP refused to modify its policy and practice of discrimination (*see* JA025 ¶27) and acted with "deliberate indifference" in accordance with an existing policy and practice of discrimination (*see* JA025 ¶28).

As a result, Ms. Goldman concluded that BCP "refuses to serve deaf" people (JA024 ¶21); that BCP "refuses" to hire ASL interpreters (JA024 ¶22); that BCP has a practice designed to "discourage the use of onsite interpreters" (JA025 ¶27); and that BCP "intentionally discriminated" and acted with "deliberate indifference" in refusing to provide her with services. (JA025 ¶30).

Ms. Goldman accused BCP, among other things, of causing her emotional distress, fear, anxiety, indignity, and humiliation. The Goldman Complaint sought both compensatory and punitive damages, as well as declaratory and injunctive relief, attorney's fees, and costs. Ms. Goldman's case was tried in the Eastern District of New York from January 14, 2019 through January 17, 2019, resulting in a defense verdict. (JA463-464).

PIIC issued BCP a policy of commercial general liability insurance, Policy No. PHPK 1257626 (the "PIIC Policy"). (JA147—JA373). BCP tendered the Goldman Complaint to PIIC, but PIIC timely disclaimed coverage. (JA373). PIIC's Denial Letter explained that the Goldman Complaint was devoid of any allegation amounting to bodily injury or property damage caused by an occurrence, as defined by the PIIC Policy.[1]

The PIIC Policy provides, in pertinent part, the following relevant terms and conditions:

> **SECTION I — 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. We will have the right and duty to defend the insured against any "suit" seeking those damages. 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. . . .
>
> ***
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

[1] The Denial Letter also set forth why the Goldman Complaint did not trigger coverage under the PIIC Policy's Coverage B-Personal and Advertising Injury, and the Human Services Organization Professional Liability Coverage Form. BCP conceded that the Goldman Complaint did not trigger those grants of coverage.

b. This insurance applies to "bodily injury" and "property damage" only if:
   (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the 'coverage territory";

***

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury
   "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

***

SECTION V — DEFINITIONS

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3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

***

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

***

(JA271-72, 284, 289).

BCP commenced this action against PIIC, asserting causes of action for breach of contract to provide a defense and indemnity, and for bad faith.[2]

---

[2] BCP's indemnity claim became moot following trial. (*See* SPA001 at n. 2; Dkt. No. 43 at 6 n.1). Additionally, BCP did not appeal from that part of the district court's determination dismissing the bad faith cause of action. (SPA009; Dkt. No. 43 at 6).

PIIC moved to dismiss BCP's Complaint. (JA073). The Eastern District of New York dismissed the complaint, in a July 2, 2019 Decision and Order. (SPA001). The district court found that the Goldman Complaint alleged that BCP "refused to provide Ms. Goldman with a sign language interpreter on multiple occasions" (SPA006), "dismissively told her to seek treatment for her son elsewhere" (SPA006), and "denied services to deaf people and had a policy or practice of refusing to offer on-site sign language interpreting services." (SPA006). The district court held that "[e]ach claimed action – the refusal to give Ms. Goldman accommodation and the policy against offering interpretation services – was expected or intended by the insured," (SPA006), and thus "[t]he *Goldman* complaint alleged only intentional acts resulting in discrimination." (SPA008).

BCP filed this appeal on July 23, 2019. (JA485).

<u>SUMMARY OF ARGUMENT</u>

The District Court correctly determined that PIIC owes no coverage to BCP because the Goldman Complaint alleged only non-accidental, excluded intentional conduct.

It is well settled that whether an insurance company owes a duty to defend a particular action is determined by a comparison of the contract of insurance with the factual allegations of the pleading. The trial court did exactly this: it compared Ms.

Goldman's allegations to the coverage, determining that the factual allegations could only be construed as non-accidental, excluded intentional conduct.

