64 N.Y.2d 304
Court of Appeals of New York.

SEABOARD SURETY COMPANY, Appellant,
v.
GILLETTE COMPANY et al., Respondents.

Dec. 27, 1984.

Synopsis

The Supreme Court, Appellate Division, 99 A.D.2d 736, 472 N.Y.S.2d 863,affirmed order of the Supreme Court, New York County, David H. Edwards, Jr., J., which, inter alia, declared that insurer breached its duty to defend insureds under separate but similar insurance policies, and insurer appealed. The Court of Appeals, Jasen, J., held that since some of claims against insureds were within general inclusory provisions of policies and were not unambiguously excepted from coverage by exclusions, insurer had duty to defend irrespective of veracity of complaint allegations, ultimate liability of insureds or ultimate obligation of insurer under its duty to indemnify.

Order affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (7)

[1] **Insurance** In general; standard

Where insurance policy includes insurer's promise to defend insured against specified claims as well as to indemnify for actual liability, insurer's duty to furnish defense is broader than its obligation to indemnify.

86 Cases that cite this headnote

[2] **Insurance** Pleadings

Insurer's duty to defend arises whenever allegations in complaint against insured fall within scope of risks undertaken by insurer, regardless of how false or groundless such allegations might be.

112 Cases that cite this headnote

[3] **Insurance** Pleadings

Insurance Several Grounds or Causes of Action

Insurer's duty to defend is not contingent on insurer's duty to indemnify should insured be found liable, nor is it material that complaint against insured asserts additional claims which fall outside policy's general coverage or within its exclusory provisions, but duty to defend rests solely on whether complaint alleges any facts or grounds which bring action within protection purchased.

126 Cases that cite this headnote

[4] **Insurance** Exclusions and limitations in general

Whenever insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language.

140 Cases that cite this headnote

[5] **Insurance** Exceptions, exclusions or limitations

Insurance Exclusions and limitations in general

Any exclusions or exceptions from insurance policy coverage must be specific and clear in order to be enforced; they are not to be extended by interpretation or implication, but are to be accorded strict and narrow construction.

177 Cases that cite this headnote

[6] **Insurance** Burden of proof

Before insurance company is permitted to avoid policy coverage, it must satisfy burden which it bears of establishing that exclusions or exemptions apply in particular case.

124 Cases that cite this headnote

[7] **Insurance** Pleadings

Where some of claims against insureds fell within general inclusory provisions of policies and were not unambiguously excepted from coverage by exclusions, insurer had duty to defend as soon as action was brought against insureds, irrespective of veracity of complaint allegations, ultimate liability of insureds or ultimate obligation of insurer under its duty to indemnify.

169 Cases that cite this headnote

Attorneys and Law Firms

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John M. Friedman, Jr., and Joseph Zelmanovitz, New York City, for respondents.

***307** *****874** **OPINION OF THE COURT**

JASEN, Judge.

The question presented on this appeal is whether the exclusions from liability coverage contained in the insurance policies at issue negate the insurer's duty to defend.

****273** This is an action brought by Seaboard Surety Company (Seaboard) for a declaratory judgment that it had no duty to defend or indemnify The Gillette Company (Gillette) or J. Walter Thompson Company (Thompson) under separate but similar insurance policies, each known as a "Libel, Slander, Copyright, Piracy, Plagiarism, and Privacy Liability Policy" (Libel Policy). Previously, Seaboard had refused to defend Gillette and Thompson in a suit brought against them by the Alberto-Culver Company (Alberto).

