IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

STATE FARM FIRE & CASUALTY COMPANY	:	
Plaintiff,	:	
vs.	:	Civil Action No. CV07-2164BA
CHRISTY TOLER, BRENDA GREEN, JOYCE GREEN, ARROWHEAD CLINIC INCORPORATED, ARROWHEAD MANAGEMENT, INC., BROWN ENTERPRISES, INC., H. BROWN MANAGEMENT COMPANY, LLC, HARRY W. BROWN SR. And HARRY W. BROWN, JR.,	:	
Defendant.	:	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court is a Motion for Summary Judgment filed by Plaintiff State Farm Fire & Casualty Company (hereinafter "Plaintiff"). Additionally, there is a cross-motion for Summary Judgment filed by the Arrowhead/Brown Defendants in which they seek summary judgment on the issue of Plaintiff's Duty to Defend. Having read and considered said motions, all responses thereto, all argument and evidence of record including that presented at the hearing on August 4, 2008, and the applicable law, the Court finds as follows:

FINDINGS OF FACT

In November 2007, Plaintiff filed the instant action seeking a declaratory judgment that it owes no liability coverage and no duty to defend and indemnify for any of the claims asserted

against the Arrowhead/Brown Defendants in the underlying damage suit.

In the underlying damage suit, Christy Toler, Brenda Green and Joyce Green (hereinafter "the State Court Plaintiffs") alleged the following: that they were injured in an automobile collision and sought chiropractic treatment at a Brown Arrowhead Clinic as a result; that when they sought treatment, their telephone call would either be handled by staff of the clinic or relayed to a call center; that the specific clinic or the call center would then contact an attorney and advise the attorney that a new patient had scheduled an appointment for a specific time, date and place; the list of attorneys was limited to three and included John E. King; from this initial contact, the attorney would learn the facts of the collision; while at the clinic they were informed of the need for an attorney and they met with an individual purporting to represent the King Law Firm; either at this initial meeting or soon thereafter, they signed an attorney-client contract with King; they additionally signed an affidavit verifying their injuries, stating that they had requested the meeting and that they were not induced to seek such representation.

Plaintiff has issued several policies of insurance under which the Arrowhead/Brown Defendants have demanded liability coverage for the claims asserted against them by the State Court Plaintiffs. Plaintiff issued a business policy to Arrowhead Clinics Inc. and Arrowhead Management Inc. as named insureds, the same being policy number 91-CT-7319-2. Plaintiff issued a business policy to Harry W. Brown, Inc. and Arrowhead Management, Inc. as named insured, the same being policy number 91-BL-4800-9. Plaintiff issued a business policy to H. Brown Management Company LLC as named insured, the same being policy number 91-BL-0133-9. Plaintiff issued a commercial liability umbrella policy to Arrowhead Management Inc, Arrowhead Clinics Inc. & Harry W. Brown Inc., same being policy number 91-

BL-0133-9.

Each of the business policies provide as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury, property damage, personal injury, or advertising injury** to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments. This insurance applies only:

1. to **bodily injury or property damage** caused by an occurrence which takes place in the coverage territory during the policy period;

2. to **personal injury** caused by an **occurrence** committed in the **coverage territory** during the policy period. The **occurrence** must arise out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

3. to **advertising injury** caused by an **occurrence** committed in the **coverage territory** during the policy period. The **occurrence** must be committed in the course of advertising your goods, products or services."

Similarly the commercial liability umbrella policy provides:

This insurance applies only:

1. to **bodily injury or property damage** caused by an **occurrence** which takes place in the **coverage territory** during the policy period;

2. to **personal injury** caused by an **occurrence** committed in the **coverage territory** during the policy period. The **occurrence** must arise out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

3. to **advertising injury** caused by an **occurrence** committed in the **coverage territory** during the policy period. The **occurrence** must be committed in the course of advertising your goods, products or services.

