At an IAS Term, Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of August, 2004

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

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THE CITY OF NEW YORK,

Plaintiff,

- against -

Index No. 44472/03

SAFECO INSURANCE COMPANY OF AMERICA &
NATIONAL UNION FIRE INSURANCE COMPANY,

Defendants.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4 5-6
Opposing Affidavits (Affirmations)	7-8 7-8
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff City of New York (the City) moves for an order, pursuant to CPLR 3212, granting summary judgment against defendants General Insurance Company of America, sued herein as Safeco Insurance Company of America (Safeco) and National Union Fire Insurance Company of Pittsburgh, Pennsylvania, sued herein as National Union Fire Insurance Company (National Union). The motion seeks a judgment declaring

that those insurers must defend and indemnify the City in an action entitled *Anthony Jeffrey, et al. v Guiliani, et al.*(Kings County, Index No. 47924/01).[1]

Defendants separately cross-move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and declaring that neither is obligated to defend and indemnify the City in the *Jeffreys'* action.

Background

The Underlying Action

The *Jeffreys'* lawsuit, which spawned this declaratory judgment action, concerns the removal of three children, Anthonya, Alicea and Anthea Jeffrey from their parents, Anthony and Urselin Jeffrey, from August 1998 through October 2000. The pro se complaint in that case names the Administration for Children's Services (ACS) and the Coalition for Hispanic Family Services, Inc., sued therein as the Coalition for Hispanic Families (Coalition), among the defendants. The complaint alleges that Anthonya saw blood in her stool on July 21, 1998 and that she subsequently tested positive at the East New York Treatment Center for a sexually transmitted disease. The treatment center, according to the complaint, referred Anthonya to Kings County Hospital which, in turn, notified the ACS, successor to the Child Welfare Administration (CWA), about Anthonya's alleged condition.

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[1] Plaintiffs Anthony, Urselin, Anthonyna, Alicea and Anthea Jeffrey (the Jeffreys) commenced that action in December 2001 by filing a summons with notice. Thereafter, in February 2003, a complaint was served. The file shows that no preliminary conference has occurred therein.

According to the complaint, in August 1998 ASC filed three petitions to remove the three children from their parents and placed them with the Coalition, a not-for-profit, community-based, family services/foster care organization. A hearing in October 1998 allegedly resulted in the dismissal of the removal case. The complaint further alleges that ASC appealed the dismissal, the Appellate Term remanded the case for a further hearing and ASC thereafter "dismissed" the case for lack of evidence in October 2000 and returned the children to their parents. The complaint further claims that the parents initially had only supervised visits with the children twice a week. The complaint's four causes of action, collectively seeking $9 million, cite the "defendants' combined actions" which allegedly "tore the family asunder, " "interfered with the right to parent," "caused physical stres[s], emotional pain and suffering" and "resulted in malicious prosecution and conspiracy."

The Operative Agreement

The Coalition executed an agreement, dated March 27, 1998, with the City, through the ACS, which required the Coalition to provide necessary care for all children in the ACS foster care system placed with the Coalition. The agreement makes the ACS, as CWA's successor, responsible for the review and approval of the Coalition's plan for parental visitation. It further states that "the Commissioner [of the Department of Social Services] has the ultimate responsibility for the protection and preservation of the welfare of each Child receiving Services under this Agreement. . . . [T]he Commissioner has the ultimate authority for making all decisions relative to the welfare of such child, including, but not limited to, all case planning and dispositional decisions and . . . the management and

supervisory staff of CWA [now ACS] carries out such responsibilities on behalf of the Commissioner and in accordance with the authority vested in the Commissioner."

The Insurance Policies

The above agreement also required that the Coalition obtain insurance coverage of at least $1,000,000.[2] The Coalition sought to fulfill this insurance obligation by purchasing a commercial general liability policy from defendant National Union and both a commercial general liability policy and a professional liability policy from defendant Safeco.

National Union's policy covers "bodily injury" and "property damage" "caused by an 'occurrence,'" which the policy defines as "an accident, including continuance or repeated exposure to substantially the same harmful conditions." The policy excludes "'bodily injury' or 'property damage' expected or intended from the standpoint of the insured." The policy designates "[a]ny and all funding sources" of the Coalition as an additional insured, but "only with respect to liability arising out of your operations or premises owned by or rented to you."