On appeal, however, BCP eschews the factual allegations, instead leading this Court on a meandering discussion of discrimination liability theories. But BCP's argument departs from the touchstone of a coverage determination – what did the plaintiff claim? Here, Ms. Goldman alleged that she was intentionally refused an ASL interpreter. It is irrelevant if such a claim can establish liability under different theories of law – her allegation was that the refusal to accommodate was intentional, not accidental, and not as a result of a disparate impact from a facially neutral policy.

Every factual predicate in the Goldman Complaint alleged non-accidental conduct. Since the Goldman Complaint asserted intentional discrimination, there is no coverage under PIIC's CGL policy. This Court should affirm.

ARGUMENT

A. Standard of Review

The Second Circuit reviews the granting of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.* Iqbal, 556 U.S. 662, 678 (2009). A pleading that merely offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S at 555. Nor does a pleading suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557. At the motion to dismiss stage, the court "is generally limited to the facts as presented within the four corners of the complaint, to documents attached to the complaint, or to documents incorporated within the complaint by reference." *Williams v. Time Warner, Inc.*, 440 F. App'x 7, 9 (2d Cir. 2011) (quoting *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002).

B. Duty to Defend

An insurer's duty to defend is ordinarily ascertained by comparing the

allegations of a complaint with the wording of the insurance contract. *See Int'l Bus. Machs. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 144 (2d Cir. 2004) (citations omitted); *see also Emp'rs. Ins. Co. of Wausau v. Northfield Ins. Co.*, 150 F.Supp.3d 196, 200 (E.D.N.Y. 2015). An insurer must defend the action if the complaint, liberally construed, contains any allegations that arguably or potentially bring the action within the protection purchased. *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204 (2d Cir. 1989). There is no defense obligation where the factual allegations provide no basis for coverage under the policy. *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 163, 581 N.Y.S.2d 142 (1992) (citations omitted).

The court is not "required to accept [a party's] legal characterization of the causes of action . . . ." *County of Columbia v. Continental Ins. Co.*, 189 A.D.2d 391, 595 N.Y.S.2d 988 (3rd Dep't 1993), *aff'd*, 83 N.Y.2d 618, 612 N.Y.S.2d 345 (1994). Instead, "the facts alleged in the [underlying] complaint, rather than the conclusory assertions found therein, are controlling." *Willard v. Preferred Mut. Ins. Co.*, 662 N.Y.S.2d 342, 343, 242 A.D.2d 960 (4th Dep't 1997); *see Mugavero*, *supra* at 162. This is because "an insurer cannot be required to defend against an action that otherwise [alleges intentional acts] simply because discovery might uncover other causes or a rational jury might find otherwise." *AmGuard Ins. Co. v. Country Plaza Associates Inc.*, 2014 WL 3016544, *7 (E.D.N.Y. 2014).

Interpretation of insurance policies, similar to other contracts, is a matter of

law. *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London,* 136 F.3d 82, 85 (2d Cir. 1998) (quotation marks omitted).

POINT I

THERE IS NO "OCCURRENCE"

PIIC is entitled to an affirmance because the Goldman Complaint solely alleges intentional conduct that fails to trigger the PIIC Policy's coverage grant.

A. The Goldman Complaint Must Allege an Accident as a Precondition to Coverage

The PIIC Policy provides in Coverage A that PIIC "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." (JA271, 289). "This insurance applies to 'bodily injury' . . . only if [t]he 'bodily injury' is caused by an 'occurrence.'" (JA271, 289). An "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (JA284)

Thus, an "occurrence" is defined as an accident. Accident means "an unexpected, unusual or unforeseen" event. *Commercial Union Assur. Co., PLC v. Oak Park Marina, Inc.*, 198 F.3d 55, 59 (2d Cir. 1999); *see Brooklyn Law School v. Aetna Cas. and Sur. Co.*, 849 F.2d 788, 789-90 (2d Cir. 1988).

Indeed, as outlined under New York Insurance Law § 1101(a), for coverage to trigger under an insurance contract there must be a "fortuitous event," defined as "any occurrence or failure to occur which is, or is assumed by the parties to be, to a

substantial extent beyond the control of either party." Thus, this focus on a "fortuitous event" in New York Insurance Law is conduct—rather than element—specific.