All of the policies define **"personal injury", "occurrence"** and **"advertising injury"** as follows:

"personal injury means injury, other than **bodily injury,** arising out of one or more of the following offenses:

a. false arrest, detention or imprisonment;

b. malicious prosecution;

c. wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, by or on behalf of its owner, landlord or lessor;

d. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

e. oral or written publication of material that violates a person's right of privacy;

"**occurrence**" means:

b. the commission of an offense, or a series of similar or related offenses, which results in **personal injury** or **advertising injury**.

"**Advertising injury**" means injury arising out of one or more of the following offenses:

a. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. oral or written publication of material that violates a person's right of privacy;

c. misappropriation of advertising ideas or style of doing business; or

d. infringement of copyright, title or slogan.

The three business policies contain the following exclusions (recited in pertinent part):

Under Coverage L, this insurance does not apply:

to **bodily injury** or **property damage:**

b. to any person or property which is the result of willful and malicious acts of the insured.

to **bodily injury, property damage** or **personal injury** due to rendering or failure to render any professional services or treatments. This includes but is not limited to:

h. chiropractic, massage, physiotherapy, chiropody or osteopathy services or treatments and

to **personal injury** or **advertising injury** :

c. arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;

The commercial liability umbrella policy contains similar exclusions:

Under coverage L- Business Liability, this insurance does not apply:

1. to **bodily injury** or **property damage:**

b. to any person or property which is the result of willful and malicious acts of the insured.

18. to **personal injury** or **advertising injury:**

c. arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;

The Arrowhead/Brown Defendants have demanded that Plaintiff provide liability coverage and a defense to them for the claims asserted against them by the State Court Plaintiffs under one or more of the policies of insurance issued by the Plaintiff. The Plaintiff is providing a defense after having sent reservation of rights letters to the Defendants in March 2005.

Plaintiff filed the instant Motion for Summary Judgment arguing that although the claims made by the State Court Plaintiffs may come within the definitions of the terms covered, the claims are excluded from coverage under the policies in question. Plaintiff points to two exclusions: (1) that the insurance does not apply to bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments, including chiropractic services or treatment; and (2) that the insurance does not apply to personal injury or advertising injury arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.

Plaintiff additionally seeks summary judgment with regard to all waiver, estoppel and laches defenses raised by any of the defendants.

The Arrowhead/Brown Defendants have additionally filed a cross-motion for summary judgment in which they argue that they are entitled to summary judgment on the issue of the duty to defend.

CONCLUSIONS OF LAW

Standard on a Motion for Summary Judgment

O.C.G.A. §9-11-56© provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party may prevail on a motion for summary judgment by "showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case." Lau's Corp. v. Haskins, 261 Ga. 491 (1991). The court is required to construe all evidence and all reasonable deductions in favor of the non-moving party and to give the non-moving party the benefit of every doubt and every reasonable inference. Bearden v. Bearden, 231 Ga.App. 182 (1998).

I. Plaintiff's Motion for Summary Judgment

A. Whether Plaintiff is entitled to summary judgment on the issue of whether there is no duty to defend or indemnify Arrowhead/Brown defendants in the underlying civil action.

Plaintiff argues it has no duty to defend or indemnify the Arrowhead/Brown Defendants

because the claims as alleged by the State court Plaintiffs in the underlying action are excluded from coverage.

Plaintiff argues that the claims of the State Court Plaintiffs are not property damage, bodily injury or advertising injury. It concedes that the alleged actions of the Arrowhead/Brown Defendants are within the definition of "personal injury" since the suit contains allegations of violations of the State Court Plaintiffs' privacy rights. State Farm argues however, that the claims are excluded from coverage based on the following two different exclusions contained in the three business policies: (1) claims of personal injury due to rendering or failure to render any professional services or treatments including chiropractic services or treatments; and (2) claims of personal injury arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured. (The umbrella policy contains a similarly worded exclusion for the willful violation of a penal statute. It additionally has Malpractice and Professional Services Exclusion Endorsement.)

1. Whether the exclusion for claims of personal injury due to rendering or failure to render any professional services or treatments including chiropractic services or treatments applies.

Plaintiff agues that the State Court Plaintiffs' claims are clearly excluded from coverage based upon the exclusion for personal injury due to rendering or failing to render any professional services or treatments including chiropractic services or treatments which is contained in the business policy.

The specific language of the exclusions contained in the business policy is that the insurance does not apply:

10. to **bodily injury, property damage** or **personal injury** due to rendering or failure to render any professional services or treatments. This includes but is not limited to:

h. chiropractic, massage, physiotherapy, chiropody or osteopathy services or treatments.

The similar language in the umbrella policy which is contained in the Malpractice and Professional Services Exclusion Endorsement provides that the insurance does not apply to any claim or expense arising out of

1. the rendering of or failure to render

b. any service or treatment conducive of health or of a professional nature . . . .

Plaintiff argues that the claims are excluded by the above provision since the State Court Plaintiffs went to the Arrowhead/Brown Defendants seeking chiropractic treatment and services. Therefore, they argue, the alleged violation arose from the rendering or failing to render those chiropractic services. Plaintiff points to language from the case of BBL-McCarthy, LLC v. Baldwin Paving Company, 285 Ga. App. 494, 498 (2007) in which the Court of Appeals previously construed the phrase "arising out of" very broadly, finding that they had previously construed "arising out of" as meaning "had its origins in", "grew out of" or "flowed from". Id. at 498. Therefore, Plaintiff argues that since a chiropractor's improper disclosure of confidential patient information "arises out of" rendering or failing to render professional services, the claims are excluded from coverage.

"... exclusions in an insurance policy are to be interpreted narrowly in favor of the insured, 'on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms.'" [cit omitted]. Rentrite, Inc.v. Sentry Select Ins. Co., 2008 WL 4309141 (2008).

The allegation by the State Court Plaintiffs is that their common law right to privacy was violated when certain information was disclosed by the call center at the Arrowhead/Brown clinic to attorney John E. King. The exclusion provided in the business policies refer to a "personal injury" "due to rendering or failure to render" professional services. These policies do not contain the language "arising out of" as used in the exclusion in the umbrella policy. Even if the Court was persuaded by the argument of the Plaintiff that the claims of the State Court Plaintiffs "arose out of" the rendering or failure to render professional services, there still remains an issue as to the language contained in the business policy exclusions.

The Court finds that the claims for breach of privacy were not "due to" the rendering or failure to render professional services. In fact, there remains a question of fact as to whether the State Court Plaintiffs were even treated prior to their meeting with a representative of the John E. King law firm. (One State Court Plaintiff testified that she spoke with a representative of the law firm prior to being treated for her injuries.) Because the Court must narrowly construe the language of the exclusions, the Court finds that the claims for breach of privacy were not due to the rendering or failure to render professional services.

Plaintiff's motion for summary judgment on this issue is DENIED.

2. Whether the exclusion for claims of personal injury arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured applies.

Plaintiff additionally argues that the State Court Plaintiffs' claims are excluded from coverage as the result of the willful violation of a penal statute, HIPPA, for the purposeful disclosure of confidential patient information by the Arrowhead/ Brown defendants to attorney

John E. King. Plaintiff argues that the fact that HIPPA establishes criminal penalties for a person who knowingly discloses individual identifiable health information to another person makes it a penal statute.

Both the State Court Plaintiffs and the Arrowhead/ Brown Defendants argue that HIPPA is not even mentioned in the allegations of the State Court Plaintiffs in their underlying complaint or amended complaint. They argue that what the State Court Plaintiffs claim is a violation of their common law right to privacy. The Arrowhead/Brown Defendants additionally argue that in order for there to be a violation of HIPPA, there must be a disclosure of "identifiable health information" and no such information was disclosed.

Pretermitting whether there has been a disclosure of "identifiable health information", the Court is persuaded by the argument of the State Court Plaintiffs and the Arrowhead/Brown Defendants that there is no allegation in the underlying complaint or amended complaint that there was a violation of HIPPA. Instead, the State Court Plaintiffs allege a violation of their common law right to privacy.

"As a general rule, 'the duty to defend is determined by the contract; and since the contract obligates the insurer to defend claims asserting liability under the policy[,] even if groundless, the allegations of the complaint against the insured are looked to to determine whether a liability covered by the policy is asserted.'" [cit. omitted]. Utica Mutual Insurance Company v. Kelly & Cohen, Inc., 233 Ga. App. 555, 556, 504 S.E. 2d 510 (1998). The Court finds that since the State Court Plaintiffs made no allegations of a violation of HIPPA, Plaintiff cannot use that as the basis for the exclusion of insurance under the policy. Therefore, the Court finds that the above exclusion from insurance is not applicable. Plaintiff's motion for summary

judgment on this issue is DENIED.

B. Whether Plaintiff is entitled to summary judgment on the issue of all waiver, estoppel and laches defenses.

Plaintiff argues that it is entitled to summary judgment on all waiver, estoppel and laches defenses raised by any defendants in their Answers to the Complaint for declaratory judgment.

Plaintiff argues that the State court Plaintiffs do not have standing to assert any waiver, estoppel or laches defenses or to complain about the way in which the Plaintiff reserved its rights or to the timing of the filing of the declaratory judgment action. The Arrowhead/Brown Defendants continue to point to the same arguments they raised in their Motion to Dismiss.

The State court Plaintiffs have no standing to assert these defenses. See e.g. Capital Indemnity Corporation v. Fraley, 266 Ga. App. 561 (2004) (plaintiff in the underlying damage suit has no standing to assert the defenses of waiver or estoppel in the insurer's declaratory judgment action); Danforth v. Government Employees Insurance Company, 282 Ga. App. 421, 428-429 (2006). Additionally, this issue has already been decided adverse to the Defendants in this Court's order of April , 2008 on the Defendants' Motion to Dismiss. Therefore, Plaintiff's Motion for Summary Judgment on the issue of any waiver, estoppel or laches defenses is hereby GRANTED.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for summary judgment is DENIED in part and GRANTED in part.

II. Arrowhead/Brown Defendant's Cross-Motion for Summary Judgment

The Arrowhead/Brown defendants have filed a cross-motion for summary judgment arguing that they are entitled to judgment on the issue of Plaintiff's duty to defend them in the

underlying action.

"[A]n insurer's duty to pay and its duty to defend are separate and independent obligations." [cit. omitted]. Utica Mutual Insurance Company v. Kelly & Cohen, Inc., 233 Ga. App. 555, 556, 504 S.E. 2d 510 (1998). An insurer's duty to defend is broader than its duty to indemnify. See Penn-America Ins. Co. V. Disabled American Veterans, 224 Ga. App. 557, 559, 481 S.E. 2d 850 (1997). "The true rule is that the duty to defend is determined by the contract; and since the contract obligates the insurer to defend claims asserting liability under the policy; even if groundless, the allegations of the complaint are looked to to determine whether a liability covered by the policy is asserted." [cit.omitted]. Great American Insurance Company v. McKemie, 244 Ga. 84, 85, 259 S.E. 2d 39 (1979). Therefore, "it is only where the complaint sets forth true factual allegations showing no coverage that the suit is one for which liability insurance coverage is not afforded and for which the insurer need not provide a defense. [Cit]" Utica supra.

In order to determine whether Plaintiff has a duty to defend, the Court must consider the allegations of the complaint in the state court action together with the relevant policy language and determine whether a liability covered by the policy is asserted. In the underlying complaint, the State Court Plaintiffs allege a violation of their common law right of privacy. The Court finds that this alleged violation is covered by the policy because this disclosure would come within the definition of a personal injury, since the allegations are that this injury arose out of an oral or written publication of material that violates a person's right of privacy.

Therefore, the Court finds that the Plaintiff has a duty to defend the Arrowhead/Brown Defendants in the underlying complaint filed against the Arrowhead/Brown Defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Arrowhead/Brown Defendants cross-motion for summary judgment on the issue of Plaintiff's duty to defend is hereby GRANTED.

SO ORDERED this 10th day of November, 2008.

JAMES F. BASS, JR., Judge
Superior Court of Chatham County
State of Georgia

cc: All parties