

UTICA MUTUAL INSURANCE COMPANY,
vs.
AMITY INSURANCE AGENCY, INC., & others.^[1]

No. 12-P-1384.

Appeals Court of Massachusetts.

Entered: September 17, 2013.

By the Court (Rapoza, C.J., Cypher & Green, JJ.)

Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Amity Insurance Agency, Inc. (Amity), is the insured in an errors and omissions policy (policy) issued by Utica Mutual Insurance Company (Utica). Amity and its principals (David Solomon and Roy Solomon) appeal from summary judgment entered on Utica's declaratory relief action concerning its duty to defend and to indemnify Amity in a lawsuit brought by a third party, Weston Associates Management Co., Inc. (Weston), as a consequence of actions by Amity's former employee, Anthony Marino. We affirm.

Discussion.

Weston's complaint alleged that it paid Marino money for insurance policies; that Marino furnished copies of purported insurance policies to Weston; but that, in fact, Marino never secured any insurance for Weston. Marino's fraudulent issuance of those policies was undisputed (as it is here) and Weston and Amity entered into a settlement agreement.^[2] Amity now wishes Utica to reimburse it for the funds it expended to defend and to settle the Weston matter. On cross motions for summary judgment, the judge below determined that Utica had no duty to defend Amity in the circumstances.^[3] Amity presses three claims of error: (1) that Weston's complaint stated claims sufficient to entitle Amity to summary judgment on the duty to defend issue; (2) that the inapplicability of a certain policy exclusion obligates Utica to defend Amity against Weston's claims; and (3) that the judge below erred in determining that Weston's lawsuit did not arise from Amity's failure to render professional services. We agree with the determination made below that Utica had no duty to defend Amity against Weston's complaint, which obviates the need to consider Amity's argument concerning the meaning of the phrase professional services in the policy.

1. Duty to defend.

We begin with the language in the policy pertaining to coverage. Pursuant to Section II — Coverage, Utica agreed to pay on behalf of Amity all loss to which the policy applies, as follows:

The 'loss' must arise out of 'wrongful acts' committed in the conduct of the insured's business, wherever committed or alleged to have been committed, by the insured or any person for whose 'wrongful acts' the insured is legally liable in rendering or failing to render *professional services* (emphasis supplied). Relevant to this appeal are the two highlighted phrases: whether the loss arose from Marino's wrongful acts and whether the loss arose from Marino's concomitant fail[ure] to render professional services to Weston. The policy defines wrongful acts as any negligent act, error, or negligent omission to which this insurance applies. The policy does not define professional services.

The summary judgment appealed from here is premised upon the wrongful acts requirement to trigger coverage under the policy. Reading Weston's complaint in light of *Bagley v. Monticello Ins. Co.*, 430 Mass. 454, 458 (1999), the judge concluded that Marino's intentional acts cannot be considered negligent acts, errors, or omissions resulting in Amity's failure to procure Weston excess liability insurance coverage. Although in a footnote to that sentence, the judge remarked that Marino's conduct also did not amount to a failure to render professional services, that conclusion was not the primary basis for his decision. Because we agree that the wrongful acts requirement to trigger coverage under the policy was not met in the circumstances presented here, we do not consider whether Marino's conduct amounted to a failure to render professional services.

An insurer's duty to defend encompasses its duty to indemnify. *Id.* at 458-459. If there is no duty to defend, there is no duty to indemnify. *Id.* at 459. An insurer has a duty to defend an insured when the allegations in a complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms. *Billings v. Commerce Ins. Co.*, 458 Mass. 194, 200 (2010). The duty to defend is determined based on the facts alleged in the complaint, and on facts known or readily knowable by the insurer that may aid in its interpretation of the allegations in the complaint. *Ibid.* An important caveat for present purposes is that [i]t is the *source* from which the plaintiff's personal injury originates rather than the specific *theories of liability* alleged in the complaint which determines the insurer's duty to defend. *Bagley, supra* at 458, quoting from *New England Mut. Life Ins. Co. v. Liberty Mut. Ins. Co.*, 40 Mass. App. Ct. 722, 727 (1996).

Amity's focus on Weston's theories of liability is unpersuasive in light of *Bagley*. Viewed in the light most favorable to Amity, it is clear from the undisputed record that Amity made known to Utica from the outset that the *source* of the injury alleged in Weston's complaint was Marino's intentional, criminal actions. Although the record on appeal includes **Utica Mutual Insurance Company v. AMITY INSURANCE AGENCY, INC., Mass: Appeals Court 2013** negligent hiring or supervision claim, Weston's complaint does not state such a claim and we focus on the complaint as filed.^[4] See *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 394-395 (2003). The source of the allegations in Weston's complaint was Marino's intentional, criminal conduct, which cannot be viewed as a negligent act, error, or omission. Accordingly, losses arising from that conduct are not covered under the policy.

2. Policy exclusion.

Amity attempts to distinguish *Bagley* by focusing narrowly on that decision's facts: namely that *Bagley* turns on the language of an insurance policy exclusion. 430 Mass. at 456. Amity argues that such an exclusion was not at work in this case. Pursuant to Section III — Exclusions of this policy:

If a 'suit' is brought against the insured alleging both 'wrongful acts' within the coverage of the policy and dishonest, fraudulent, malicious, or criminal conduct, then we will defend the insured in the trial court, but we shall not have any liability for any judgment for dishonest, fraudulent, malicious, or criminal conduct nor shall we have any further obligation to defend after judgment in the trial court. This exclusion applies

only to insureds who participated in, acted with knowledge of, or acquiesced to such conduct.

Amity contends that the language of this exclusion entitles it to a defense by Utica because it had no knowledge of Marino's crime. The exclusion only would apply, however, if Amity otherwise was covered by the policy.

Under *Bagley*, Utica's duty to defend and thus Amity's coverage under the policy is premised upon a reading of Weston's complaint with an eye toward the source of the injury alleged therein. *Id.* at 458. Again, the source of the injury alleged here was Marino's criminal acts, which the judge below rightly concluded did not amount to 'wrongful acts' within the coverage of the policy. Accordingly, the exclusionary language quoted *supra* is irrelevant to this appeal.

3. Failure to render professional services.

Even if Marino failed to render professional services to Weston because of his intentional, criminal actions, as noted *supra*, Utica still has no duty to defend Amity under the policy. Cf. *Herbert A. Sullivan, Inc., supra* at 395 (no duty to defend lawsuit alleging premium overcharges and fraudulent acts of concealment). We thus do not review the judge's determination in this regard.^[5]

Judgment affirmed.

[1] David Solomon and Roy Solomon.

[2] Weston's complaint asserts claims for breach of contract, negligence, fraud, and violation of G. L. c. 93A. Weston and Amity settled the law suit for \$60,000. The settlement agreement allocates \$59,000 of the settlement for compromise of the negligence-based claims.

[3] The matter was decided on Utica's motion for summary judgment and Amity's motion for partial summary judgment on its counterclaims to Utica's action for declaratory judgment.

[4] Although Weston's complaint states a claim for negligence in failing to secure the insurance policies, there is nothing to suggest a claim for liability grounded in Amity's negligence in hiring or supervising Marino.

[5] We deny Amity's request for appellate attorney's fees and costs.

