STATE OF MICHIGAN

COURT OF APPEALS

ERIE INSURANCE EXCHANGE, Plaintiff/Counter Defendant-Appellee/Cross-Appellee,	UNPUBLISHED May 17, 2012
v	No. 302889 Hillsdale Circuit Court LC No. 10-000084-CK
LAKE CITY INDUSTRIAL PRODUCTS, INC., and JEFFREY MEEDER, Defendants-Cross-Appellants,	
and	
AMERICAN COPPER & BRASS, INC., Defendant/Counter-Plaintiff-Appellant.	

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

The present litigation arose in response to an underlying class-action lawsuit in federal court brought by American Copper & Brass, Inc. (American Copper), against Lake City Industrial Products, Inc. (Lake City), and Jeffrey Meeder, the owner of Lake City, alleging a violation of the Telephone Consumer Protection Act (TCPA), 47 USC § 227. American Copper claims that Lake City sent unsolicited advertisements by way of facsimile (fax) in violation of the TCPA, a practice known as "blast faxing." In response, Erie Insurance Exchange (Erie), Lake City's insurer, filed a lawsuit in Michigan seeking a declaratory judgment that Erie did not have a duty to defend or indemnify Lake City in the underlying litigation. Currently, American Copper appeals as of right from the February 16, 2011, order granting Erie's motion for summary disposition and finding that Erie did not have an obligation to defend or indemnify Lake City. Lake City has filed a cross-appeal challenging the summary-disposition order and adopting American Copper's arguments. We reverse and remand.

While the trial court did not specify whether summary disposition was granted under MCR 2.116(C)(8) or (C)(10), because the trial court considered evidence outside the pleadings, we review the decision under the (C)(10) standards. *Steward v Panek*, 251 Mich App 546, 554-

555; 652 NW2d 232 (2002). Appellate review of a motion for summary disposition is de novo. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) questions the factual support of the plaintiff's claim and should be granted, as a matter of law, when no genuine issue of any material fact exists to warrant a trial. *Spiek*, 456 Mich at 337. The court considering the motion reviews "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action." *Id*.

"[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

We note at the outset that we agree with the trial court's choice of Pennsylvania law to resolve this dispute involving an insurance policy entered into in Pennsylvania between two Pennsylvania companies. See Restatement (Second) of Conflict of Laws § 188; see also *Chrysler Corp v Skyline Industrial Servs*, *Inc*, 448 Mich 113, 124; 528 NW2d 698 (1995) (discussing the Restatement).[1] Therefore, the issue before this Court is whether, under Pennsylvania law, allegations of property damage arising from a violation of the TCPA can give rise to an insurer's duty to defend or whether such conduct is necessarily intentional (and thus outside the scope of the insurance policy). It appears that, to date, Pennsylvania has not ruled on the issue. Erie urges this Court to follow the reasoning of federal district courts in Pennsylvania. However, in Pennsylvania, as in Michigan, federal court interpretations of state law are not binding on state courts. See *Weaver v Penn Bd of Probation & Parole*, 688 A2d 766, 772 n 11 (Pa Cmwlth, 1997), and *Sharp v City of Lansing*, 464 Mich 792, 802-803; 629 NW2d 873 (2001). American Copper and Lake City urge us to follow the decision of a Pennsylvania trial court. However, the decisions of Pennsylvania trial courts do not bind Pennsylvania's appellate courts. *Ambrogi v Reber*, 932 A2d 969, 977 n 3 (Pa Super, 2007); *Philadelphia v Price*, 419 Pa 564, 568; 215 A2d 661 (1966). Accordingly, we find no binding Pennsylvania law on the issue and will consider the contract terms and the language of the complaint anew.

Under Pennsylvania law, when interpreting an insurance policy, the primary goal is to "ascertain the parties' intentions as manifested by the policy's terms." *Kvaerner Metals Div of Kvaerner US*, *Inc v Commercial Union Ins Co*, 589 Pa 317, 331; 908 A2d 888 (2006). When not defined by the policy, words of "common usage" should be "construed in their natural, plain, and ordinary sense, and a court may inform its understanding of these terms by considering their dictionary definitions." *Wall Rose Mut Ins Co v Manross*, 939 A2d 958, 962 (Pa Super, 2007). Although courts must give effect to the "clear and unambiguous" language of the policy, if policy language is ambiguous, the policy must be construed in favor of the insured and against the insurer. *Donegal Mut Ins Co v Baumhammers*, 595 Pa 147, 155; 938 A2d 286 (2007). Any exceptions or exclusions to the policy's coverage must be narrowly construed against the insurer, *Kropa v Gateway Ford*, 974 A2d 502, 507 n 4 (Pa Super, 2009), and the insurer bears the burden of proving the applicability of the exclusion, *Wall Rose*, 939 A2d at 962.

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[1] We note that the parties do not challenge the trial court's choice of Pennsylvania law.

