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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LINDSEY FINANCIAL, INC. et al., Plaintiffs and Appellants, v. AMERICAN AUTOMOBILE INSURANCE COMPANY, Defendant and Respondent.	E067037 (Super.Ct.No. CIVDS1511650) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Fransen and Molinaro and Nathan W. Fransen for Plaintiffs and Appellants.

Hager & Dowling, Lora D. Hemphill and Christine W. Chambers for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs and appellants, Lindsey Financial, Inc. and its owner, William Lindsey (collectively Lindsey), purchased a "Life Insurance Agents Errors and Omissions" policy

of insurance from defendant and respondent, American Automobile Insurance Company (AAIC). Lindsey's clients, the Walkers, paid Lindsey $115,000 for financial planning advice and sued Lindsey after they discovered the Internal Revenue Service had identified Lindsey's recommended financial plan as a tax avoidance scheme. AAIC refused to indemnify or defend Lindsey against the Walker complaint.

In this action, Lindsey sued AAIC for (1) breach of the AAIC policy and (2) breach of the covenant of good faith and fair dealing, or bad faith. The trial court granted AAIC's motion for summary judgment and entered judgment in favor of AAIC. Lindsey appeals, claiming AAIC had a duty to indemnify and defend Lindsey against the Walker complaint. We affirm. The undisputed evidence shows AAIC had no duty to indemnify or defend Lindsey against the claims alleged in the Walker complaint.

II. BACKGROUND

A. *The Walker Complaint*

On February 7, 2014, David Walker, Curtis Walker, and Walker Brothers Machinery Moving, Inc. (Walker Brothers) (collectively, the Walkers) filed the Walker complaint against Lindsey in San Bernardino County Superior Court case No. CIVDS1401401. The Walker complaint alleged causes of action for fraud and deceit, fraud—suppression of fact/concealment, negligent misrepresentation, negligence, breach of written contract, and breach of the implied covenant of good faith and fair dealing. According to the Walker complaint, Lindsey Financial, Inc. is a financial planning firm that holds itself out as an expert in "'tax and estate strategies.'" William Lindsey

represented that he had 25 years' experience in "wealth, estate, and charitable planning" for high net worth clients.

On December 1, 2012, the Walkers and Lindsey entered into "Financial Planning Agreements" for Lindsey's provision of "'financial planning'" concerning the Walkers' "personal and business tax positions for 2012." "A major component" of Lindsey's "'tax planning'" involved the Walkers' use of a limited liability company called SZ Industries, LLC (the LLC) as a "'passed through'" entity for tax purposes—that is, the LLC's income was to be passed through to and taxed to its owners. Lindsey's plan was to have the LLC issue 5,000 membership units, 100 voting units and 4,900 nonvoting units, to David and Curtis Walker and their spouses. David and Curtis Walker and their spouses were to then gift their collective 4,900 nonvoting units, representing 98 percent of the LLC's equity, to the National Outreach Foundation Incorporated, a 501(c)(3) tax-exempt organization (the tax exempt entity).

The transaction "theoretically" would have allowed the Walkers "to shift certain tax burdens" to the tax exempt entity and also would have allowed the Walkers to claim a charitable deduction for transferring the nonvoting units to the tax exempt entity. The LLC's sole asset was to be "a static list of current customers" of Walker Brothers, valued at approximately $7 million at the time of the transfer, and Walker Brothers was to make monthly payments to the LLC for the use of the customer list. The tax exempt entity was to receive 1 percent to 3 percent of the income from Walker Brothers's use of the customer list, while the rest of the income was to remain in the LLC, "with, arguably,

98% of these amounts allocable" to the tax exempt entity as "unrelated business taxable income." As the owners of the LLC's voting units, David and Curtis Walker and their spouses would have had the power "to determine the amount and timing of any distributions made with respect to" their voting units and the tax exempt entity's nonvoting units.

Lindsey "aggressively" marketed this "factual scenario" or financial plan to the Walkers as a "perfectly legal method of limiting their tax liability," but Lindsey did not tell the Walkers that this factual scenario "fit[] squarely within" what the Internal Revenue Service had deemed a "tax avoidance scheme" in Internal Revenue Bulletin 2004-17. The Walkers were planning to implement the financial plan when, around March 2013, they were informed of its "potentially adverse legal consequences." By that time, the Walkers had paid Lindsey $115,000. The Walker complaint sought "general," "special," and "punitive damages" from Lindsey, according to proof.