Because the only allegations in the Goldman Complaint sound in intentional conduct, there is no coverage and this Court should affirm.[3] *See Brooklyn Law School*, 849 F.2d at 789-90 (dismissing action where complaint only alleged intentional conduct); *see Central Mut. Ins. Co. v. Willig*, 29 F.Supp.3d 112, 119 (N.D.N.Y. 2014).

B. It Is the Insured's Burden to Demonstrate an Accident or "Occurrence"

It is axiomatic that "[t]he insured has the initial burden of proving that the damage was the result of an 'accident' or 'occurrence' to establish coverage where it would not otherwise exist." *Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622 (2002). BCP has failed to meet—and indeed cannot meet—this burden because the Goldman Complaint solely asserts intentional conduct.

C. Goldman Alleged Only Non-fortuitous, Intentional Conduct

BCP cannot meet its burden because the Goldman Complaint alleged only intentional, non-fortuitous conduct. Ms. Goldman claimed that she was the victim

[3] BCP, by making no other argument, tacitly concedes that if this Court finds only allegations of intentional discrimination within the Goldman Complaint, that there is no coverage.

of BCP's intentional, discriminatory refusal to provide her with a sign language interpreter. (JA021 ¶1). Such allegations do not trigger the grant of coverage afforded by the PIIC Policy.

From paragraph one of the Goldman Complaint it is made known that "[BCP] flatly refused to serve Ms. Goldman, because of her disability, when she requested an appointment for her son . . . ." (JA021 ¶ 1). Goldman alleged that BCP "refused to schedule an appointment" (JA023 ¶14), was "rude, dismissive, and disrespectful" (JA023 ¶16, and *see* JA024 ¶20), and ultimately hung up on her (JA024 ¶18). As a result, Ms. Goldman concluded that BCP "refuses to serve deaf" people (JA024 ¶21), that BCP "refuses" to hire ASL interpreters (JA024 ¶22), that BCP has a practice designed to "discourage the use of onsite interpreters" (JA025 ¶27), and, of course, that BCP "intentionally discriminated" and acted with "deliberate indifference" (JA025 ¶30).

The Goldman Complaint alleged that BCP refused to schedule an appointment for a hearing-disabled person and refused to provide an ASL interpreter, both according to an alleged policy or practice of refusing such services to the hearing-disabled. Plaintiff "intentionally discriminated against [Goldman] and acted with deliberate indifference . . . ." (JA025). Merriam-Webster defines the verb "refuse" as "to express oneself as unwilling to accept" or "to show or express unwillingness to do or comply with" a request, thus requiring an affirmative expression of such

unwillingness. "Refuse", *Merriam Webster*, available at: https://www.merriam-webster.com/dictionary/refuse, (accessed: Oct. 17, 2019). Merriam-Webster defines the verb "deliberate" as "to think about or discuss issues and decisions carefully." "Deliberate", *Merriam-Webster*, available at: https://www.merriam-webster.com/dictionary/deliberate, (access: Oct. 17, 2019) These definitions demonstrate intentional, rather than accidental, conduct. In the Goldman Complaint, allegations of "deliberate indifference" are allegations of carefully made—intentional—decisions not to act in accordance with the patron's requests.

It is readily apparent that the Goldman Complaint alleged only non-accidental conduct.

D. There Is No Duty to Defend Allegations of Intentional Conduct

It is undisputable that the gravamen of the Goldman Complaint is that BCP intentionally refused to provide services to Ms. Goldman based on her disability. As a result, the district court correctly held that BCP failed to establish that the allegations of the Goldman Complaint came within the grant of coverage and that PIIC correctly disclaimed the duty to defend.

In evaluating an insurer's duty to defend, a court must focus on the facts alleged, not the legal characterizations that the parties offer. The factual allegations of the underlying complaint—rather than its legal characterizations of the underlying events—determines the availability of coverage. *Allstate Ins. Co. v. Mugavero*, 79

N.Y.2d 153, 160, 581 N.Y.S.2d 142 (1992); *see Dodge v. Legion Ins. Co.*, 102 F.Supp.2d 144, 150 (S.D.N.Y. 2000); *Tomain v. Allstate Ins. Co.*, 238 A.D.2d 774, 775, 656 N.Y.S.2d 470 (3rd Dep't 1997); *Monter v. CNA Ins. Companies*, 202 A.D.2d 405, 406, 608 N.Y.S.2d 692 (2nd Dep't 1994). The intentional discrimination against the disabled—as alleged here—cannot be construed as anything but intentionally depriving Ms. Goldman of services.

Moreover, because the character of allegations contained within the Goldman Complaint control an insurer's duty to defend, Plaintiff's attempt to recast the alleged "intentional discrimination" as "accidental" is unavailing.

The Goldman Complaint only asserts uncovered intentional conduct. BCP spends much effort, but to little effect, examining the burdens of proof of the statutes that are the predicate for Ms. Goldman's claims. BCP argues that since making a *prima facie* claim for disparate impact or failure-to-accommodate does not necessarily require an intent to discriminate, then, *ipso facto*, Ms. Goldman's factual allegations are transformed and stripped of their intentional nature. (See Doc. No. 43 at 31) This circular reasoning is ineffective.

There is no duty to defend intentional conduct, even where a complaint contains statutory causes of action that may be shown through negligence. *See Atl. Mut. Ins. Co. v. Terk Techs. Corp.*, 763 N.Y.S.2d 56, 64, 309 A.D.2d 22 (1st Dep't 2003) (finding no duty to defend allegations premised on intentional, knowing

conduct notwithstanding that a violation of the pleaded statute can be unintentional). In *Terk Techs*, the underlying complaint alleged violations of the Lanham Trademark Act. *Id.* at 58. It was argued—as here—that because that statutory cause of action did not require proof of intent, the underlying allegations triggered a defense. *Id.* at 63.

In affirming that there was no coverage, the First Department noted that:

> it is impossible to envision how Terk could have unknowingly, and unintentionally, approached a local manufacturer to produce a cheaper, low-quality knockoff of the CD 25; marketed the counterfeit product in packaging indicating it was a genuine [trademark holder] creation manufactured in Denmark, both blatantly false; and then fraudulently misled [the trademark holder] when he inquired as to poor sales, indicating that demand was low, whereas the counterfeit product was enjoying vigorous sales.

Id. at 64. The appellate panel looked at the gravamen of the allegations and, finding them wholly intentional in nature, affirmed that there was no coverage.

Similarly, in *Hubel v. Madison Mut. Ins. Co.*, No. 2001-5404, 2003 WL 21435624, at *4 (N.Y. Sup. Ct. May 16, 2003), a prospective lessor alleged that she was discriminated against by the landlord intentionally, willfully, and with wanton disregard for her rights because of her familial status. The court held that "[t]here is nothing accidental about a single, specific and express decision not to rent to a prospective tenant solely due to the size and makeup of her family." *Id.*

Here, it is equally impossible to envision how BCP could have acted unknowingly, and unintentionally in denying accommodations to Ms. Goldman. That the statutory causes of action can be proven without evidence of intent does not wash away the intentional conduct allegations in the Goldman Complaint. For example, it is axiomatic that an automobile accident case can be established without a showing of intentional conduct. But, if the plaintiff's complaint alleges only that the defendant intentionally caused the incident, well, for insurance purposes it's not an accident and the defendant is not covered. The result here is no different, BCP's machinations aside.

The Goldman Complaint allegations do not reflect statistical disparities between groups sufficient to support a finding of discrimination, but rather intentional wrongs flowing directly from the acts committed against Ms. Goldman. *See* NY DFS Circular Letter No. 6 (1994). Plaintiffs' alleged acts in accordance with a policy or practice of refusing to schedule appointments for the hearing-disabled or provide them with an ASL interpreter are intentional wrongs against the hearing-disabled, with resulting harms flowing directly from those acts. Those policies alleged are not facially-neutral, but rather policies inherently motivated by the protected trait, hearing-disability. Therefore, it cannot be said that the Goldman Complaint sets out a cognizable disparate impact theory of liability.