Safeco's general liability policy substantially mirrors National Union's policy, but contains an additional exclusion for "the rendering of or failure to render any professional

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[2] That provision pertinently provides that the Coalition must "carry paid up insurance in the sum of not less that one million dollars per occurrence to protect the Department and the City of New York against any and all claims, loss or damage, whether in contract or tort, including claims for injuries, to, or death of persons, or damage to property, whether such injuries, death or damages be attributable to the negligence or any other acts of the Contractor, its employees, or otherwise."

service."[3] Safeco's professional liability policy, on the other hand, allegedly covers the Coalition's professional services, according to Safeco's counsel.[4]

The Coverage Demand and Responses

The City, which reports receiving the *Jeffreys'* complaint on or about February 18, 2003, sent a copy to the Claims Department of Frank Crystal & Company (Crystal), the insurance broker and agent for the Coalition who helped acquire the above insurance policies from the insurers herein. The City claimed additional insured status under the Coalition's insurance policy by advising Crystal by fax of the *Jeffreys'* action. The City also demanded "to be defended, along with the Coalition"[5] and requested Crystal to forward the *Jeffreys'* complaint and the demand for the defense of the City. National Union, through its claims agent, York Claims Service, Inc., thereafter advised the City, by letter dated June 4, 2003, that it was reviewing the matter but needed documentation of the City's additional insured status and its contract with the Coalition.

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[3] This provision, quoted in Safeco's initial memorandum of law, p. 10, allegedly appears in an exclusion attached to Safeco's policy, annexed as Exhibit E to the April 13, 2004 Affidavit of Susan M. Rasp, the Safeco Claims Specialist involved herein. The policy declaration page, appearing immediately after the Exhibit E tab, lists the "Designated Prof Services" exclusion as attached to the policy, but the exhibit itself omits the cited exclusion. The two copies of the prior listed form attached to the policy, namely, the Additional Insured - Designated Person or Organization Endorsement, perhaps explains this oversight. The City, in any event, has rectified this situation by attaching a copy of the "Designated Professional Services"exclusion to its opposition papers to the defendants'cross motions.

[4] The City only seeks coverage in this action from Safeco under its general liability policy and, therefore, the submissions did not include a copy of Safeco's professional liability policy.

[5] *See* Fax Transmittal, dated May 22, 2003, from Christopher Dickerson, Affirmative Litigation Division.

Safeco, which received both the City's and Coalition's coverage request on June 6, 2003, responded by letter, dated June 11, 2003, from its claims specialist Susan M. Rasp, and asserted that the complaint did not list any allegations against the Coalition, its named insured. The letter also stated the need for more information to make a coverage decision and, like National Union's response, requested a copy of the insurance and indemnification clauses of the contract between the City and the Coalition, as well as any applicable additional insured endorsement. Ms. Rasp contacted Safeco's underwriter on June 23, 2003 and learned that no attempt had been made to specifically add the City as a named insured to either the general liability or professional liability policies. She then requested that the Coalition provide her with a copy of its contract with the City.

The City replied to Ms. Rasp's June 11, 2003 letter in a fax-transmitted memo dated July 10, 2003. That memo accompanied: (1) a certificate of insurance from Crystal that identified the City and the ACS as additional insureds on Safeco's policies issued to the Coalition; (2) Safeco's additional insured endorsement from its general liability policy; and (3) a typical insurance clause from the City's contracts with its foster care agencies. The memo reiterated the City's coverage demand.

The City further replied to Ms. Rasp in a letter dated October 27, 2003 that purportedly attached the relevant provisions of its contract with the Coalition and requested an answer to its defense demand by November 3, 2003. Ms. Rasp questioned the accuracy of the submission[6] and spoke with the City's counsel herein on October 30, 2003. She

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[6] The City acknowledges that it inadvertently sent Safeco the insurance provision from its later contract with the Coalition, rather than the applicable one, but claims that the two insurance provisions do not dramatically differ.

advised counsel that Safeco was still waiting for a copy of the contract between the City and the Coalition to make a final coverage decision and that insufficient proof then existed to entitle the City to invoke Safeco's defense under the general liability or professional liability policies. She also reasserted her position that there were no specific allegations in the underlying complaint which would demonstrate that the City's alleged liability arose from the Coalition's operations.

In addition, Ms. Rasp told counsel that the allegations of the *Jeffreys'* complaint concerned professional services (which the general liability policy excludes) and that the Coalition's professional liability policy failed to include the City as an additional insured. The City subsequently commenced this declaratory judgment action on November 12, 2003. The Coalition, according to Ms. Rasp, sent a copy of its contract with the City to Safeco on or about February 10, 2004.

The Parties' Positions

The City argues that its status as an additional insured under National Union's and Safeco's general liability policies requires those insurers to defend it because the *Jeffreys'* complaint cites the "defendants' combined actions" as causing harm to the family. National Union and Safeco, in the City's view, waived the policies' exclusions to coverage by failing to issue a disclaimer letter.

Defendants see no duty to defend the City. They claim that no waiver occurred, that the underlying complaint predicates liability on the City's, not the Coalition's, operations, thus making the City ineligible as an additional insured, and that the alleged, intentional acts

fail to constitute a covered "occurrence" or "accident." Safeco additionally contends that the general liability policy fails to cover the emotional distress injuries alleged herein, which it regards as not arising from an accident, and that the professional services' exclusion in its general liability policy separately negates coverage.

Discussion

The Disclaimer Issue

(a)

Insurance Law § 3420 (d) requires an insurer's disclaimer "as soon as is reasonably possible."[7] However, the Court of Appeals has observed that "investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer (*see e.g. 2540 Assoc. v Assocurazioni Generali*, 271 AD2d 282, 284 [1st Dept 2000] [delay reasonable because of insurer's need to conduct a 'prompt, diligent and good faith investigation of the claim']" . . .) (*First Financial Ins. Co. v Jetco Contracting Corp.*, 1 NY3d 64, 69 [2003]; *see also New York Cent. Mut. Fire Ins. Co.*, 234 AD2d 279, 280 [1996]); and *Matter of Prudential Property & Cas. Ins. Co.*, 213 AD2d 408, 408 [1995]). Consequently, the reasonableness of the delay involved herein rests upon an evaluation of defendants' investigations.

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[7] More specifically, that provision provides that "[i]f under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

Here, National Union responded to the City's defense demand, received some time after May 22, 2003, with a June 4, 2003 letter requesting that the City document its additional insured status and provide a copy of its contract with the Coalition. The City has given no indication that it replied to National Union's request and apparently failed to provide the requested information to that insurer before commencing this action.

Safeco likewise requested additional insured status information from the City and its contract with the Coalition in a June 11, 2003 letter, after having received the City's demand on June 6, 2003. The City's July 10, 2003 reply to Safeco provided some requested material, but its subsequent letter dated October 27, 2003, more than four and a half months after Safeco's request, acknowledged the need to provide the relevant portions of its contract with the Coalition. That October response, in any event, proved insufficient and Safeco only received the requested contract after this action began and then only from the Coalition.

Defendants cite the City's contract with the Coalition in arguing that the allegations in the *Jeffreys'* complaint failed to arise from the Coalition's operations and thereby negated the City's claim to additional insured status. The goal of resolving whether the City qualifies as an additional insured made each defendant's prompt investigation a diligent, thorough and good faith inquiry as well. Such "a 'reasonable investigation is preferable to piecemeal disclaimers'" (*DiGuglielmo v Travelers Property* Casualty, 6 AD3d 344, 346 [2004], *quoting* 2540 *Assoc. Assicurazioni Generali*, 271 AD2d 282, 284 [2000]).

Hence, the insurers' requests for a copy of the City's contract with the Coalition represented a prudent, cautious and comprehensive approach on each insurer's part. The

resulting "delay [and inability] in issuing the disclaimer was justified and, indeed, necessitated by [the City's] conduct" (*id.*). Determining whether the allegations in the *Jeffreys'* complaint arose from the City's or the Coalition's operations, in other words, required an examination of the City's contract with the Coalition to identify each party's specified responsibilities and obligations.

Case law supports such an approach. Decisions, for example, have recognized an analogous need to review an underlying lease agreement and identify a tenant's obligations in deciding whether a claim implicated those obligations and thus triggered an additional insured endorsement (*Greater New York Mut. Ins. Co. v Mutual Marine Office, Inc.*, 3 AD3d 44, 47 [2003] and *General Acc. Fire & Assur. Corp. v Travelers Ins. Co.*, 162 AD2d 130 [1990]). The failure to timely provide necessary documentation so that a comprehensive disclaimer or noncoverage decision can be made understandably delays or, as here, prevents such a decision and, in turn, nullifies the assertion of a failure to disclaim.

(b)

Defendants also claim that they had no obligation to disclaim. "Where [, as here,] a clause limits the circumstances in which a party is an additional insured under an insurance policy and the underlying claim falls outside the limited coverage provided, disclaimer pursuant to Insurance Law § 3420 (d) is not required (*see Crespo v City of New York*, 303 AD2d 166, 167 [2003]; *American Ref-Fuel Co. of Hempstead v Employers Ins. Co. of Wausau* [265 AD2d 49], *supra*, at 54 [2000])" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Utica First Ins. Co.*, 6 AD3d 681, 682 [2004]).

The Court of Appeals has explained that "[a] disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy" (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 [2001]). "Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to [Insurance Law] section 3420 (d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered" (*Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000]).

Here, construction of the additional insured and covered occurrence provisions of the policies principally determines the insurers' obligations. Consequently, the alleged "noncoverage arose from a lack of inclusion, not a policy exclusion, [and] a timely disclaimer of coverage was not required [citations omitted]" (*Continental Casualty Co. v Luhrs*, 299 AD2d 357, 358 [2002]). In addition, the insurers' investigatory actions and the courts' disfavor for piecemeal disclaimers, both discussed above, overcome the City's argument regarding the failure to disclaim for noncoverage defenses stemming from the "professional service" exclusion and the exclusion for "expected or intended" injuries. No waiver of the insurers' various defenses therefore occurred in this case.

The Additional Insured Issue

(a)

The Appellate Division, Second Department has recently reminded litigants that "[a]n insurer is obligated to defend its insured where the allegations of the complaint in the

underlying action give rise to a reasonable possibility of coverage (*see Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169 [1997])" (*Haight v Estate of DePamphilis*, 5 AD3d 547, 548-549 [2004]). Thus, "[i]f, liberally construed, the complaint is within the embrace of the policy, the insurer must come forward to defend its insured (*see, Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981] [, *rearg denied* 54 NY2d 753 (1981)]" (*Agoado Realty Corp. v United Intern. Ins. Co.*, 95 NY2d 141, 145 [2000]). In addition, "[i]f any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984])" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]).

Here, defendants' general liability policies conditionally include "any and all funding sources" of the Coalition as additional insureds "but only with respect to liability arising out of [the Coalition's] operations."[8] The *Jeffreys'* complaint highlights various City operations, including the ASC's actions in allegedly bringing petitions and removing the children from their parents, remanding the children to the Coalition, appealing to the Appellate Term to remand the case and ultimately discontinuing the case.

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[8] Safeco's counsel advises that its professional liability policy, not in issue herein, contains no equivalent funding source language or any other language that would potentially include the City as an additional insured.

However, the complaint also cites limited and supervised visitation while in the Coalition's care as bases for the causes of action.[9] Such "allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (*Frontier Insulation Contractors*, 91 NY2d at 175 [1997]). The Appellate Division, Second Department has echoed that "[t]he duty of the insurance carrier to defend, which is 'exceedingly broad' (*Colon v Aetna Life & Cas. Ins. Co.*, 66 NY2d 6, 8 [1985]; *see, Continental Cas. Co. v Rapd-Am. Corp.*, 80 NY2d 640, 648 [1993]), is triggered whenever the four corners of a complaint, liberally construed, suggest a reasonable possibility of coverage" (*Conrad R. Sump & Co. v Home Ins. Co.*, 267 AD2d 415, 417 [1999]). The visitation-related claims arguably implicate the Coalition or at least suggest that liability could arise from Coalition operations, thereby making the City an additional insured as a Coalition funding source.

The additional insured clause, citing "liability arising out of [the Coalition's] operations," focuses "upon the general nature of the operation in the course of which the injury was sustained" (*Consolidated Edison Co. v Hartford Ins. Co., supra* [203 Ad2d 83], at 83 [1994]). Further, the clause was not to be read as an exclusion of coverage . . . since, as an endorsement, it was an addition to coverage, not a limitation" (*Tishman Const. Corp. of New York v CNA Ins. Co.*, 236 AD2d 211, 211 [1997]).

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[9] Paragraph 26 of the complaint states "[i]nitially the plaintiff's [*sic*] parents, the Jeffreys had only supervised visits two times a week." Paragraph 27 then states that: "[d]uring the entire two year proceedings, a family member had to supervise contact between the parents and their children. It was a hardship on the older grandmother. No matter what progress the parents made, it remained supervised contact throughout." Paragraph 46 then alleges that: '[t]he father felt really sad about not taking his children home every night. The supervision put an emotional and physical strain on the whole family."

(b)

The Coalition's contract with the City, a permissible document to utilize in determining coverage herein, as discussed above, also supports coverage. That contract, which impliments the ACS' legal custody of foster care children pursuant to Social Services Law § 383 (2),[10] recognized the ACS' responsibility for review and approval of a plan for parental visitation and the ACS' ultimate responsibility for all case planning and dispositional decisions concerning the welfare of each child receiving the Coalition's foster care services.

However, the contract also provides that the Coalition plays a role in parental visitation. In Article IX, entitled "Parental Visiting," it states, in part, that "[f]or the purpose of ensuring visitation between children in foster care and their parents and siblings, the Contractor shall develop a plan that will assure visitation during expanded hours that are other than normal working hours (9 a.m. to 5 p.m.) and school hours (8 a.m. to 3 p.m.)." The contract further provides (in the same Article IX) that the need for the CWA's [now, the ACS'] written approval to curtail family visitation "shall not limit the Contractor's rights to prevent or control contact in a specified situation, when in the Contractor's judgment such contact would constitute a threat to the child's life, health, or safety."

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[10] That provision provides that "[t]he custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded."

Visitation problems mentioned in the *Jeffreys'* complaint could thus potentially involve the Coalition's operations, even going outside the complaint and examining the applicable agreement between the City and the Coalition. The Court of Appeals has in this regard required an insurer to provide a defense "where, notwithstanding the complaint allegations, underlying facts made known to the insurer create a 'reasonable possibility that the insured may be held liable for some act or omission covered by the policy' (*Meyers & Sons Corp. v Zurich Am. Ins. Group, supra* [74 NY2d 298], at 302 [1989])" (*Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d 61, 70 [1991]). Here, a review of the complaint and the Coalition's contract, separately and collectively, brings the City within the general liability insurance policies as an additional insured.

In addition, no determination of Coalition liability is required as a prerequisite to the insurers' duty to defend the City, as National Union argues. Such finding affects indemnity obligations and "[t]he duty to defend is broader than the duty to indemnify (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]; *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 669 [1981])" (*Haight v Estate of DePamphilis*, 5 AD3d at 548 [2004]). Indeed, the Court of Appeals has stressed the importance of the core policy obligation to defend an additional insured "since a 'provision for defense of suits is useless and meaningless unless it is offered when the suit arises' (7C Appelman [Insurance Law and Practice], *op. cit.*, § 4684, at 83)" (*Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d at 70 [1991]). Such duty to defend, though, still requires a covered occurrence and the inapplicability of any asserted exclusion.

The Covered "Occurrence" or "Accident" Issue and
The "Expected" or "Intended Exclusion" Issue

(a)

Determining whether the City's actions constitute a covered accident or occurrence requires an examination of the resultant injuries from the insured's perspective. "The critical issue is not whether [the cause of the injury] was accidental or intentional, but whether the harm that resulted to the victim . . . was 'expected or intended by the protected person'" (*Jubin v St. Paul Fire & Mar. Ins. Co.*, 236 AD2d 712, 713 [1997] *quoting Pistolesi v Nationwide Mut. Fire Ins. Co.*, 236 AD2d 94, 95 [1996], *lv denied* 88 NY2d 816 [1996]). The Court of Appeals has recently reiterated that "in deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and unforseen" (*RJC Realty Holding Corp. V Republic Franklin Ins.* Co., 2 NY3d 158, 163 [2004] [emphasis in original] *quoting* Agoado *Realty Corp. v United Inter. Ins. Co.*, 95 NY2d 141, 145 [2000] *citing Miller v Continental Ins. Co.*, 40 NY2d 675, 677 [1976] *quoting* 1A Appelman, Insurance Law & Practice § 391, at 22).

In addition, the Court of Appeals has "long recognized . . . that insurable 'accidental results' may flow from intentional causes' (*see McGroarty v Great Am. Ins. Co.*, 36 NY2d 358, 364 [1975] [,*rearg denied* 36 NY2d 874 (1975)])" (*Slayko v. Security Mut. Ins. Co.*, 98 NY2d 289, 293 [2002]). Hence, Court of Appeals' decisions have broadly construed "accident" as covering an alleged sexual assault by an insured's masseur (*RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d at 163 [2004]), a tenant's murder by an

unknown assailant (*Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145-146 [2000]), a decedent's death from a heroin overdose (*Miller v Continental Ins. Co.*, 40 NY2d 675, 677-678 [1976]), a building's damage from an insured's continued excavation and construction on adjacent property despite several warnings (*McGoarty v Great Am. Ins. Co.*, 36 NY2d 358, 363-364 [1975], *rearg denied* 36 NY2d 874 [1975]) and a collision where the insured knowingly and willfully loaned the insured vehicle to a minor unaccompanied by a duly licensed person (*Messersmith v American Fid. Co.*, 232 NY 161 [1921]).

The Appellate Division, Second Department has also very recently classified an alleged assault by an insured's employee upon a mentally disabled plaintiff as "'unexpected, unusual and unforseen' from [the insured's] point of view, and therefore . . . an 'accident,' [which] did not fall within the 'expected or intended' exclusion of the general liability policies issued" (*Ace Fire Underwriters Ins. Co. v Orange-Ulster Bd. Of Cooperative Educational Services*, __ AD3d __, 2004 NY Slip Op 05587 [2004]). Another Appellate Division, Second Department decision similarly concluded that a plaintiff's injuries constituted the accidental result of an intentional act where the insured "took a 12-gauge shotgun and fired a round of buckshot at the front door of the [Emotions discotheque] club injuring the plaintiff" (*Barry v Romanosky*, 147 AD2d 605, 605 [1989]).

The "transaction as a whole test" applies to these decisions classifying the various occurrences as accidents. That test emanates from Judge Benjamin Cardozo's analysis in the *Messersmith* case that "[t]he character of the liability . . . is determined by the quality and purpose of the transaction as a whole" (*Messersmith v American Fid. Co.*, 232 NY at 166

[1921]). The Court of Appeals then additionally reasoned that "if the resulting damage could be viewed as unintended by the fact finder the total situation could be found to constitute an accident" (*McGroarty v. Great Am. Ins. Co.*, 36 NY2d at 364-365 [1975]).

Here, defendants err in simply taking the parents' perspective and claiming that the City intended to harm them or could reasonably expect their alleged injuries. Instead, a jury could look at the transaction as a whole and recognize the City's desire to protect the *Jeffreys'* children, the CWA's fulfillment of its governmental responsibility, and the prospect of rehabilitating the family unit. Consequently, that jury could view the resulting damage as unintended and the total situation as a covered accident.

(b)

In addition, the Appellate Division, Second Department has held that

> "[a]n insurer may be relieved of its duty to defend only if it can establish, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured, or by proving that the allegations fall wholly within a policy exclusion (*see Frontier Insulation Contrs. v Merchants Mut. Ins. Co., supra* [91 NY2d 169, 175 (1997)], *Deetjen v Nationwide Mut. Fire Ins. Co., supra* [302 AD2d 350 (2003)]). If any of the allegations arguably arise from a covered event, the insurer must defend the entire action (*see Frontier Insulation Contrs. v Merchants Mut. