19-2266

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Brooklyn Center for Psychotherapy, Inc.,
Plaintiff–Appellant,
-against-

Philadelphia Indemnity Insurance Co.,
Defendant–Appellee.

On Appeal from U.S. District Court for the Eastern District of New York

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APPELLANT'S REPLY BRIEF

O'CONNELL AND ARONOWITZ
Attorneys for Plaintiff–Appellant
54 State Street
Albany NY 12207-2501
(518) 462-5601

JEFFREY J. SHERRIN
MICHAEL Y. HAWRYLCHAK
Of Counsel

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INTRODUCTION

Faced with a complaint (the "*Goldman* Complaint") alleging both intentional and nonintentional disability discrimination, Plaintiff-Appellant Brooklyn Center for Psychotherapy, Inc. ("Brooklyn Center") was forced to defend against the possibility of being held liable for purely nonintentional conduct. Defendant-Appellee Philadelphia Indemnity Insurance Co. ("PIIC") denied insurance defense coverage under Brooklyn Center's liability policy (the "Policy"), arguing that the *Goldman* Complaint alleged only intentional discrimination, which falls outside of the Policy's coverage.

PIIC's argument relies on an expansive interpretation of the word "intentional" that, if actually applied as PIIC advocates, would wrongly deny insurance defense coverage for vast categories of insurable legal claims against which insureds like Brooklyn Center believed they were purchasing protection. PIIC further contends that allegations of intentional discrimination so taint the *Goldman* Complaint that even claims requiring no proof of intent are removed from insurance coverage.

ARGUMENT

In its brief, PIIC utterly fails to address Brooklyn Center's key arguments. First, PIIC fails to grapple with the nature of failure-to-accommodate claims and how they relate to the distinct theories of disparate treatment and disparate impact.

Second, PIIC continues to rely uncritically on a capacious concept of intentionality which, applied consistently, would make a hash of existing insurance coverage law.[1]

A nuanced consideration of both issues is necessary to understand how the underlying complaint in this case fits into the existing body of insurance coverage caselaw and why that complaint asserted a covered claim triggering insurance defense coverage.

I. The *Goldman* Complaint alleged nonintentional failure-to-accommodate claims sufficient to to bring it within insurance coverage.

Brooklyn Center does not dispute that the *Goldman* Complaint contains allegations of intentional discrimination. Nor does Brooklyn Center dispute that intentional discrimination claims, standing alone, would not fall within the coverage of the Policy, and thus would not trigger insurance defense coverage.

But insurance defense coverage does not turn on whether a complaint alleges any noncovered claim, nor does it require that *all* claims in a complaint be covered by insurance. Rather, if *any* claim in the complaint is even "arguably" covered by

[1] PIIC also argues that the *Goldman* Complaint falls within the Policy's specific exclusion for "Expected or Intended Injury." Appellee's Brief, ECF No. 54 ("PIIC Br."), at 25. As Brooklyn Center noted in its opening brief, the exclusion for injury that is "expected or intended," is simply the flip side of the scope of coverage for an "accident," defined as an injury that was "unexpected, unusual and unforeseen," and so the two Policy provisions collapse into a single inquiry. Appellant's Brief, ECF No. 43 ("BCP Br."), at 13–14. We are aware of no case, and PIIC has cited none, where a claim was deemed to be a covered occurrence, but was nevertheless excluded as an expected or intended injury.

the insurance policy, then the duty to defend attaches. *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co.*, 16 N.Y.3d 257, 264 (2011).

The *Goldman* Complaint clears this low bar.

A. The *Goldman* Complaint contains nonintentional allegations sufficient to state a claim for failure to accommodate.

Taking the *Goldman* Complaint as pleaded, the plaintiff could have prevailed at trial without proving any intentional discrimination. The elements of a discrimination claim under the ADA are "(1) that [plaintiff] is a qualified individual with a disability; (2) that she was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to her disability." *Davis v. Shah*, 821 F.3d 231, 259 (2d Cir. 2016). Under a failure-to-accommodate theory, "a covered entity's failure to provide such accommodations will be sufficient to satisfy the third element." *McInerney v. Rensselaer Polytechnic Inst.*, 688 F. Supp. 2d 117, 125 (N.D.N.Y. 2010).

The *Goldman* Complaint contains allegations that are more than sufficient to state a claim for nonintentional discrimination based on a failure-to-accommodate theory. It alleges, among other things, that:

- "Fanni Goldman is a deaf individual who communicates primarily in American Sign Language ('ASL')," and she "brings this action because of

Defendant's unlawful discrimination against her and its failure to accommodate by ensuring effective communication with her." JA057 ¶ 1.

- Goldman "is deaf, primarily communicates in American Sign Language, and is substantially limited in the major life activities of hearing and speaking within the meaning of federal, state, and local antidiscrimination laws." JA058 ¶ 3.

- Brooklyn Center "is a place of public accommodation under federal, state, and local antidiscrimination laws and is a recipient of federal financial assistance." JA058 ¶ 4.

- "Ms. Goldman requested an appointment for her son." JA059 ¶ 11.

- Brooklyn Center's employee "told Ms. Goldman that [Brooklyn Center] would not provide an ASL interpreter." JA059 ¶ 13.

- Brooklyn Center "refuses[2] to hire qualified onsite sign language interpreters as a matter of policy and practice." JA060 ¶ 22.

- Brooklyn Center, "as a health care provider, knew or should have known of its obligations under the ADA, Section 504, the NYHRJL, and the NYCHRL to provide accommodations to individuals with disabilities, including individuals who are deaf or hard of hearing." JA060 ¶ 23.

- Brooklyn Center, "as a health care provider, knew or should have known that it had an obligation to individuals who are deaf or hard of hearing under the ADA, Section 504, the NYHRL, and the NYCHRL to develop policies to promote compliance with these statutes and to provide reasonable accommodations, including but not limited to the provision of an ASL interpreter, to ensure effective communication." JA060 ¶ 24.

- Brooklyn Center's "staff knew or should have known that their actions and/or inactions created an unreasonable risk of causing [Goldman] greater levels of fear, anxiety, indignity, humiliation, and/or emotional distress than a hearing person would be expected to experience." JA060 ¶ 25.

- Goldman "is aware of discriminatory barriers to access at [Brooklyn Center]

[2] PIIC suggests that the *Goldman* Complaint's use of the word "refuse" bears some significance. PIIC Br. 11–12. It does not. While the word "refuse" may signify an intentional act, it does not indicate an intentionally *wrongful* act. *See* Section I.C, *infra*.

and is thereby deterred from accessing [Brooklyn Center]'s healthcare services because of the discrimination she has faced and expects to face in the future." JA061 ¶ 29.

- Brooklyn Center "discriminated against [Goldman] on the basis of her disability by . . . failing to ensure effective communication through the provision of onsite qualified sign language interpreters." JA062 ¶ 39.

"So long as a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Hu v. City of New York*, 927 F.3d 81, 97 (2d Cir. 2019) (internal quotation marks and citations omitted).

The issue is even clearer when viewed from the defendant's perspective. Brooklyn Center, faced with the allegations in the *Goldman* Complaint, had to be prepared to defend against the possibility that Brooklyn Center could be found liable on the basis of failure to accommodate alone, irrespective of any discriminatory intent.[3] In other words, even if Brooklyn Center were to successfully refute all evidence of discriminatory intent, or even if the plaintiff were to simply fail to put on any evidence of discriminatory intent, Brooklyn Center could nevertheless be

[3] Why would a plaintiff complaining of intentional disparate treatment also include allegations of failure to make reasonable accommodations? To provide an avenue for victory at trial even if intent cannot be proven. If the failure-to-accommodate claim could be proved only on a showing of discriminatory intent, it would add nothing to the existing claim for disparate treatment.

found liable if its policies insufficiently accommodated the needs of the hearing impaired. This need to defend against a nonintentional failure-to-accommodate claim triggered PIIC's duty to defend.[4]

B. Failure-to-accommodate claims are analogous to disparate impact for purposes of insurance coverage.

PIIC dismisses Brooklyn Center's "meandering discussion of discrimination liability theories," PIIC Br. 6, but PIIC's response illustrates its fundamental misunderstanding of discrimination law and of Brooklyn Center's legal argument. Disability discrimination claims can be based "on any of three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009) (internal quotation marks omitted).

As it did in its briefing in the District Court, *see* JA400 ("Liability predicated on allegations of discrimination may either be presented through a theory of disparate treatment or disparate impact."), PIIC persists in attempting to fit every discrimination claim into the disparate treatment and disparate impact categories,

[4] PIIC cites *AmGuard Insurance Co. v. Country Plaza Associates Inc.*, No. 13-CV-5205 JFB ARL, 2014 WL 3016544, at *7 (E.D.N.Y. July 3, 2014) for the proposition that "an 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." But in *AmGuard*, all of the "underlying causes of action require intentional conduct." *Id.* Here, the *Goldman* Complaint clearly pleads a failure-to-accommodate theory, which requires no proof of intent.

suggesting that if a discrimination claim is not one, then it must be the other, ignoring failure to accommodate as a distinct theory.

Brooklyn Center has never argued that the *Goldman* Complaint alleges disparate impact claims, but instead has emphasized that "[f]ailure to accommodate is a third distinct type of discrimination claim, different from disparate treatment and disparate impact, with distinct elements of proof." BCP Br. 18. PIIC nevertheless insists on refuting the argument Brooklyn never made: "[H]er 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," PIIC Br. 6; "The Goldman Complaint allegations do not reflect statistical disparities between groups," PIIC Br. 15; "[I]t cannot be said that the Goldman Complaint sets out a cognizable disparate impact theory of liability," PIIC Br. 15; "Under no circumstances can BCP's policy . . . support an unintentional claim of disparate impact discrimination.," PIIC Br. 21; "Reviewing the Goldman Complaint in its entirety, no supportable claim for disparate impact exists," PIIC Br. 21.

This fixation on only disparate impact and disparate treatment blinds PIIC to the distinct characteristics of failure-to-accommodate claims. Most significantly, PIIC fails to appreciate that the injury in a meritorious failure-to-accommodate claim is not the denial of an accommodation, but the lack of access to services resulting from that denial. *See* 42 U.S.C.A. § 12182 (requiring modifications when "necessary

to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities"); N.Y. Exec. Law § 296 (requiring modifications when "necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities" or when such persons would be "excluded or denied services because of the absence of auxiliary aids and services"); N.Y.C. Admin. Code § 8-107 (requiring reasonable accommodations "to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question"). This distinction is crucial because it severs the direct causal link between the decision not to provide an accommodation and the resulting harm.

In a disparate impact case, a defendant might *intentionally* enact a facially neutral policy without *intending* the resulting disparate impact on different classes of persons. Likewise, in a failure-to-accommodate case, a defendant might *intentionally* enact a policy with respect to available accommodations without *intending* the resulting inability of a person with a disability to access services.[5] This is notably unlike a disparate treatment claim where the intentional act — denying access on the basis of a protected characteristic — is one and the same with the actionable harm.

[5] Brooklyn Center's argument has nothing to do with "burdens of proof" in "making a *prima facie* claim for disparate impact or failure-to-accommodate." PIIC Br. 13. Intent to discriminate is not an *element* of the claim under either disparate impact or failure to accommodate and plays no role in the proof at any stage.

PIIC completely misconstrues Brooklyn Center's discussions of both the fact-intensive nature of reasonable accommodation determinations, BCP Br. 22–23, and whether ASL interpreters are a necessary accommodation, BCP Br. 23–24. Brooklyn Center was neither commenting on the merits of Ms. Goldman's alleged request for accommodation, PIIC Br. 26, nor attempting to add "extrinsic evidence to the record." PIIC Br. 22. The purpose of both discussions was to illustrate the causal separation between the decision to provide (or not provide) a particular accommodation and any resulting actionable lack of access to services. Due to the fact-intensive nature of reasonable accommodations determinations generally, and the necessity of ASL interpreters specifically, a party intentionally adopting a policy concerning the provision of disability accommodations does not necessarily intend any resulting inability to access services.

C. PIIC's broad interpretation of intentionality would deny coverage to nearly all disparate impact claims and many basic negligence claims.

As in the District Court, PIIC continues to rely on a capacious definition of intentional conduct that is incompatible with well-established New York insurance coverage case law. This was a key point in Brooklyn Center's opening brief, (*See* BCP Br. 14, 26–28,) but PIIC leaves it entirely unaddressed and unrebutted. The basic argument is simple: the mere existence of intentional acts by a defendant,

including intentional acts that are causally responsible for the injuries at issue, does not remove an incident from insurance coverage.

PIIC quotes the District Court, arguing 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," and thus "[t]he Goldman complaint alleged only intentional acts resulting in discrimination." PIIC Br. 5 (quoting SPA006, SPA008). But this is not New York law. Rather, New York courts have held that "though an intentional act may ultimately cause certain damages, those damages may, under New York law, be considered 'accidental' if the "total situation could be found to constitute an accident." *City of Johnstown, N.Y. v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989) (surveying New York caselaw). "It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, 'intended' by the insured because the insured knew that the damages would flow directly and immediately from its intentional act." *Id.* (internal citations omitted).

New York's treatment of disparate impact discrimination claims is instructive. As PIIC recognizes, PIIC Br. 16, disparate impact claims are considered covered occurrences as a matter of New York public policy and caselaw. Yet, virtually every

disparate impact claim alleges "intentional acts resulting in discrimination" — the adoption and application of facially neutral policies.

But insurance coverage for disparate impact is not barred because "specific discriminatory acts against individuals . . . are not an element of the wrong and need play no part in the facts alleged." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). Whether acts are intentional wrongs for purposes of insurance coverage "turns most centrally upon the relationship between the wrongdoer's act and the resultant harm: if that relationship may be said to be sufficiently fortuitous, rather than intended, coverage is permitted." *Id.*

Consider a classic case of automobile negligence. A driver turns left at an intersection without ensuring adequate clearance and is struck by oncoming traffic. Here, the driver's action — pulling into the intersection and making a left-hand turn — is entirely intentional. But the ensuing collision is still an "accident" for insurance purposes because the insured does not expect or intend the resulting injury.

The intentional discrimination cases PIIC relies on are inapposite. Both *Hubel v. Madison Mutual Insurance Co.*, No. 2001-5404, 2003 WL 21435624 (N.Y. Sup. Ct. Onondaga Cty. May 16, 2003), and *Rosenberg Diamond Development Corp. v. Wausau Insurance Co.*, 326 F. Supp. 2d 472 (S.D.N.Y. 2004), *aff'd sub nom. Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 144 F. App'x 122 (2d Cir. 2005), involved solely claims of disparate treatment. But disparate

treatment definitionally involves an intentional wrong — discriminatory intent is an element of the claim. Each of these cases involved a deliberate decision to treat persons differently on the basis of a protected characteristic. In neither did the plaintiff state a claim for disparate impact, failure to accommodate, or indeed, any theory of liability provable without evidence of intent. Neither case speaks to whether a failure-to-accommodate theory necessarily results in intentional harms, or whether Brooklyn Center necessarily intended the alleged harms from the failure-to-accommodate claims in the *Goldman* complaint.[6]

PIIC calls out two foreign cases cited in Brooklyn Center's opening brief, *Educational Testing Service v. Liberty Mutual Fire Insurance Co.*, No. C-96-2790-VRW, 1997 WL 220315 (N.D. Cal. Apr. 18, 1997), and *Loyola Marymount University v. Hartford Accident & Indemnity Co.*, 219 Cal. App. 3d 1217 (Ct. App. 1990), as supporting its position that the existence of intentional actions in a discrimination claim is enough to remove it from insurance coverage. But PIIC utterly fails to grasp the reason Brooklyn Center cited these cases.

[6] Similarly, PIIC cites a string of cases where insurance defense coverage was denied for intentional acts. PIIC Br. 12–13. In each, the alleged intentional act was inherently wrongful: *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 160 (1992) (child sexual abuse); *Dodge v. Legion Ins. Co.*, 102 F. Supp. 2d 144, 152 (S.D.N.Y. 2000) (therapist sexual misconduct); *Tomain v. Allstate Ins. Co.*, 238 A.D.2d 774, 776 (3d Dep't 1997) (malicious prosecution); *Monter v. CNA Ins. Companies*, 202 A.D.2d 405, 406–07 (2d Dep't 1994) (violent assault).