In 1974, a product manufactured by Gillette was advertised on national television in a commercial prepared by Thompson. The commercial compared a rival product manufactured by Alberto unfavorably to Gillette's product in a demonstration depicting the supposed advantages of the latter. Alberto brought suit in Federal court in Chicago against both Gillette and Thompson, seeking damages and injunctive relief on the ground that its product had been wrongfully portrayed. Alberto's complaint included claims of unfair competition, deceptive trade practices, consumer fraud and deceptive business practices, and common-law libel. Alberto alleged, *inter alia,* that the commercial "falsely implie[d]" deficiencies in its product, "falsely" and "unfairly disparage[d] [plaintiff's] business", its reputation "and its * * * products", and featured Alberto's trademark "without [plaintiff's] authorization or consent". The complaint specifically asserted violations of several Federal and State laws, including an Illinois statute prohibiting deceptive trade practices (defined as "disparag[ing] the goods, services or business of another by false or misleading representation of fact" [Ill.Rev.Stat., 1973, ch. 121½, § 270a, subd. (a); §§ 311–313]), and another ***308** prohibiting the unauthorized use of brand names or trademarks (Ill.Rev.Stat., 1973, ch. 140, §§ 26, 28).

At the commencement of the Alberto action, Gillette and Thompson requested that Seaboard provide them with a defense under their separate insurance policies. Seaboard disclaimed all coverage under the policies and declined. Repeated requests throughout the course of the action met with continued refusal. Finally, in 1979, the Alberto action was settled by Gillette and Thompson and they demanded that Seaboard pay their settlement as well as defense costs. Again Seaboard refused.

Shortly thereafter, Seaboard commenced this action for a declaration that it properly refused to defend Gillette and Thompson in the Alberto action, and that it has no duty to indemnify them for any part of the settlement in that action or for any costs or legal expenses they incurred. Gillette and Thompson counterclaimed for reimbursement of their defense costs and for the amount of the settlement. The action against Gillette was dismissed by Special Term by reason of the pendency of a similar action instituted by Gillette in Massachusetts. In the action against Thompson, Special Term granted that party's motion for partial summary judgment, holding that Seaboard had a duty to defend Thompson in the Alberto action, despite the possible limitations on Seaboard's duty to indemnify. The Appellate Division affirmed, without an opinion.[1]

In the interim, the Appellate Division reversed Special Term's prior dismissal of Seaboard's action as against Gillette. Then, in a motion identical to Thompson's, Gillette sought partial

summary judgment on Seaboard's duty to defend, and both Gillette and Thompson sought summary judgment awarding them actual defense costs incurred in the Alberto action or an immediate trial to determine the amount of damages.[2] Special Term granted Gillette's **274 ***875 motion on Seaboard's duty to defend and granted the joint motion by ordering a severance and trial on the defense cost claims.

The Appellate Division affirmed, again without opinion, and subsequently granted Seaboard's motion for leave to appeal to *309 this court certifying the following question: "Was the order of the Supreme Court, as affirmed by this Court, properly made?" We now affirm, 99 A.D.2d 736, 472 N.Y.S.2d 863, and answer the certified question in the affirmative for the following reasons.

The insurance policies issued by Seaboard to Gillette and Thompson, in effect at all relevant times, are virtually identical. They each contain sections which outline with some specificity what is covered and what is excluded from coverage. Under the heading "insuring agreements", each policy contains the following pertinent provisions describing the scope of coverage:

"Indemnity 1. To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, as the result of any final judgment for money damages resulting from

"(a) libel, slander, defamation or

"(b) any infringement of copyright or of property rights or title or of slogan or

"(c) piracy, plagiarism or unfair competition or idea misappropriation under implied contract or

"(d) any invasion of rights of privacy committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Insured's advertising activities.[3]

"Service 2. To defend, in the name and on behalf of the Insured, any suit seeking damages for any of the above causes, even if such suit is groundless, false or fraudulent."

Under the heading "this agreement is subject to the following conditions", each policy contains a list of what is not included in its coverage. As modified by certain endorsements, these sections provide in pertinent part:

"Exclusions A. This Policy does *not* cover any liability for:

"4. Incorrect description of any article or commodity, or any claim or suit based upon or arising out of alleged false, misleading, deceptive, fraudulent or misrepresenting advertising or to any claim or suit for unfair competition based thereon.[4]

*310 "8. Any claim, suit or action brought against the Insured because of an act committed by that Insured with knowledge the same constituted any of the hazards insured by this policy."[5]

While Seaboard concedes that the allegations in the Alberto complaint fall within the scope of the inclusory sections of each policy entitled "insuring agreements", it, nevertheless, contends that the exclusory provisions upon which the agreements are explicitly conditioned negate coverage for the Alberto action and, thereby, freed it from any duty to defend Gillette and Thompson therein. Under the rules governing an insurer's duty to defend and the effect to be given exclusory provisions in a policy, Seaboard's contentions must fail and the policies in question must be construed to provide Gillette and Thompson with coverage for defending against the Alberto action.

[1] [2] [3] Where an insurance policy includes the insurer's promise to defend the insured against specified claims as well as **275 ***876 to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify. (*International Paper Co. v. Continental Cas. Co.,* 35 N.Y.2d 322, 326, 361 N.Y.S.2d 873, 320 N.E.2d 619; *Lionel Freedman, Inc. v. Glens Falls Ins. Co.,* 27 N.Y.2d 364, 368, 318 N.Y.S.2d 303, 267 N.E.2d 93.) The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. (*Goldberg v. Lumber Mut. Cas. Ins. Co.,* 297 N.Y. 148, 154, 77 N.E.2d 131.) The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection

purchased. (*Ruder & Finn v. Seaboard Sur. Co.,* 52 N.Y.2d 663, 669–670, 439 N.Y.S.2d 858, 422 N.E.2d 518; *Schwamb v. Fireman's Ins. Co.,* 41 N.Y.2d 947, 949, 394 N.Y.S.2d 632, 363 N.E.2d 356; *Utica Mut. Ins. Co. v. Cherry,* 38 N.Y.2d 735, 737, 381 N.Y.S.2d 40, 343 N.E.2d 758; *Prashker v. United States Guar. Co.,* 1 N.Y.2d 584, 590, 592, 154 N.Y.S.2d 910, 136 N.E.2d 871.) Though policy coverage is often denominated as "liability insurance", where the insurer has made promises to defend "it is clear that [the coverage] is, in fact, 'litigation insurance' as well." (*International Paper Co. v. Continental Cas. Co., supra,* 35 N.Y.2d, at p. 326, 361 N.Y.S.2d 873, 320 N.E.2d 619.) As such, "[s]o long as the claims [asserted against the insured] may rationally be said to fall within policy coverage, whatever may later prove to be the limits of the insurer's responsibility to pay, ***311** there is no doubt that it is obligated to defend." (*Schwamb v. Fireman's Ins. Co., supra,* 41 N.Y.2d, at p. 949, 394 N.Y.S.2d 632, 363 N.E.2d 356.)

[4] **[5]** **[6]** Moreover, whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so "in clear and unmistakable" language. (*Kratzenstein v. Western Assur. Co.,* 116 N.Y. 54, 59, 22 N.E. 221; see, also, *Hartol Prods. Corp. v. Prudential Ins. Co.,* 290 N.Y. 44, 49–50, 47 N.E.2d 687.) Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. (*Taylor v. United States Cas. Co.,* 269 N.Y. 360, 363, 199 N.E. 620; *Griffey v. New York Cent. Ins. Co.,* 100 N.Y. 417, 421, 3 N.E. 309; *Rann v. Home Ins. Co.,* 59 N.Y. 387, 389; see, also, *Wagman v. American Fid. & Cas. Co.,* 304 N.Y. 490, 109 N.E.2d 592.) Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case (*Neuwirth v. Blue Cross & Blue Shield,* 62 N.Y.2d 718, 476 N.Y.S.2d 814, 465 N.E.2d 353; *Prashker v. United States Guar. Co.,* 1 N.Y.2d 584, 592, 154 N.Y.S.2d 910, 136 N.E.2d 871, *supra; Slocovich v. Orient Mut. Ins. Co.,* 108 N.Y. 56, 66, 14 N.E. 802), and that they are subject to no other reasonable interpretation (cf. *International Paper Co. v. Continental Cas. Co., supra,* 35 N.Y.2d, at p. 325, 361 N.Y.S.2d 873, 320 N.E.2d 619; *Hoffman v. Aetna Fire Ins. Co.,* 32 N.Y. 405, 413–415).

[7] Here, it cannot be said that the provisions of the insurance policies clearly negated Seaboard's duty to defend against every allegation asserted in Alberto's complaint. Some of the claims against Gillette and Thompson fall within the general inclusory provisions of the policies and are not unambiguously excepted from coverage by the exclusions. The inclusory provisions contained in the sections titled "insuring agreements" explicitly predicate the duty to defend on the commencement against the insureds of "*any suit seeking damages* for any of the above causes". (Emphasis added.) Consistent with the case law, these provisions triggered Seaboard's duty to defend as soon as Alberto brought an ****276** *****877** action alleging, as it did, such misconduct as disparagement of Alberto and its products, unauthorized use of Alberto's brand name or trademark, unfair competition, and common-law libel—all of which fairly fall within the scope of the various torts listed in the inclusory provisions of the policies. The veracity of the allegations and the ultimate liability of Gillette and Thompson, as well as the ultimate obligation of Seaboard "to pay by reason of liability", under its duty to indemnify, are irrelevant to its duty to defend.

Nor do the particular exclusory provisions relied upon by Seaboard negate its duty to defend under the facts in this case. If ***312** Seaboard is to be "relieved of [its] duty to defend it is obligated to demonstrate that the allegations of the complaint cast that pleading *solely* and *entirely* within the policy exclusions, and, further, that the allegations, *in toto,* are subject to no other interpretation." (*International Paper Co. v. Continental Cas. Co., supra,* 35 N.Y.2d, at p. 325, 361 N.Y.S.2d 873, 320 N.E.2d 619 [emphasis added].) But Alberto's complaint against Gillette and Thompson did include allegations which were not explicitly listed in the exclusions. Alberto's claims of product disparagement and misuse of trademark in violation of Illinois's consumer fraud and deceptive trade practices laws—which are not disputed by Seaboard to fall within the scope of the policy's general inclusions—cannot be said "solely and entirely" to fall within either of the exclusory provisions relied upon by Seaboard. Neither of these claims is contingent upon an "[i]ncorrect description" of the insured's own product[6] and neither of these claims is exclusively predicated upon allegations of knowing, willful or intentional conduct on the part of Gillette or Thompson. Rather, as they are stated in Alberto's complaint, these claims allege facts and grounds which brought the lawsuit within the coverage of the policies and which Seaboard has failed to demonstrate fall necessarily within the policies' exclusions.

In sum, appellant insurer has not established on this motion for summary judgment that as a matter of law it has no duty to defend. "A declaration that there is no obligation to defend

could now properly be made only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy" (*Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 39 N.Y.2d 875, 876, 386 N.Y.S.2d 221, 352 N.E.2d 139).

We have considered appellant's other contentions and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed, and the certified question answered in the affirmative.

COOKE, C.J., and JONES, WACHTLER, MEYER, SIMONS and KAYE, JJ., concur.
Order affirmed, etc.

All Citations

64 N.Y.2d 304, 476 N.E.2d 272, 486 N.Y.S.2d 873

Footnotes

1 Subsequently, the Appellate Division denied Seaboard's motion for reargument or for leave to appeal to this court. Thereafter, this court dismissed Seaboard's motion for leave to appeal by reason of nonfinality of the Appellate Division's order.

2 When Gillette moved for partial summary judgment, Seaboard cross-moved for a stay pending the outcome of its appeal on Thompson's motion. Special Term granted the stay and did not consider the instant motions—i.e., Gillette's motion and its joint motion with Thompson—until the Appellate Division affirmed the partial summary judgment granted in Thompson's favor.

3 This clause in Thompson's policy concluded with "arising out of the Insured's business of Advertising Agents."

4 This exclusion, as stated, is set forth in an endorsement to exclusion No. 4 in the Gillette policy and to exclusion No. 5 in the Thompson policy.

5 This exclusion appears as No. 9 in the Thompson policy.

6 The parties agree that this is the meaning of the "Incorrect description" exclusion.