B. *Lindsey's Tender of the Walker Complaint to AAIC*

In March 2014, Lindsey tendered its defense of the Walker complaint to AAIC. In May 2014, AAIC denied it had a duty to defend or indemnify Lindsey against the claims alleged in the Walker complaint because it did not allege a potential for liability based on the rendering or the failure to render "Professional Services" concerning a "Covered Product," as those terms are defined in the AAIC policy, among other reasons. Instead, AAIC explained, the Walker complaint centered solely on the tax advice Lindsey had provided to the Walkers.

Lindsey disputed AAIC's position on the ground Lindsey's financial planning agreements with the Walkers included proposed services involving covered products, such as insurance. Lindsey further argued that because Lindsey provided financial planning strategies that "contemplated" selling insurance products, AAIC had a duty to defend Lindsey against the Walker complaint. Lindsey did not explain how the financial planning advice it provided to the Walkers related solely to a "Covered Product" as the AAIC policy required.

In response, AAIC reiterated that the Walker complaint did not allege facts that could be construed to encompass potential liability for a "Wrongful Act" in the rendering/failure to render "Professional Services" solely related to a "Covered Product" as the AAIC policy required. AAIC pointed out that the contemplated sale of insurance, as asserted by Lindsey, could not establish potential liability coverage under the policy because the Walkers never accepted Lindsey's advice and recommendations concerning insurance products. Lindsey responded that AAIC had a duty to defend them against the Walker complaint because its alleged causes of action *could potentially* encompass the proposed sale of insurance and other covered products. Lindsey claimed the duty to defend was also triggered because it spent time on the financial planning component of the Walkers' financial plan which incorporated the purchase of life insurance.

C. *Lindsey's Action Against AAIC and AAIC's Motion for Summary Judgment*

Lindsey filed this action against AAIC on August 12, 2015, alleging two causes of action for (1) breach of the AAIC policy and (2) breach of the covenant of good faith and

fair dealing, or bad faith. In an interrogatory response, Lindsey admitted the Walkers declined to proceed with or purchase any insurance-related services from Lindsey, although Lindsey had analyzed David's and Curtis Walker's life insurance needs.

In May 2016, AAIC moved for summary judgment on Lindsey's complaint, and the trial court granted the motion. At the hearing on the motion, the trial court noted that "[t]he alleged wrongful acts within the Walker [c]omplaint relate to improper tax advice, with no indication such tax advice [involved] the tax consequences or benefits in obtaining life insurance" or other insurance. Thus, the court ruled, AAIC had no duty to indemnify or defend Lindsey against the Walker complaint and, therefore, AAIC did not act in bad faith in investigating and denying coverage or a defense to the Walker complaint. Lindsey timely appeals from the judgment in favor of AAIC.

D. *The AAIC Policy*

Coverage under the AAIC policy is limited to a "Loss" resulting from a "Claim" alleging a "Wrongful Act" concerning a "Covered Product," as the AAIC policy defines these terms. Here, we set forth the pertinent provisions of the AAIC policy in their technical detail, including the policy's pertinent defined terms.

The AAIC policy provides: "We will pay on the Agent's behalf all Loss which such Agent is legally obligated to pay as a result of a Claim first made against such Agent or its Agency/Agency Staff and reported to Us during the Policy Period in accordance with Section VI. Conditions I.2, provided that such Claim is for a Wrongful Act in the rendering of or failure to render Professional Services in connection with a Covered

Product . . . ." Section III. R. of the AAIC policy defines a "Wrongful Act" as "[a]ny actual or alleged negligent act, error or omission, or negligent misstatement or misleading statement by any Agent or its Agency/Agency Staff in the rendering of or failure to render Professional Services."

Section III. N. of the AAIC policy (as replaced by the policy's Coverage Level II endorsement), defines "Professional Services" as "the following services rendered in connection with a Covered Product by the Agent/Agency Staff to a Client in the conduct of such Agent's profession as a Life or Accident and Health Insurance Agent or Broker, General Agent or Broker, a Property & Casualty Insurance Agent or Broker, [or] a Notary Public," so long as such agent is properly licensed to render such services on any date which a wrongful act involving such services is alleged to have occurred:

"1. Soliciting (whether directly or indirectly), negotiating, placing, recommending, selling or servicing a Covered Product; but not including the surrender, conversion or any alteration of a Covered Product in order to acquire or invest in anything other than a Covered Product; [¶] 2. Providing advice or consulting *solely related* to a Covered Product, including financial planning or consulting *solely related* to a Covered Product but not including any advice or recommendation to in any way convert, redeem or alter a Covered Product in order to acquire or invest in anything other than a Covered Product." (Italics added.)

"Covered Product[s]" are enumerated in Section III. F. and include the following products offered by a Product Provider: "1. Life insurance, other than Variable Life Insurance products; [¶] 2. Accident and Health Insurance; [¶] 3. Disability Income Insurance; [¶] 4. Fixed Annuities, including Individual Retirement Annuities; or [¶] 5. Group Employee Benefit Plans, Life, Accident and Health Plans or Disability Plans, provided such Plans are fully insured at all times, but not including Group or Ordinary Pension or Profit Sharing Plans, Individual Retirement Accounts, Keogh Plans, 401(k) or 501(b) Plans; or [¶] 6. Expert witness testimony."

Exclusion J. of the AAIC policy excludes coverage for claims based on financial planning and tax advice, except where directly related to a covered product. Exclusion J. provides: "We shall not be liable to make any payment for Loss in connection with any Claim: [¶] . . . [¶] J. Based upon, arising out of or in any way involving any services performed by the Insured, . . . as: [¶] . . . an accountant, . . . tax preparer or advisor (except for tax advice provided directly concerning a Covered Product), . . . *a financial planner* or registered investment adviser, except as to services directly related to a Covered Product." (Italics added.)

III. DISCUSSION

A. *Standard of Review on Summary Judgment*

We review an order granting summary judgment de novo. (*Merrill* v. *Navegar, Inc.* (2001) 26 Ca1.4th 465, 476.) Summary judgment is properly granted where there

are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

A defendant moving for summary judgment bears the initial burden of showing that the plaintiff's causes of action have no merit. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-851.) The defendant meets this burden by making a prima facie evidentiary showing that one or more elements of the plaintiff's causes of action cannot be established, or there is a complete defense to each cause of action. (*Id*. at p. 849; Code Civ. Proc., § 437c, subd. (*o*)(2).) If this showing is made, the burden shifts to the plaintiff to produce evidence of a triable issue of material fact concerning the element or defense. (*Aguilar v. Atlantic Richfield Co.*, *supra*, at pp. 849-850.)

B. *AAIC Had No Duty to Indemnify or Defend Lindsey Against the Walker Complaint*

"An insurance policy is a contract between an insurer and an insured." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 45.) Professional liability, or errors and omissions policies, like the AAIC policy, typically require the insurer to indemnify the insured for the insured's commission of a "wrongful act" (the duty to indemnify), and further require the insurer to defend the insured in any action brought against the insured for damages based on the insured's wrongful act (the duty to defend). (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) ¶¶ 7.2452a, 7.2500, pp. 7K-11, 7K-28.)

The insurer's duty to defend is separate from and broader than the insurer's duty to indemnify. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19 (*Waller*).) The

duty to indemnify "runs to claims that are actually covered"; in contrast, the duty to defend "runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed." (*Buss v. Superior Court*, *supra*, 16 Cal.4th at p. 46.) But "'where there is no possibility of [or potential for] coverage, there is no duty to defend . . . .'" (*Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1029.)

"The determination of whether the duty to defend arises is made by comparing the allegations of the [third party] complaint, as well as extrinsic facts, with the terms of the policy." (*Legarra v. Federal Mutual Ins. Co.* (1995) 35 Cal.App.4th 1472, 1479.) The duty to defend arises if the third party complaint pleads, or if the insurer becomes aware of, facts giving rise to the potential for coverage. (*Waller*, *supra*, 11 Cal.4th at p. 19.) "When determining whether a particular policy provides a potential for coverage and a duty to defend, we are guided by the principle that interpretation of an insurance policy is a question of law." (*Id*. at p. 18.)

Here, the trial court correctly concluded that AAIC did not have a duty either to indemnify or defend Lindsey against the claims alleged in the Walker complaint, because the undisputed evidence showed there was no coverage or potential for coverage of those claims under the AAIC policy. Under the AAIC policy, AAIC had a duty to indemnify Lindsey against a "Loss" Lindsey was legally obligated to pay as a result of a "Claim" against Lindsey for a "Wrongful Act" in the rendering of or the failure to render "Professional Services in connection with a Covered Product . . . ."

The parties agree that the Walker complaint gave rise to a potential "Loss" by Lindsey as a result of a "Claim" for a "Wrongful Act." The question we must determine, independently of the trial court, is whether the Walker complaint, or any other evidence known to AAIC, indicated that the Walkers were asserting a "Claim" against Lindsey for a "Wrongful Act" in the rendering or failure to render "*Professional Services in connection with a Covered Product . . . .*" (Italics added.)

The AAIC policy defines "Professional Services," in pertinent part, as "[p]roviding advice or consulting solely related to a Covered Product, *including financial planning or consulting solely related to a Covered Product . . . .*" "Covered Product" means certain products offered by a "Product Provider," and includes "[l]ife [i]nsurance products" but not variable life insurance products.

Thus, the AAIC policy covered a claim based on Lindsey's "financial planning or consulting" services—provided those financial planning or consulting services "solely related" to a "Covered Product." The Walker complaint did not assert any claims based on or arising out of Lindsey's "financial planning or consulting solely related to a Covered Product." Instead, it asserted fraud and other tort claims based on Lindsey's financial planning and consulting services in connection with the so-called "tax avoidance scheme"—using the LLC and the tax exempt entity to reduce the Walkers' tax liabilities. As alleged in the Walker complaint, Lindsey's financial planning and consulting services were not "solely related to" any "Covered Product." Indeed,

Lindsey's complained-of financial planning and consulting services to the Walkers had *nothing to do with* any "Covered Product."

Mirroring its limited coverage provisions, the AAIC policy also excluded coverage for claims based on "tax advice" or financial planning services that were not "directly related to a Covered Product." Exclusion J. provides: "We shall not be liable to make any payment for Loss in connection with any Claim: [¶] . . . [¶] J. Based upon, arising out of or in any way involving any services performed by the insured, . . . as: [¶] . . . an accountant, . . . tax preparer or advisor (except for tax advice provided directly concerning a Covered Product), . . . *a financial planner* or registered investment adviser, except as to services directly related to a Covered Product." (Italics added.) Although the claims alleged in the Walker complaint were based on Lindsey's "tax advice" and financial planning services to the Walkers, the tax advice and financial planning services were not "directly related to" and, indeed, had nothing to do with, any "Covered Product." Thus, the Walkers' claims were not only *not covered* by the AAIC policy; they were *excluded* from coverage.

Lindsey claims the trial court erroneously disregarded the "[n]ontax-[r]elated [s]ervices" that Lindsey provided to the Walkers in concluding that AAIC had no duty to indemnify or defend Lindsey against the claims alleged in the Walker complaint. Lindsey points to its "Financial Planning Agreement[s]" with David Walker, Curtis Walker, and Walker Brothers, which provided that Lindsey would "review and analyze," among other things, the Walkers' "life and disability insurance," "estate and tax

planning," "fee planning needs," and "money management and investment portfolio," all as part of a "substantive and comprehensive discussion integrating relevant options and possible solutions in regards to [the Walkers'] Financial Status, which shall include the following financial aspects as they relate to [the Walkers'] needs: [¶] i) Insurance; [¶] . . . [¶] v) Retirement planning."

Based on its Financial Planning Agreements with the Walkers, Lindsey argues its services to the Walkers included financial planning, advice, and consulting services, that is, "Professional Services" "solely" or "directly" related to the "Covered Products" of "Life Insurance," and "Individual Retirement Annuities." Lindsey argues it is immaterial that the Walkers did not purchase any life insurance or individual retirement annuities from Lindsey, because the AAIC policy covers a "Claim" based on a "Wrongful Act" arising out "Professional Services rendered in connection with a Covered Product," and these "Professional Services" include *not just selling*, but "[s]oliciting (whether directly or indirectly), negotiating, placing, recommending, selling or servicing a Covered Product." Thus, Lindsey argues, AAIC had a duty to indemnify and defend Lindsey against the claims alleged in the Walker complaint, because Lindsey rendered some services to the Walkers that were "solely" or "directly" related to the Covered Products of life insurance and individual retirement annuities.

This argument is unavailing, because the Walker complaint did not allege a claim arising out of a "Wrongful Act" by Lindsey in connection with Lindsey's solicitation for sale, recommendation, negotiation, or other act in connection with *any* covered product,

including *any* insurance or individual retirement annuities. Instead, the Walker complaint alleged claims based solely on Lindsey's tax advice and financial planning services rendered in connection with the "tax avoidance scheme" involving the Walkers' use of the LLC and tax exempt entity to reduce their tax liabilities. The AAIC policy both did not cover and expressly excluded coverage for these claims.

As AAIC points out, an insurer has a duty to defend its insured where the third party complaint against the insured, or other facts known to the insurer, reveal a potential for coverage. (*Waller, supra*, 11 Cal.4th at p. 19.) But "the insured may not speculate about unpled third party claims to manufacture coverage." (*Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 538.) The Walker complaint, and the facts known to AAIC, revealed no potential for coverage. There was no reason for AAIC to believe the Walkers would amend the Walker complaint to allege a claim against Lindsey arising from a wrongful act in the rendering of professional services "solely related" to a covered product. Thus, AAIC had no duty to defend or indemnify Lindsey against the Walker complaint.

Lastly, Lindsey claims the AAIC policy should be construed to cover the claims alleged in the Walker complaint because the policy did not define the phrases "solely related to" or "directly related to," and because these phrases, which are now being used to exclude coverage, were not "made conspicuous, plain, and clear" in the policy. As Lindsey points out: "In general, provisions relating to exclusions from coverage must be '"conspicuous,"' that is, 'placed and printed so that [they] will attract the reader's

attention'; and must be '"plain and clear"'—i.e., 'stated precisely and understandably, in words that are part of the working vocabulary of the average layperson. [Citations.]' [Citation.] It is the insurer's burden to make its coverage exclusions and limitations conspicuous, plain and clear. [Citation.]" (*Dominguez v. Financial Indemnity Co.* (2010) 183 Cal.App.4th 388, 396.)

Although the AAIC policy does not define the phrases "solely related to" and "directly related to," there is no need to because their meaning is made plain and clear. To begin with, the policy clearly and conspicuously provides, on page 1, under the heading "I. Coverage," that in order to be covered, a "Loss" or "Claim" must result from a "Wrongful Act in the rendering of or failure to render Professional Services in connection with a Covered Product." And, in its preamble, the policy admonishes the insured to "[r]ead this entire Policy carefully to determine Your rights and duties, Our rights and duties and what is and is not covered."

A careful reading of the policy leads the reader to section "III. Definitions," where the term "Professional Services," which is bolded throughout the policy, is defined as including: "Providing advice or consulting solely related to a Covered Product, including financial planning or consulting solely related to a Covered Product." Thus, the policy clearly defines "Professional Services" as being limited to advice, consulting, and financial planning services "solely related to a Covered Product."

The phrase "directly related to a Covered Product" appears in Exclusion J., which appears under conspicuous section "IV. Exclusions." Exclusion J. begins with the stand-

alone phrase: "We shall not be liable to make any payment for Loss in connection with any Claim," which is followed by several exclusions, set out in separate paragraphs numbered A. through U. Exclusion J. reads: "Based upon, arising out of or in any way involving any services performed by the Insured . . . as: [¶] . . . [¶] 2. . . . a financial planner . . . except as to services directly related to a Covered Product." Thus, the policy clearly excluded coverage for financial planning services not "directly related to" a covered product.

In sum, under the terms of the AAIC policy, and based on the facts known to AAIC, there was no coverage or potential for coverage of the claims alleged in the Walker complaint. For this reason, summary judgment was properly granted on Lindsey's complaint against AAIC for breach of the AAIC policy and breach of the implied covenant of good faith and fair dealing, or bad faith. As the *Waller* court observed: "It is clear that if there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractional relationship between the insured and the insurer." (*Waller*, *supra*, 11 Cal.4th at pp. 36.) In other words, where there is no breach of the insurance contract or policy, there can be no breach of the implied covenant of good faith and fair dealing.

IV. DISPOSITION

The judgment is affirmed. AAIC shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278.)

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FIELDS
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.