In *Loyola*, the California court held that a disparate impact claim involved intentional discrimination simply because the employer intentionally adopted a facially neutral policy and intentionally applied it to its employee. *Loyola*, 219 Cal. App. 3d at 1225. This is emphatically *not* the law of New York. *See Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co.*, 168 Misc. 2d 971, 976 (Sup. Ct. N.Y. Cty.), *aff'd*, 234 A.D.2d 112 (1st Dep't 1996); *Rosenberg Diamond Dev. Corp. v. Wausau Ins. Co.*, 326 F. Supp. 2d 472, 475 (S.D.N.Y. 2004), *aff'd sub nom. Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 144 F. App'x 122 (2d Cir. 2005); *see also* Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994).

In *Educational Testing*, the court applied the holding of *Loyola* to a failure-to-accommodate claim because of the "many similarities" between disparate impact and failure to accommodate. *Educ. Testing*, 1997 WL 220315, at *5 ("Like a claim of disparate impact, a claim for failure to accommodate implicates a facially neutral employment policy. When the employer intentionally implements such a policy or commits a similar affirmative act, the employment action is not an accident for purposes of insurance coverage even if the results were not intended."). The analogy between disparate impact and failure to accommodate is sound. But in New York,

where disparate impact claims *are* covered by insurance, the implications of the argument in *Educational Testing* are precisely the opposite.[7]

D. The *Goldman* Complaint alleges discrimination under both disparate treatment and failure-to-accommodate theories.

The *Goldman* Complaint unquestionably contains allegations that sound in intentional discrimination. That much is not in dispute. But PIIC repeatedly invokes the "gravamen" of the complaint to avoid considering *all* of its allegations. And the *Goldman* Complaint also contains allegations sufficient to state a claim for nonintentional discrimination by a failure to provide reasonable accommodations.[8]

This case is complicated by the fact that claims in the *Goldman* Complaint resting on different theories of liability are not separated across different counts. Rather, because each of the four statutory causes of action can be proved under either a disparate treatment theory or a failure-to-accommodate theory, each of the four counts in the complaint contains allegations in support of both theories under one of

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[7] It is also worth noting that other California courts have expressly rejected the reasoning in *Educational Testing*, finding defense coverage for failure-to-accommodate claims. *See Republic Indemnity Co. v. Superior Court*, 224 Cal. App. 3d 492, 502 (Ct. App. 1990).

[8] PIIC cites *Atlantic Mutual Insurance Co. v. Terk Technologies Corp.*, 309 A.D.2d 22, 32 (1st Dep't 2003), for the proposition that intentional allegations remove insurance defense coverage from a claim that does not otherwise require a showing of intent. In *Terk Technologies*, however, the court held that "it [was] impossible to envision" how the specific trademark violation described in the complaint could have been unintentional. *Id.* In other words, the alleged intentional acts were inseparable from the conduct comprising the violation. That is not the case here. *See* Section I.A, *supra*.

the four statutes. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."

This means that allegations supporting a failure-to-accommodate theory are intermingled with allegations supporting intentional disparate treatment under each count. But it is immaterial that the complaint also contains intentional allegations.[9] *see* Fed. R. Civ. P. 8(d)(2) ("A party may state as many separate claims or defenses as it has, regardless of consistency."); *see also Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670 (1981) ("a policy protects against poorly or incompletely pleaded cases as well as those artfully drafted."). For purposes of insurance coverage all that matters is that the *Goldman* Complaint includes at least one covered claim. *Fieldston Prop. Owners*, 16 N.Y.3d at 264.

The Seventh Circuit's decision in *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178 (7th Cir. 1980), is instructive. *Solo* involved a dispute over an EEOC claim alleging discrimination on the basis of sex. Because the EEOC claim could support a theory of disparate treatment or disparate impact, and "EEOC would in all

[9] PIIC's reliance on *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), which involved a religious failure-to-accommodate claim under Title VII, is misplaced. Title VII has two provisions prohibiting disparate treatment and disparate impact. *Id.* at 2031–32. Failure-to-accommodate is available as theory of liability under either provision. *Id.* at 2032. In Abercrombie, the plaintiff alleges disparate treatment by failure to accommodate, which, by definition, requires intentional discrimination. *Id.* at 2033. By contrast, under the disability discrimination statutes at issue here, failure to accommodate is a third distinct theory of liability separate from disparate impact and disparate treatment, and never requires proof of intent.

likelihood have been permitted to proceed under either theory," the duty to defend attached. *Id.* at 1185. PIIC attempts to distinguish *Solo* on the ground that the court "still looked to the factual allegations in the complaint in order to determine the duty to defend." PIIC Br. 22.

PIIC's characterization of *Solo* is flatly incorrect. In fact, the Court in *Solo* noted that the EEOC complaint "included allegations of intentional discrimination," *Solo*, 619 F.2d at 1182, and the sole allegation quoted in the opinion is intentional, *Id.* at 1184, but rather than finding that disparate impact had been expressly alleged, the court said only that "the allegations in the underlying EEOC complaint were so general that the EEOC would in all likelihood have been permitted to proceed under either theory." *Id.* at 1185.

Instead of relying on the complaint, the Court relied on the employer's representations at argument "that the basis of the underlying claim against it was in fact a disparate impact claim based on its policy of requiring sales experience as a prerequisite for certain promotions," which according to the employer "disqualified disproportionate numbers of women." *Id.* at 1187. Rather than "looking to the factual allegations in the complaint," as PIIC asserts, the court stated that "there is nothing in the record below to enable us to make a clear determination of whether the EEOC's complaint was in fact aimed at such a policy." *Id.* The Court nonetheless required insurance coverage because of the possibility that the general

language of the complaint could "contain a potential disparate impact claim" and "disparate impact liability does not require proof of discriminatory motive." *Id.*

The *Goldman* Complaint presents a far stronger case for coverage than the complaint at issue in *Solo* in that it expressly alleges failure-to-accommodate claims.

II. Failure-to-accommodate claims are covered occurrences categorically.

To prevail in this case, it is enough for Brooklyn Center to show that the *Goldman* Complaint includes allegations sufficient to state a claim for nonintentional failure to make reasonable accommodations. *See* Section I.A, *supra*. In this section, however, Brooklyn Center presses a broader argument: that claims of discrimination by failure to make reasonable accommodations should be considered covered occurrences for purposes of insurance defense, categorically, regardless of the nature of the specific allegations.[10]

A. A plaintiff can always prevail on a failure-to-accommodate claim without proving any intentionally discriminatory act.

New York law has chosen to draw a bright line between disparate treatment and disparate impact for purposes of insurance coverage. Disparate impact claims,

[10] PIIC strangely asserts that Brooklyn Center "tacitly concedes that if this Court finds only allegations of intentional discrimination within the Goldman Complaint . . . there is no coverage." PIIC Br. 10 n.3. In fact, Brooklyn Center expressly argued precisely the opposite: the inclusion of a failure-to-accommodate theory in the *Goldman* Complaint should trigger insurance defense coverage, without regard to the details of the specific allegations. BCP Br. 31–32.

like failure-to-accommodate claims, do not require any showing of discriminatory intent. But even though it is not an element of the claim, a disparate impact claim could nevertheless be the result of discriminatory intent; a business could, for example, enact a facially neutral hiring policy that results in a sharply disparate impact, expecting and intending that the policy would have such a discriminatory result. In other words, disparate impact does not require absence of intent; intent is simply irrelevant to the claim. *See* Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994) ("specific discriminatory acts against individuals . . . *need play no part* in the facts alleged" (emphasis added)).

Despite the possibility that a disparate impact might result from intentional actions, decisions discussing insurance coverage of disparate impact and disparate treatment claims have distinguished them in categorical terms. *See Am. Mgmt. Ass'n*, 168 Misc. 2d at 976 (requiring coverage of disparate impact claim which "need not be intentional"); *Rosenberg Diamond Dev. Corp.*, 326 F. Supp. 2d at 475 (distinguishing between disparate treatment claims and disparate impact claims, which "could be insured").

This categorical position makes sense in light of the fact that intent is not an element of a disparate impact claim and therefore plays no role in the proof of the claim. Any disparate impact claim, therefore, regardless of whether intentional acts of discrimination have been pleaded, can be proved without reliance on those alleged

acts. The same holds true for failure-to-accommodate claims. Because discriminatory intent is not an element of such a claim, it need not be pleaded, and, even if it is pleaded, it need not be proved.

PIIC has mischaracterized Brooklyn Center as arguing "that all claims under the ADA are provided blanket CGL coverage." PIIC Br. 19. This is not Brooklyn Center's position.[11] The ADA (like the other anti-discrimination statutes at issue) can be proved under multiple legal theories. Brooklyn Center's most sweeping argument is that any ADA claim premised on a theory of liability that need not be supported by allegations of discriminatory intent — *i.e.*, disparate impact or failure to accommodate — must be provided insurance defense coverage.[12]

B. The opposite view would allow plaintiffs to opportunistically deny defense coverage.

There is also a strong practical reason to favor the categorical approach advocated by Brooklyn Center. The view advocated by PIIC would give a plaintiff the ability, by strategic pleading, to eliminate defendants' insurance defense

[11] PIIC's characterization also wrongly conflates liability coverage with insurance defense coverage. Liability coverage is available only when the facts proved at trial fall within the policy coverage. Only insurance defense coverage extends to allegations that have not yet, and may never be, proved. *See Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 669–670 (1981).

[12] PIIC cites *Terk Technologies*, 309 A.D.2d 22, in opposition to this categorical approach. In *Terk Technologies*, the court found that "it [was] impossible to envision" how the alleged violation could have been unintentional. *Id.* This only suggests that the categorical treatment would not extend to a hypothetical case where there is no possibility of proving liability without showing intent.

coverage without any corresponding limitation on the plaintiff's ability to prove its case. Indeed, PIIC's theory provides a roadmap for plaintiffs' attorneys to maximize settlement pressure by forcing defendants to bear litigation costs that should have been covered by insurance.

A plaintiff has significant ability to control how a case is litigated by choosing which claims to include and which to omit from the complaint. But such strategic omissions normally come with a cost. For example, a plaintiff in state court may choose not to plead a federal cause of action to avoid removal to federal court. But in doing so, that plaintiff gives up any broader theory of liability or more generous damages that the federal claim might have provided.

Under the approach advocated by PIIC, however, a plaintiff asserting a claim requiring no proof of intent can, simply by pleading gratuitous allegations of wrongful intent, deny defendant insurance coverage. Yet because intent is not an element of the claim, the plaintiff can nevertheless prevail without ever proving — or indeed even producing any evidence of — intent.

Consider, for example, an employment discrimination complaint alleging that a certain test given to job applicants had a disparate impact on a particular protected class. According to PIIC, by simply alleging that the test was intentionally adopted for the purpose of discriminating against that class, the plaintiff would enable defendant's insurer to disclaim all defense coverage. Yet the plaintiff's litigation

strategy need not change in the slightest because this alleged discriminatory intent need never be proved and would play no part in any instructions ultimately given to the jury.

It is easy to see why this theory might be appealing from the perspective of an insurance company looking to reduce its defense obligations, but it makes little sense in light of longstanding insurance defense principles which require an insurer to defend "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim." *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997).

CONCLUSION

For the reasons set forth above and in Plaintiff-Appellant Brooklyn Center's opening brief, this Court should reverse the Judgment of the District Court, hold that the *Goldman* Complaint triggered PIIC's insurance defense obligations as a matter of law, and remand for further proceedings.

Dated: November 4, 2019
Albany, New York

O'CONNELL & ARONOWITZ. P.C.

By: /s/ *Michael Y. Hawrylchak*

Jeffrey J. Sherrin
Michael Y. Hawrylchak
Attorneys for Plaintiff–Appellant
54 State Street
Albany, New York 12207
Tel: (518) 462-5601
Fax: (518) 462-2670
Email: mhawrylchak@oalaw.com

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By: /s/ *Michael Y. Hawrylchak*
Michael Y. Hawrylchak
Attorney for Plaintiff–Appellant