The allegations in the Goldman Complaint of intentional conduct are directed

at BCP and its policies and procedures, rather than an isolated act of a single "rogue" employee, and cannot be said to have been "unexpected, unusual and unforeseen" from BCP's perspective.

The New York Superintendent of Insurance has provided that:

> Discrimination based upon disparate treatment is an intentional wrong whose resultant harm flows directly from the acts committed, and liability coverage for it is impermissible. The Department's longstanding prohibition against coverage for discrimination claims generally originated at a time, some thirty years ago, when virtually all discrimination claims were of this type.

Rosenberg Diamond Development Corp. v. Wausau Ins. Co., 326 F.Supp.2d 472, 476 (S.D.N.Y.) (quoting NY DFS Circular Letter No. 6 (1994)). NY DFS Circular Letter No. 6 (1994) notes the difference between claims based upon disparate treatment and disparate impact, stating that:

> actions and recoveries under the various and evolving civil rights laws have increasingly been rooted in discrimination claims based upon disparate impact, rather than disparate treatment. In such cases, the discriminatory result does not directly proceed from specific discriminatory acts against individuals; in fact, such acts are not an element of the wrong and need play no part in the facts alleged. Rather, such suits are normally grounded upon statistical or other numerical profiles that reflect disparities between or among groups sufficient to support a finding of discrimination.

The distinction is an important one regarding coverage, and *Rosenberg Diamond Development Corp.*, *supra*, provides compelling analysis against coverage

for intentional discrimination claims like the one at issue here. In *Rosenberg Diamond Development*, no coverage was afforded for allegations of discrimination based upon a corporation's choice "to perpetuate racial separation and . . . systematically engag[e] in racial discrimination . . . ." *Id.* at 476. Continuing, the court noted that "disparate treatment discrimination, by its very definition, results from intentional acts. Clearly, an intentional act is not an 'accident'. Nor is it an 'occurrence' within the meaning of the applicable commercial landlord policy . . . ." *Id.* (quoting *Hubel,* at *5).

The Goldman allegations must be characterized as allegations of intentional—rather than accidental—conduct. *Rosenberg Diamond Development Corp.*, 326 F.Supp.2d at 476 (citing *Hubel*, 2003 WL 21435624, at *5). Accordingly, the Goldman Complaint presents no "occurrence" under the policy, as there has not been an alleged "accident," and, additionally, it is against New York public policy to provide coverage for such claims.

Although BCP would have this court place all discrimination claims into "covered" and "uncovered" categories based solely upon theoretical elements and a misguided reading of New York public policy, the issue is simpler than even that:

> Liability insurance coverage for intentional wrongs is, and has always been, prohibited on two related grounds: first, purposeful misconduct lacks the element of 'fortuity' generally required of insurance contracts; and, second, indemnification of wrongful conduct that is intentional (and hence in theory may be deterred) is against public

policy.

NY DFS Circular Letter No. 6 (1994). Intentional discrimination is an intentional wrong, regardless of the particular theory asserted. Despite coverage being permissible where a theory of *negligent* disparate impact or failure-to-accommodate is supported by allegations, coverage is not extended in every case and without regard to assertions of intentional wrongs and the lack of "fortuity."

The Goldman Complaint alleges that BCP refused to schedule an appointment for a hearing-disabled person and refused to provide an ASL interpreter, both according to an alleged policy or practice of refusing such services to the hearing-disabled. (JA023-025). There are no factual allegations of accidental conduct and, therefore, the Goldman Complaint fails to allege a covered occurrence.

E. Theoretical, Statutory Causes of Action Are No Replacement For the Factual Allegations of Intentional Conduct

Only the factual allegations in the Goldman Complaint determine coverage. Notwithstanding, BCP claims that "[i]t would be perverse to allow a plaintiff to nullify a defendant's insurance coverage simply by pleading extraneous elements that it need not prove at trial." Still, and tellingly, BCP admits that "Goldman could have omitted" allegations of intentional discrimination and did not. (See Dkt. No. 43 at 33-34). BCP is correct, Ms. Goldman did not omit allegations of intentional conduct, and her reasoning – whether to build a case for punitive damages, to plead out of coverage, or some other factor – is wholly irrelevant. New York law is clear

it is the factual allegations of the complaint, when compared to the insurance policy, that determines the duty to defend.

The factual allegations in discrimination cases are important. For example, intentional discrimination is supportable—but not required—under the ADA or Rehabilitation Act. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). In the same breath, negligence is supportable—but not required—under the ADA. Given these two propositions, BCP's argument that all claims under the ADA are provided blanket CGL coverage, in every instance despite the existence of alleged intentional wrongs, is absurd. Here, intentional conduct that is factually alleged absent negligent conduct is not covered under the PIIC Policy.

This same reasoning applies to BCP's assertion that intent is not a required element under the New York Human Rights Law ("NYSHRL") or the New York City Human Rights Law ("NYCHRL"). *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 110-11 (2d Cir. 2013) (applying disparate-treatment analysis in NYCHRL context); *Cotterell v. Gilmore*, 64 F.Supp.3d 406, 425 (E.D.N.Y. 2014) (applying disparate-treatment analysis in NYSHRL context). Negligence is supportable—but not required—under the NYSHRL or NYCHRL, and factual allegations of intentional discrimination under those statutory provisions are not covered under liability insurance policies. Here, intentional conduct that is factually alleged absent negligent conduct is not covered under the PIIC Policy.

If, as here, an intentional failure-to-accommodate is asserted, the factual predicate of that claim is the intentional wrong of an insured, which is not covered under liability insurance. *See, e.g., E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2032 (2015) ("[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."). Such intentional discrimination and willful avoidance of providing services to certain disabled individuals is not to be tolerated, let alone tolerated for the purposes of insurance coverage.

The elements of any specific cause of action or theory of discrimination is noticeably absent from the PIIC Policy's grant of coverage. That is because insurance coverage is not triggered by some formulaic recitation of the elements of a cause of action but rather the existence of allegations involving fortuity. *See Atl. Mut. Ins. Co. v. Terk Techs. Corp.*, *supra* at 64 (1st Dep't 2003) (holding "factual allegations" indicated intentional conduct, despite theoretical possibility of unintentional conduct allowable for claim under Lanham Act claim).

Indeed, BCP cites foreign caselaw standing for this very proposition. *See Educational Testing Service v. Liberty Mut. Fire Ins. Co.*, 1997 WL 220315, *5 (N.D. Cal. April 18, 1997) ("This was an intentional act that cannot be considered an 'accident' under the CGL policy. . . . Since no facts available to Liberty Mutual at

the time of tender could turn ETS's failure to accommodate Perrault into an accident, Liberty Mutual had no duty to defend against Perrault's discrimination claim under the CGL policy."). In fact, BCP cites a second case for good measure that stands for this very proposition. *Loyola Marymount University v. Hartford Accident & Indemnity Co.*, 219 Cal.App.3d 1217 (Ct. App. 1990) (holding that an alleged policy to deny employment to married individuals, which was intentionally set by an employer and applied to an individual was clearly intentional for the purposes of coverage).

Under no circumstances can BCP's policy, as alleged by Ms. Goldman, be considered "facially neutral" in order to support an unintentional claim of disparate impact discrimination. Ms. Goldman alleged a "policy or practice of [BCP] to prohibit or impede the use of onsite qualified sign language interpreters . . ." (JA026 ¶40). Reviewing the Goldman Complaint in its entirety, no supportable claim for disparate impact exists given the gravamen of assertions alleging that BCP "simply treated some people less favorably than others because of their [hearing impairment]." *Raytheon Co.*, 540 U.S. at 53 (citing *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252, n. 5 (1981)).

BCP suggests that "there is no blanket duty for every place of public accommodation to have a full-time ASL interpreter on staff or to procure one in response to every request" and that "[t]his is significant because it necessarily severs

the direct causal link between the decision not to provide an accommodation and the resulting harm." (Dkt. No. 43 at 24). However, this belated attempt to add extrinsic evidence to the record (on an appeal from a motion to dismiss, no less) simply ignores the Goldman Complaint. Ms. Goldman set forth BCP's discriminatory motive and intent to refuse accommodations and services by clear, unambiguous factual allegations. Regardless of whether a "blanket duty" exists, Ms. Goldman herself alleged intentional discrimination in denying the accommodations.

BCP cites *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178 (7th Cir. 1980), and others, for the proposition that where two "theories" of discrimination are presented, a duty to defend attaches. (See Dkt. No. 43 at 36-37). But the Seventh Circuit, as did the district court here, still looked to the factual allegations in the complaint in order to determine the duty to defend.[4] Here, Goldman did not allege both a negligence and an intentional conduct theory – she only alleged intentional conduct. This fact, from which BCP continues to run, strips the inquiry of any particular theory and instead focuses on the nature of the conduct as required under the insurance contract.

BCP suggests that the Goldman Complaint contains several allegations

[4] To be sure, like this Circuit, the Seventh Circuit holds that "[t]he allegations of the complaint, rather than the legal theory under which the action is brought, determine whether there is a duty to defend." *Amerisure Mut. Ins. Co. v. Microplastics, Inc.*, 622 F.3d 806, 815 (7th Cir. 2010) (citing Illinois law).

supporting negligence—but each and every one is a bare legal conclusion. Specifically, BCP cites allegations that it "'fail[ed] to accommodate by ensuring effective communication' (JA021 ¶1); 'fail[ed] to ensure effective communication through the provision of onsite qualified sign language interpreters' (JA026 ¶39); 'den[ied] [Goldman] meaningful access to the services, programs, and benefits [Brooklyn Center] offers to other individuals' (JA028 ¶ 49); 'fail[ed] to accommodate [Goldman]'s disability' (JA029 ¶ 60); 'fail[ed] to ensure effective communication through an onsite interpreter' (JA029 ¶ 61); and 'fail[ed] to accommodate [Goldman]'s disability' (JA031 ¶ 71)" support a theory of negligence. (See Dkt. No. 43 at pp. 34-35 (modifications in original)).

However, these are bare legal conclusions, rather than factual allegations as required under the pleading standard. *Iqbal*, 556 U.S. at 678; *Shin v. American Airline, Inc.*, 726 Fed. Appx. 89 (Mem) (2d Cir. 2018) (Summary Order) (affirming district court decision on racial discrimination claim because "he alleged no facts other than the bare allegation that whites were allowed to board the flight" and "cannot state a plausible claim without reference to specific statements or individual circumstances" (internal quotation marks omitted)).

In further support of a purported negligent theory of discrimination, BCP cites assertions in the Goldman Complaint that BCP "knew or should have known of its obligations . . . to provide accommodations to individuals with disabilities" (JA024

¶ 23) and "knew or should have known that it had an obligation . . . to provide reasonable accommodations." (JA024 ¶ 24)). However, BCP admits that these assertions were mere conclusory attempts to meet a "classic element of negligence"—rather than factual allegations as required under the pleading standard. *See* Dkt. No. 43 p.35; *Keller Foundations, LLC v. Zurich Am. Ins. Co.*, 758 Fed. Appx. 22, 27 (2nd Cir. 2018) (Summary Order) (holding allegations that "[defendant] knew, or should have known, that [plaintiff's] motivation in purchasing the Policy was, in part, to benefit [plaintiff's] parent company" were essentially threadbare recitals of the elements of the relevant cause of action.); *Board of Educ. of East Syracuse-Minoa Cent. School Dist. v. Continental Ins. Co.,* 198 A.D.2d 816, 817, 604 N.Y.S.2d 399 (4th Dep't 1993) ("While the complaint contains allegations that 'the District knew or should have known of the complained of conduct' and 'failed to stop or prevent such conduct,' . . . the gravamen of the complaint [remains] one alleging intentional acts and violations of Federal and State statutes to one involving negligent conduct.")

In suggesting that bare legal conclusions and formulaic recitations of elements of a cause of action are enough, BCP contends that the duty to defend is based upon "the nature of the discrimination claim." (Dkt. No. 43 at 11 and 31). BCP provides no support for its proposition. However, the intentional nature of the claim is exactly why the district court found no coverage. *See* SPA007 n.10 ("Instead, 'the Court

must look to the facts alleged to determine the nature of the claim.'" *Hubel*, 2003 WL 21435624, at *6 (collecting cases)).

Liberal construction requirements under the "duty to defend" apply solely to "factual allegations." And, the only "factual allegations" in the Goldman Complaint articulate intentional conduct by BCP. Where, as here, the factual predicate for alleged discrimination is intentional, no coverage exists under a liability policy regardless of the theory of discrimination pursued, statutory or otherwise.

Therefore, this Court should affirm the decision of the district court in dismissing the coverage action brought by BCP against PIIC for want of any alleged accidental conduct in the Goldman Complaint.

POINT II

THE GOLDMAN ALLEGATIONS ARE EXCLUDED FROM COVERAGE

In the alternative, this Court can affirm in reliance on the PIIC Policy's intentional acts exclusion. The PIIC Policy contains an exclusion for "Expected Or Intended Injury," which excludes coverage for any "'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured." (JA272). Therefore, any bodily injury arising from such intentional conduct, even if it somehow is deemed an occurrence, is still not covered under the Policy. *See Central Mut. Ins. Co. v. Willig*, *supra*, at 119. The allegations in the Goldman Complaint are

based upon intentional wrongs directed at Ms. Goldman and the resultant harm—disability discrimination—flows directly from the acts committed.

Again, BCP's alleged policy or practice of refusing to schedule appointments for the hearing-disabled or provide them with an ASL interpreter are intentional wrongs against the hearing-disabled, with resulting harms directly following from those acts. The alleged failures of BCP detailed within the Goldman Complaint unquestionably fall within the commonsense understanding of "expected or intended" conduct, and no amount of discovery or continued litigation will change that fact. *AmGuard Ins. Co. v. Country Plaza Associates Inc.*, 2014 WL 3016544, at *7 (E.D.N.Y. July 3, 2014). "[A]n insurer cannot be required to defend against an action that otherwise falls under an intentional acts exclusion simply because discovery might uncover other causes or a rational jury might find otherwise." *Id.*

BCP conflates the coverage determination with the merits of the underlying causes of action. Although a motion to dismiss a "failure-to-accommodate" claim requires the defendant to show that the accommodation not provided was unreasonable—a feat normally done through "fact-intensive inquiry," *Vale v. Great Neck Water Pollution Control Dist.*, 80 F. Supp.3d 426, 438 (E.D.N.Y. 2015), such is not that case here because at bar is a breach of an insurance contract action. Whether Ms. Goldman's request for accommodation was "reasonable" is irrelevant;

rather, whether the denial of refusal of services was alleged to be intentional is all that matters for coverage purposes.

Ms. Goldman characterized BCP's rude, dismissive, and disrespectful conduct (JA023 ¶16) as a refusal to serve the deaf or hire ASL interpreters (JA024 ¶21, 24) "flatly" because she was disabled (JA021 ¶1). The damages flowing from such allegations unquestionably fall within the commonsense understanding of "expected or intended" conduct and are excluded from coverage.

CONCLUSION

For the reasons above, Coverage A of the PIIC Policy does not provide coverage for the allegations in the Goldman Complaint, and PIIC is not obligated to defend Plaintiff. Both the PIIC Policy and New York public policy preclude coverage for claims of intentional discrimination of the hearing disabled. Such claims fail to constitute the accidental conduct necessary to trigger a covered "occurrence" as that term is defined under the PIIC Policy.

Defendant/Appellee, Philadelphia Indemnity Insurance Company requests that this Court affirm the decision of the district court holding that it is not obligated to defend Brooklyn Center for Psychotherapy, Inc.

DATED: October 18, 2019 HURWITZ & FINE, P.C.

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