In Pennsylvania, "a duty to defend is broader than the duty to indemnify." *Penn-America Ins Co v Peccadillos, Inc*, 27 A3d 259, 265 (Pa Super, 2011) (internal citation and quotation marks omitted). Whether an insurer has a duty to defend is "determined solely from the language of the complaint against the insured." *Kvaerner*, 589 Pa at 331. The court must compare "the four corners of the insurance contract to the four corners of the complaint." *American & Foreign Ins Co v Jerry's Sport Ctr, Inc*, 606 Pa 584, 609; 2 A3d 526 (2010). In making this comparison, "factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured." *Id*. at 610 (internal citations and quotation marks omitted). If the complaint contains even one claim potentially covered by the policy, the insurer has an obligation to defend the insurer concerning the entire claim until such time as "it could confine the claim to a recovery excluded from the policy." *Penn-America*, 27 A3d at 265 (internal citations and quotation marks omitted). A finding that there is a duty to defend "carries with it a *conditional* obligation to indemnify in the event the fact finder imposes liability for a claim covered by the policy." *Id*. at 269.

Here, in relevant part, the insurance contract provides coverage for claims of property damage as follows:

> 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.

The policy defines "property damage" as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

The policy covers "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"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period . . . .

An "occurrence" refers to "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined, but as commonly understood, "accident" refers to "'[a]n unexpected and undesirable event,' or 'something that occurs unexpectedly or unintentionally.' The key term in the ordinary definition of 'accident' is 'unexpected.'" *Kvaerner*, 589 Pa at 333 (internal citation omitted). Additionally, the policy excludes from coverage "'[b]odily injury' or 'property damage' expected or intended

from the standpoint of the insured." In judging Lake City's intent, the relevant inquiry is whether "the actor desired to cause the consequences of his act or [whether] he acted knowing such consequences were substantially certain to result . . . ." *United Servs Auto Ass'n v Elitzky*, 358 Pa Super 362, 374; 517 A2d 982 (1986) (internal citation and quotation marks omitted). Moreover, an event may be an "accident" from the viewpoint of the insured even when the negligence of the insured leads to an intentional act by a third party that gives rise to the injury. *Donegal Mut Ins*, 595 Pa at 156-157.

Considering the language of the complaint, we find that American Copper does not confine its allegations to intentional conduct, but includes allegations of negligence by Lake City. Specifically, the complaint alleges that Lake City may be liable under the TCPA, a strict liability statute, for *negligent* conduct, and the complaint alleges that Lake City "knew or *should have known*" that harm would result (emphasis added). The complaint further indicates that Meeder, the only Lake City employee involved in the blast faxing, may have engaged third parties to send the faxes and that he may have occupied only a "supervisory" role in the blast faxing. The complaint goes on to allege that Lake City should have known that neither Lake City nor "anybody else" had permission to fax American Copper. Taking the facts of the complaint as true and liberally construing them in the insured's favor, *American & Foreign Ins*, 606 Pa at 609-610, American Copper's reference to a third party's potential involvement and the accusations of negligence suggest that the complaint is not limited to an accusation that Lake City intentionally faxed American Copper, intending to cause harm. Rather, as the trial court concluded in *Telecom Network Design, Inc v Brethren Mut Ins Co*, 83 Pa D & C 4th 265, 276 (Pa Com Pl, 2007), in engaging a third party to fax advertisements, it is possible that Lake City did not intend or expect its advertisements to be sent to unwilling recipients, and MaxiLeads (the third party sender in this case) may have sent the fax to unwilling recipients without Lake City's knowledge or permission.

While a determination regarding an insurer's duty to defend must be made only considering the complaint, *Kvaerner*, 589 Pa at 331, we nevertheless note that the available evidence supports the possibility that Lake City may have acted with mere negligence and did not intend to cause harm. Particularly, in an affidavit and during a deposition, Meeder maintained that he employed MaxiLeads to send faxes only to willing recipients. Meeder's deposition supports the conclusion that from Lake City's viewpoint, it was unexpected that American Copper, an unwilling recipient, would even receive a fax, and it also plausibly follows that Lake City did not intend harm to unexpected recipients. In sum, the complaint, in relevant part, accuses Lake City of unintentionally causing property damage, thereby alleging that the damage may have arisen from an "occurrence" that Lake City neither intended nor expected. Under the plain terms of the insurance policy, Erie has an obligation to defend, and a conditional duty to indemnify, until such time as it becomes clear that the allegations are limited to claims excluded from the policy. *Penn-America*, 27 A3d at 265, 269.

Ultimately, Erie's duty to indemnify cannot be resolved with certainty until resolution of the underlying litigation. *Unionamerica Ins Co, Ltd v J B Johnson,* 806 A2d 431, 434 (Pa Super, 2002) (duty to indemnify arises only if, after trial in the underlying litigation, "it is determined that the loss suffered is covered by the terms of the policy"). See also *Pressley v Travelers Prop Cas Corp*, 817 A2d 1131, 1142 (Pa Super, 2003) (court has discretion to wait to rule on the indemnity issue until the underlying action is resolved). Such a determination should be made

after the resolution of the underlying action, based on whether Lake City is found to have intended or expected the resulting harm. *Id*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens