COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2025-P-0265

Bristol, ss.

WILLIAM E. O'CONNOR,
Plaintiff/Appellant

v.

MAG MUTUAL INSURANCE COMPANY
Defendant/Appellee.

On Appeal from the Bristol Superior Court
following non-jury trial

BRIEF OF THE APPELLANT

BY APPELLANT'S ATTORNEY,

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STATEMENT OF THE ISSUE

William O'Connor, a physician, was insured by MagMutual for regulatory defense for "a patient complaint about your professional activities".

O'Connor received a regulatory "Motion for Summary Suspension" that included allegations that O'Connor improperly prescribed drugs to a patient. MagMutual denied coverage, refused to defend and ultimately[1] claimed the allegations did not relate to "professional activities".

Following non-jury trial[2] of declaratory judgment[3], the judge concluded that the allegations of improperly writing prescriptions were not "professional activity".

Was this interpretation of coverage, that allegations of improperly writing prescriptions was not within the scope of "professional activities", correct?

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[1] The grounds for denial changed repeatedly over time, as noted in the record.
[2] On a documentary record only, including the regulatory complaint and the insurance contract as exhibits.
[3] The remaining counts were reserved.

STATEMENT OF THE CASE

Plaintiff William E. O'Connor, M.D. filed the present action against insurer MagMutual on 08/15/2023. (RA 4) The complaint sought a declaration of coverage for regulatory defense for a regulatory action which implicated the "professional activities" of the doctor, and remedies for breach of contract and unfair and deceptive insurance practices in violation of M.G.L. c.93A.(Complaint at RA 11)

The defendant counterclaimed seeking a contrary declaration of no coverage. (RA 16)

The parties exchanged summary judgment motions on the mirror counts of declaratory judgment, which were later both denied by Judge Katie Rayburn. (RA 5-7)

The parties agreed that this case is a matter of interpretation of the policy based on the allegations set out by the regulatory agency, and requested a Rule 16 conference on further proceedings. (RA 7) At that time the parties and the Court agreed that the matter would be set for a non-jury trial of the competing declaratory judgment claims. (RA 8)

The parties submitted the matter to the Court, (Buckley, J.) solely on the declaratory counts on the issue of coverage on September 26, 2024 relying upon AGREED FACTS (RA 67) AGREED EXHBITS (RA 75) and offered the summary judgment memoranda in lieu of argument. (RA 28; RA 54)

The Court issued findings and rulings on 02/06/2025 (RA 196) and Judgment on Findings issued on 02/07/2025. (RA 205)

The Court ruled that the matter was controlled by the case of *Roe v. Federal Ins. Co.*[4] that a complaint to the board by the former patient's husband did not implicate "professional services" covered under the defense policy. "There is nothing about the claim of over prescribing medication for the purpose of c coercing the Wife to continue her relationship with the Dr. which could be construed as providing "professional services" to the Wife. Roe at 49." (RA 203)

As this matter is one of interpretation of coverage of an insurance contract based on uncontested

[4] 412 Mass. 43 (1992)

facts, the question for the lower court was a question of law and the review in this Court is *de novo*.

STATEMENT OF THE FACTS

1.) The parties submitted the following AGREED FACTS to the trial court within the pretrial memorandum. The documents are reproduced in the Record Appendix as noted:

I. AGREED FACTS (See RA 67)

1. On or about February 6, 2020, Complaint Counsel of the Massachusetts Board of Registration in Medicine filed a Motion for Summary Suspension seeking to suspend the Plaintiff's certificate of registration to practice medicine. A true and accurate copy of the Motion for Summary Suspension is attached as ***Exhibit A*** to the Parties' Agreed Exhibits binder. (RA 78)

2. In support of the motion, Complaint Counsel included an Affidavit of the Board's investigator, Robert M. Bouton, detailing the allegations of the Board Complaint, as well as additional facts obtained during the course of his investigation. A true and accurate copy of the Affidavit of Robert Bouton is attached as ***Exhibit B*** to the Parties' Agreed Exhibits binder. (RA 81)

3. On or about September 20, 2019, MAG Mutual issued a Medical Professional Liability Insurance Claims Made Policy, PSL 3900011400 to the Plaintiff with a Policy Period of 09/01/2019 to 09/01/2020 and a retroactive date of 09/01/2019 ("Policy"). A true and accurate copy of the Policy is attached as ***Exhibit C*** to the Parties' Agreed Exhibits binder. (RA 155)

4. Dr. O'Connor sought regulatory defense coverage from MAG Mutual for the Board Complaint. Dr. O'Connor provided MAG Mutual with all documents he received from the Board, which included the Motion for Summary Suspension and Affidavit of Mr. Bouton, including all exhibits attached to the Affidavit.

5. MAG Mutual conducted an initial coverage investigation which included a review of the documents provided by Dr. O'Connor and the applicable policy language. MAG Mutual concluded that regulatory defense coverage was not available to Dr. O'Connor for the Board proceeding. On or about February 12, 2020, MAG Mutual sent a letter to Dr. O'Connor declining coverage. A true and accurate copy of the February 12, 2020 letter is attached as ***Exhibit D*** to the Parties' Agreed Exhibits binder. (RA 180)

6. On or about July 12, 2023, Dr. O'Connor, through counsel, wrote to MAG Mutual requesting that MAG Mutual reconsider its denial of coverage for the Board Complaint and demanded that MAG Mutual tender the full policy coverage of $50,000 for the regulatory defense of the Board Complaint. A true and accurate copy of the July 12, 2023 letter is attached as ***Exhibit E*** to the Parties' Agreed Exhibits binder. (RA 185)

7. Upon receipt of Attorney Trundy's letter, MAG Mutual conducted a further coverage investigation and reconsidered its initial denial of coverage. Upon further review of the policy language, consideration of the arguments raised in Attorney Trundy's letter, and the information submitted by Dr. O'Connor, MAG Mutual again determined that regulatory defense coverage was not available under the Policy for the Board Complaint. On or about August 9, 2023, MAG Mutual sent a letter to Dr. O'Connor declining coverage. A true and accurate copy of the August 9, 2023 letter is attached as ***Exhibit F*** to the Parties' Agreed Exhibits binder. (RA 190)

ARGUMENT

STANDARD OF REVIEW. This is the interpretation of a contract of insurance based upon agreed facts, in particular the scope of the regulatory complaint, and is therefore a *de novo* review of a question of law.

I. The Motion for Summary Suspension included allegations that the plaintiff doctor 'overprescribed' medications to a patient. This is a covered "professional activity" which triggers the duty to defend.

A.) The allegations in the Motion for Summary Suspension by a complainant that O'Connor lawfully issued prescriptions but for an ulterior purpose.

The Board of Registration in medicine assigned a complaint from the husband of a former female patient to investigate a complaint by the husband to the Board on January 22, 2020. (RA 82) Bouton engaged in an investigation from that time to February 5, 2020, when he reports that he was unable on that date to reach O'Connor. (RA 86). On February 6, 2020 he spoke with O'Connor[5], whereupon he advised O'Connor that the matter was to be heard by the Board that very day and advised him of the allegations, the fact of a pending warrant in Orleans District Court and to get a lawyer. O'Connor reported that he was unaware of any pending criminal matter and any lawyer hired would likely not respond that same day. (RA 87)

The Bouton investigation included, per his affidavit, three categories of accusations by the husband against O'Connor. First (a) that O'Connor had a restraining order against him by the female patient (wife). It is not reported where the order issued or if it had been served. Second (b) a claim by the

[5] He does not indicate if O'Connor reached out to him or the converse.

husband that O'Connor had violated the order and had an outstanding warrant. Third (c) that "The Husband further alleged that Dr. O'Connor was involved in a romantic relationship with Female A for a period of 8 years from approximately 2008 to 2016 and prescribed Flurazepan to Female A for a period of about six years. (RA 82-83)

Bouton then reports that in the prior year there were no prescriptions issued to Famale A. There were multiple prescriptions to Female A from July, 2012 to October, 2016, including one for Hydrocodone-Acetaminophen and twenty-two for Flurazepam. (RA 84) He attached an exhibit (RA 132) entitled "Prescriptions" to his affidavit.

It remains unclear what violation investigator Bouton was asserting against O'Connor as to writing prescriptions as set out in the foregoing.

However, the husband's complaint makes the following accusation in addition to a number of other accusations: " Lastly, he was prescribing the addictive drug, Flurazepan, to the victim for a period of about six years (see attachment D as an example). Dr. O'Connor was prescribing this drug to the victim

as her primary care physician would not fill anymore orders as he was concerned about the addictive nature of the drug. The victim feels that Dr. O'Connor used the addictive qualities of the drug as leverage to make her dependent on him and stay in the relationship." (RA 91-92)

II. The MagMutual Policy provides for regulatory defense of a patient complaint which arises out of "a patient complaint about your professional activities".

The MagMutual policy appears at RA 157. The relevant provision at issue appears at RA 177, "U. *Regulatory Defense*", which includes the bullet point subsection: " Medical License, Clinical Privileges and Other Professional Administrative Actions - Defense costs for **any** investigation, hearing, formal action or administrative proceeding brought against you by any licensing board, hospital board, healthcare organization, peer review organization, or regulatory authority which arises out of a covered claim **or a patient complaint about your professional activities**." {emphasis added}

There is no other qualifying language.

Notably, at Section V. Sexual Misconduct, immediately below, is subsection *Sexual Misconduct Defense*, where the policy states that it provides defense costs coverage "for claims arising out of your alleged sexual misconduct with your patients who are not your employees. We will not pay any judgment, settlement, fine or penalty resulting from your sexual misconduct, even if it is contended that the sexual misconduct occurred in the course of your professional activities." (RA 177)

This policy, by its own terms recognizes the distinction between defense from allegations and indemnity. The trial judge does not.

A.) The complaint and the Board's regulatory action are "reasonably susceptible" to coverage.

In *Liberty Mutual Ins. Co. v. SCA Services, Inc.*[6] the Supreme Judicial Court set out the standard for the duty to defend pursuant to an insurance policy. The Court stated that the duty is triggered "if the allegations of the complaint are 'reasonably susceptible' of an interpretation that they state or

[6] 412 Mass. 330 (1992)

adumbrate a claim covered by the policy terms, the insurer must undertake a defense..." *Id.* at 331.[7]

The board action centered on a patient complaint of the prescription of medication, a "professional activity" flowing from a patient complaint. This claimed misconduct fails within the policy coverage. There are no other conditions set out in the policy which limit the duty to defend.

Further, it is difficult to see any circumstance where a regulatory action predicated upon some allegation of professional misconduct would then be excluded by the fact that the doctor was accused of misconduct. The trial court creates a circular exclusion and eviscerates the entire concept of defense.

III. The trial judge created a non-existent policy exclusion based on a mis-reading of a case that involved the duty to indemnify where the underlying allegations of misconduct were already established as fact.

[7] The trial court Findings recite in detail the jurisprudence supporting a broad reading of the duty to defend.

The defendant cites *Roe v. Federal Ins. Co.*[8] for the proposition that the present matter does not implicate "professional services". The defendant wholly mis-reads this case.

First, the case involves an attempt to recover for damages for sexual assault AFTER the dentist admitted to sexual contact with a patient to the Board of Registration in Dentistry[9]. He then settled a lawsuit for money damages with an assignment of rights against the insurer. The action by the patient against the insurer was to seek indemnification of the settlement amount.

Second, and most importantly, the Supreme Judicial Court made clear why, in the narrow context of that case, and in contrast to numerous other cases, the conduct was not "professional services" as contemplated in that policy, but not therein defined. *Id.* at 47 The Court ruled that professional services of a dentist did not include sexual activity directed against a patient who comes for dental services. The Court wrote:

[8] 412 Mass. 43 (1992)
[9] Id. at 46. He claimed consent.

> A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.... In determining whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself."

Id.

This case was relied upon by the trial judge to support her determination of no coverage for the regulatory defense. The Court wrote that:

> " This case is controlled in all material respects by Roe v. Federal Ins. Co., 412 Mass. 43 (1992), in which the Supreme Judicial Court interpreted an insurance policy clause using the identical language[10], ''arising out of the rendering or failure to render... professional services." Id.at 47. In Roe, which dealt with a dentist's malpractice policy, the court rejected the argument that the "arising out of' language should be broadly construed to include sexual assault of a patient during a dental exam. In ruling that sexual assault did not "arise out of' dental care, the court reasoned that "there must be a causal relationship between the alleged harm and the complained-of professional act or service, that is, it must be a medical or dental act or service that causes the harm, not an act or service that requires no professional skill.... It is self-evident that his professional services ... did not call for sexual contact between him and his patient." Id. at 49-50."

[10] This is inaccurate, MagMutual uses 'professional activities".

[RA 203, p.8 of the Findings.]

The function of a medical doctor of prescribing medication involves just the set of specialized knowledge that the Court alludes to. The Court was focused on the relationship of the activities to damages, in that case and the many cases cited, and as such is not particularly helpful in this instance of a regulatory complaint.

The trial judge cited extensive caselaw on the broad duty to defend, but no case which carved out a duty to defend a regulatory complaint or a malpractice matter where the complaint was grounded in objectively professional activities, such as writing prescriptions, which are cast, by way of lay allegations, of serving an improper motive.

Certainly, the insurer can carve out such exclusions, as it did notably in the defense to sexual misconduct allegations where it would defend but not indemnify.

Further, as a general matter of construction, these juxtaposed sections (U and V) demonstrate that the insurer made conscious choices to expansive

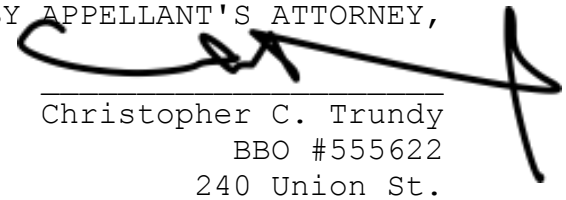
defense. Contrary in fact to the position of Federal Insurance in the *Roe* case.

Obviously, the regulatory defense is necessary to defendant against unfair and untrue allegations as well as true or partially true allegations. Carving out exceptions to this duty based solely on the Court accepting allegations as true is a deprivation of the reasonable expectation of any insured medical provider.

Conclusion

The appellant requests that the Court reverse the judgment and enter a declaratory judgment confirming the regulatory duty to defend within the policy and remand the matter for further proceedings.

Respectfully submitted,
BY APPELLANT'S ATTORNEY,



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Date: 06/12/2025

ADDENDUM

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#12

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS SUPERIOR COURT NO.: 2373CV00513

WILLIAM E. O'CONNOR,
PLAINTIFF

v.

MAGMUTUAL INSURANCE CO.,
DEFENDANT

BRISTOL SUPERIOR COURT
FILED
FEB - 6 2025
JENNIFER A. SULLIVAN, ESQ.
CLERK/MAGISTRATE

FINDINGS OF FACT, RULINGS OF LAW AND DECISION ON JURY WAIVED TRIAL

Buckley, E.M., Judge

INTRODUCTION:

This is a Declaratory Judgment action brought by the plaintiff, William E. O'Connor ("plaintiff", "O'Connor" or "Dr. O'Connor") in this case seeking a declaration of the rights and duties of his insurer, MAGMUTUAL INSURANCE CO.,("MagMutual" or "defendant") to defend him under a professional liability insurance policy. Specifically, the parties seek determination of whether a professional liability insurance policy issued by MagMutual applies to the claim for regulatory defense coverage by the plaintiff relative to a licensing board proceeding instituted against him.

I. AGREED FACTS:

The parties have filed the below Agreed Facts[1] which the court adopts and considers in deciding the issue in this trial.

1. On or about February 6, 2020, Complaint Counsel of the Massachusetts Board of Registration in Medicine filed a Motion for Summary Suspension seeking to suspend the Plaintiff's certificate of registration to practice medicine. (See, Exhibit[2] "A" incorporated by reference herein).

[1] See Joint Pre-Trial Memorandum filed 9/25/2024.
[2] Reference is made to the Exhibits provided by counsel and referenced in the Joint Pre-Trial Memorandum.

2. In support of the motion, Complaint counsel included an Affidavit of the Board's investigator, Robert M. Bouton ("Bouton") detailing the allegations of the complaint, as well as additional facts determined in his investigation. (See, Exhibit "B" incorporated by reference herein.).
3. Bouton was instructed by the Board to investigate a correspondence sent to the Board by "the Husband" ("Husband") of a former patient ('Wife") regarding claims of criminal harassment, stalking violation of G.L. c. 209A Restraining Order as well as allegations that O'Connor had attempted to break into the Wife's residence, stolen her mail and had been overprescribing her addictive medication in an effort to coerce her to continue their personal relationship. (See, Correspondence 12/24/2019 appended to Bouton's report).
4. On or about September 20, 2019, MagMutual issued a policy of Medical Professional Liability insurance to the plaintiff. The policy is a "claims made" policy for the period 9/01/2019 to 9/01/2020. (See, Exhibit "C" incorporated by reference herein).
5. O'Connor sought regulatory defense coverage from MagMutual for the Board Complaint.
6. MagMutual conducted an initial coverage investigation and determined that regulatory coverage was not available to O'Connor for the Board Proceeding.
7. On or about February 12, 2020, a denial of coverage letter setting forth MagMutual's opinion was sent to O'Connor (See, Exhibit "D" incorporated by reference herein).
8. In July 2023, O'Connor through counsel, requested that MagMutual reconsider its denial of coverage and demanded that MagMutual tender the full policy limit of $50,000 to O'Connor for the regulatory defense. (See, Exhibit "E" incorporated by reference herein.)
9. MagMutual conducted a further coverage investigation ad reconsidered its' initial denial. Further review by MagMutual determined that the regulatory defense coverage was not available under the controlling policy to O'Connor. A letter dated August 9, 2023 was sent to O'Connor declining coverage again. (See, Exhibit "F" incorporated by reference herein).

II. THE POLICY[3]

The controlling language of the Policy provides as follows:

A. Protecting You and Your Organization

[3] See, Exhibit "C" to the Joint Appendix of Exhibits which is incorporated by reference herein.

"We will protect you from claims first made and incidents first reported to us by you or your designated representative during the policy period **and arising out of your professional activities** during the protected period, **provide that you comply** with the conditions and notification provisions specified in this policy. We will protect you up to your limits of liability….".

"In addition, we will provide limited regulatory defense and in some circumstances reimbursement for civil regulatory fines and penalties. These proceedings include: **Medical License, Clinical Privilege and Other Professional Administrative Actions**."

B. Policy Definitions

The term ***"Regulatory Defense"*** as defined in the Policy affords coverage up to the limits of coverage specified on the Declarations Page…". And may include "defense costs for any investigation, hearing, formal action or administrative proceeding brought against you by any licensing board, hospital board, healthcare organization, peer review organization, or regulatory authority which **arises out of a covered claim or a patient complaint about your professional, activities.** (See, Exhibit C section "U").

A **"claim"** is defined by the Policy as follows:

"(The) Claim must be made by or on behalf of a patient and includes a civil lawsuit, notice of a civil lawsuit or notice of an intention to hold you responsible for damages for an incident covered by the Policy. The lawsuit or threatened action against you must be filed, or intended to be filed, in the United States of America,,,," .

Professional Activity is defined by the Policy as follows:

"Professional Activity- Providing or failing to provide medical professional services by you to a patient, including referrals to or a consultation with a physician, surgeon, or health care provider. Professional activity also includes, **your vicarious liability for providing or failing to provide medical professional services to a patient…". Professional Activity** includes **claims** for civil damages resulting from your violation of laws governing the standards of care in your medical practice and your duties to your patients, but does not includes (sic) claims for any acts which are in violation of any other law, statute, ordinance or regulation, including but not limited to willful

destruction, alteration or falsification of medical records except as may be provided in defense costs coverage". (See, Exhibit "C").

DISCUSSION

The Parties' Positions:

The plaintiff avers in this claim for regulatory defense that the regulatory allegations made against him include both professional activities and non-professional activities and, as such, the defendant owes the plaintiff a duty to defend. The plaintiff construes the duty to defend broadly and, as the allegations are "reasonably susceptible: of an interpretation that "states or adumbrates a claim covered by the policy term", the insurer MagMutual owes a defense to the Plaintiff.

The defendant avers that the claim for regulatory defense presented by the Plaintiff arises out of a licensing board proceeding. As such, the policy covers only those claims which (1) arise out of a covered claim or (2) are made by a patient or on behalf of a patient arising out of the plaintiff's professional activities and must be claims covered within the policy. Specifically, the defendant claims that the claims made by the husband to the Board were not a "civil lawsuit, a notice of a civil lawsuit or an intention to hold Dr. O'Connor responsible for damages." As such, it is not a covered claim. Equally, the defendant argues that the Board complaint did not arise out of the plaintiff's professional activities and, as such, there is no coverage for a regulatory defense.

I. THE MAGMUTUAL POLICY DOES NOT PROVIDE A DUTY TO DEFEND DR. O'CONNOR AS THE BOARD COMPLAINT IS NOT A "CLAIM" AND THE CRIMINAL ACTIVITIES OF DR. O'CONNOR WERE NOT PROFESSIONAL ACTIVITIES WITHIN THE MEANING OF THE POLICY

It is well settled that the interpretation of an insurance policy is a question of law for the court. Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 146 (1982); A. W. Chesterton Co v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 519 (2005). Where the terms of the policy are unambiguous, the question of interpretation is appropriate for summary judgment. See *Sullivan v. Southland Life Ins. Co.*, 67 Mass.App.Ct. 439, 442 (2006). Courts construe the provisions of an insurance policy according to their plain meaning if the terms are unambiguous. Id. This is "consistent with court's long-standing policy that the rules governing the interpretation

of an insurance contract are the same as those governing the interpretation of any other contract." Id. Where the provisions of an insurance policy are plainly expressed, the policy must be enforced in accordance with its terms, Cody, 387 Mass. at 146, and interpreted in a manner consistent with what an objectively reasonable insured would expect to be covered. McGregor v. Allamerica Ins. Co., 449 Mass. 400, 402 (2007); City Fuel Corp. v. National Fire Ins. Co. of Hartford, 446 Mass. 638, 642–43 (2006). "[I]t is a long-standing rule of construction that the favored interpretation of an insurance policy is one which best effectuates the main manifested design of the partie.." Metropolitan Prop. & Cas. Ins. Co. v. Fitchburg Mutual Ins. Co., 58 Mass. App. Ct. 818, 823 (2003). If, however, "the contract is ambiguous, "doubts as to the meaning of the words must be resolved against the insurance company that employed them and in favor of the insured." August A. Busch & Co. of Mass., Inc. v. Liberty Mut. Ins. Co., 339 Mass. 239, 243 (1959). "A term is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." County of Barnstable v. American Fin. Corp., 51 Mass. App. Ct. 213, 215 (2001). An ambiguity is not created merely because there is a controversy between the parties as to the interpretation of the policy provisions. See Lumbermans Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 466 (1995). In interpreting the policy, the objective is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background and purpose." Id., quoting Massachusetts Property Ins. Underwriting Assn. v. Wynn, 60 Mass. App. Ct. 824, 827 (2004); Sullivan, 67 Mass. App. Ct. at 442 ("a contract is to be construed to give reasonable effect to each of its provisions."). "However, an ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other" (citation omitted). Lumbermans Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 466 (1995). "[A]n ambiguity exists in an insurance contract when the language contained therein is susceptible of more than one meaning" (citation omitted). Id. ,

When construing an insurer's duty to defend under a contract of insurance, the "[q]uestion of the initial duty of a liability insurer to defend is decided by matching the …complaint with the policy provisions: if the allegations of the complaint are "reasonably susceptible" or an interpretation that they state or adumbrate a claim covered by the policy terms, the insurer must undertake the defense…[T]he process is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss

fits the expectation of protective insurance reasonably generated by the terms of the policy. See, Sterlite Corp. v. Continental Cas. Co., 17 Mass. App. Ct. 316, 318 (1983). "[T]he duty to defend depends not only on the actual facts of the event giving rise to the claimed liability, but o the full range of possible facts that could fall within the scope of the ….complaint". Sterilite at 319. It is only where the allegations in the complaint do not state a claim which under any reasonable interpretation of the policy would require the insurer to pay. Terrio v. McDonough, 16 Mass. App. Ct. 163, 168 (1983); HDH Corp., v. Atlantic Charter Ins. Co., 425 Mass, 433, 437 (1997).

It is well settled that a liability insurer owes a "[b]road duty to defend its insured against any claims that create a potential for indemnity." Doe v. Liberty Mut. Ins. Co., 423 Mss. 366, 368-69 (1996) citing Liberty Mut. Ins. Co. v. SCA Servs Inc., 412 Mass. 330, 332 (1992). The insurer's duty to defend "[is triggered where the allegations in the complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms. Notwithstanding the possibility that the underlying claim may ultimately fail, or that the merits of the claim are weak or frivolous." Holyoke Mut. Ins. Co in Salem v. Vibram, USA, Inc., 480 Mass. 480, 484 (2018) quoting Billings v. Commerce Ins. Co., 458 Mass. 194, 200 (2010). The allegations need not "specifically and unequivocally make out a claim within the coverage" but must "show, through general allegations, a possibility that the liability claim falls within the insurance coverage." Id., quoting Billings, supra at 200-201. If a duty to defend is established with respect to part, but not all, of a Complaint… or one type of damage alleged but not others, the insurer has a duty to defend the entire action. GMAC Mortg., LLC v. First Am Title Ins. Co., 464 Mass. 733, 738 (2013); Aetna Cas. & Sur. Co. v. Continental Cas. Co., 413 Mass. 730, 732 (1992); Deutsche Bank Nat. Ass'n v. First Am. Title Ins. Co., 465 Mass. 741, 746 n. 11 (2013).

Here the Plaintiff's correspondence to the Board, is not a "claim" within the meaning of the policy. The Husband's letter was not a " civil lawsuit, notice of a civil lawsuit or notice of an intention to hold [Dr. O'Connor] responsible for damages for an incident covered by the Policy." Rather, the Husband's correspondence provided notice to the Board of a potential "ethical issue' about Dr. O'Connor. The Husband advanced no "claim" or instituted a civil action against the Dr. but rather, sought the Board to "[i]nvestigate and determine if he [Dr. O'Connor] has violated any medical code of ethics and if he is still qualified to practice medicine." See, Husband's correspondence 12/24/2019. Nothing in the notice to the Board even in the broadest of construction

would be found to be a " civil lawsuit, notice of a civil lawsuit or an intention to hold Dr. O'Connor responsible for damages." See, Exhibit "F" policy.

Equally, the Husband's correspondence did not present a claim "arising out of", Dr. O'Connor's Professional Activities. The proceedings before the Board did not arise out of either a "claim" or a "patient complaint about the insured's professional activities." See Policy Exhibit "F", section VII(u). The policy unambiguously defines a "Claim" as a "civil lawsuit, notice of a civil lawsuit or notice of an intention to hold (the insured) responsible for damages for an incident covered by the policy." See, Exhibit "C" section VII(A). Coverage for a regulatory defense as defined in the policy provides "defense costs for …an administrative *proceeding brought against you…* which *arises out of a covered claim or a patient complaint about your professional activities*." (See, Exhibit "C" section VII(A). The phrase "arising out of" is generally "[u]nderstood to mean 'originating from, growing out of, flowing from, incident to or having connection with." Metropolitan Prop. Cas. Ins. Co. v. Fitchburg Mut. Ins. Co., 58 Mass. App. Ct. 818, 820-821 (2003). Nothing about the criminal activities of the defendant which included stalking, stealing mail, violating of a G.L. c. 209A restraining order, over prescribing addictive medicine to the Wife could be construed in any way as "arising out of " Dr. O'Connor's professional duties.

Said another way, the letter from the husband put the Board on notice that Dr. O'Connor is "actively stalking her (the Wife/ former patient), leaving irrational voice messages on her phone, stealing her mail and surveilling her property to determine her activities. In addition, he violated the 209A abuse order …by trespassing onto her property and attempted to break into the house." (See, Exhibit B- pg. 13 et seq attached to Affidavit of Robert M. Bouton). He further avers that "he was prescribing the addictive drug, Flurazepan, to the victim for a period of about six years… as her primary care physician would not fill anymore orders as he was concerned about the addictive nature of the drug. The victim feels that Dr. O'Connor used the addictive qualities of the drug as leverage to make her dependent on him and stay in the relationship." Id. [4] These allegations are rooted in criminal behavior and are not causally connected in any way to the "professional activities" between Dr. O'Connor and his former patient, the Wife.

[4] The husband further contends that Dr. O'Connor filed a Stipulation with the Board in 2015 admitting that he lacked candor with the Board and failed to identify his drunk driving conviction in his 2015 medical license renewal. See The Final Decision and Order of the Board dated January 21,2016 related to this offense. Dr. O'Connor was issued a fine, ordered to complete community service as a result of the finding of the Board.

This case is controlled in all material respects by Roe v. Federal Ins. Co., 412 Mass. 43 (1992), in which the Supreme Judicial Court interpreted an insurance policy clause using the identical language, "arising out of the rendering or failure to render ... professional services." *Id.* at 47. In Roe, which dealt with a dentist's malpractice policy, the court rejected the argument that the "arising out of" language should be broadly construed to include sexual assault of a patient during a dental exam. In ruling that sexual assault did not "arise out of" dental care, the court reasoned that "there must be a causal relationship between the alleged harm and the complained-of professional act or service, that is, it must be a medical or dental act or service that causes the harm, not an act or service that requires no professional skill.... It is self-evident that his professional services ... did not call for sexual contact between him and his patient." Id. at 49–50.

Clearly here, there was nothing in the professional relationship between the Wife and Dr. O'Connor which would be causally connected to the myriad of criminal activities conducted by Dr. O'Connor against the wife. Nothing about his criminal activities involved providing professional services to the Wife. To the extent that the plaintiff argues that the allegation of prescribing medication is sufficient to bring the claim within the coverage of the policy, this court rejects that argument. There is nothing about the claim of over prescribing medication for the purpose of coercing the Wife to continue her relationship with the Dr. which could be construed as his providing "professional services" to the Wife. "Common sense,...is always ...a useful guide in differentiating covered from uncovered cases." Roe, at 49.

For the above reasons, the court finds that the there is no coverage for a regulatory defense under the MagMutual policy for Dr. O'Connor as the Board Complaint was not a "civil lawsuit... or claim ... seeking to hold Dr. O'Connor liable for damages" and further, that the activities complained of by the Husband in his Board Complaint did not arise out of any "professional activities" of the plaintiff.

II. MAGMUTUAL DID NOT ENGAGE IN UNFAIR AND DECEPTIVE TRADE PRACTICES WHEN IT DENIED COVERAGE TO DR. O'CONNOR

In order to prevail on his claim for violation of G.L. c. 93A, sec. 11, the plaintiff must show that the defendant committed (1) an unfair or deceptive trade practice and (2) that he suffered a

loss of money or property as a result of that unfair trade practice. See, Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 22-23 (1997). Ordinary contract disputes "[w]ithout conduct that [is] unethical, immoral, oppressive, or unscrupulous," are ot actionable under G.L. c. 93A . See, Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 505 (1997) citing Levings v. Forbes & Wallace, Inc., 8 Mass. App Ct. 498, 504 (2004); Duclersaint v. Federal Nat'l Mortg. Ass'n, 427 Mass. 809, 814 (1998) (" a good faith dispute as to whether money is owed, or performance of some kind is due, is not the stuff on which a c. 93A claim is made."). Where an insurer properly denies a defense on a claim, as here, there can be no violation of G.L. c. 93A. See, Home Ins. Co. v. Liberty Ins. Co., 444 Mass. 599, 608 (2005). Resolution here of the Plaintiff's contract claim disposes of the G.L. c. 93A claim because the only wrong alleged is a violation of the contract. See, Lumberman's Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 468 (1995) ("an insurance company which in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy cannot ordinarily be said to have committed a violation of G.L. c. 93A").

ORDER

Judgment shall enter in favor of the defendant MagMutual Insurance Company on all counts in its Counterclaim as follows:

(1) The Board Complaint does not fall within the Regulatory Defense Coverage of the Policy;

(2) MagMutual owed no duty to defend Dr. O'Connor in connection with the Board Complaint;

(3) MagMutual owed no duty to tender or otherwise reimburse Dr. O'Connor for any defense costs he incurred in connection with the Board Complaint;

(4) MagMutual did not commit any violation of G.L. c. 93A, sec. 11 when it denied the Plaintiff's claim for regulatory coverage.

So Ordered,
By the Court (Buckley, J.)

Attested to: _____
Garrett R. Fregault, Esq.
Assistant Clerk / Magistrate

Dated: February 6, 2025

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JUDGMENT ON FINDING OF THE COURT #13

Trial Court of Massachusetts
The Superior Court

DOCKET NUMBER
2373CV00513

Jennifer A Sullivan
Bristol County

CASE NAME
O'Connor, William E
vs.
MAG Mutual Insurance Company

COURT NAME & ADDRESS
Bristol County Superior Court - Taunton
9 Court Street, Rm 13
Taunton, MA 02780

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
MAG Mutual Insurance Company

BRISTOL SUPERIOR COURT
FILED
FEB - 7 2025
JENNIFER A. SULLIVAN, ESQ.
CLERK/MAGISTRATE

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
O'Connor, William E

This action came on for trial before the Court, Hon. Elaine M Buckley, presiding, the issues having been duly tried, and a decision on the case having been rendered,

It is **ORDERED AND ADJUDGED:**

That the plaintiff(s) named above takes nothing, that the action be dismissed on the merits, and that the defendant(s) named above, will recover statutory costs.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
02/07/2025	X

Garrett R. Fregault, Esq.
Assistant Clerk/Magistrate

Date/Time Printed: 02-07-2025 12:35:30

SCV086: 04/2016

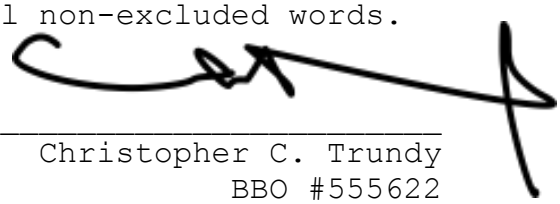
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Christopher C. Trundy, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

Use only if producing brief in a monospaced font/page limit: I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, ten characters per inch, and contains 2631 total non-excluded words.



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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on 6/09/2025, I have made service of this Brief and Appendix upon the attorney of record for the defendants/appellees by and through the Electronic Filing System] on June 12, 2025

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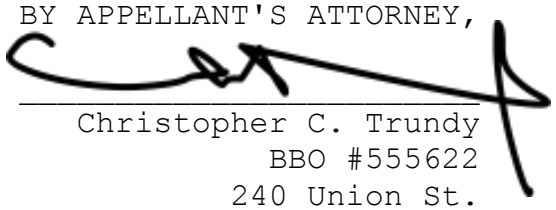
BY APPELLANT'S ATTORNEY,



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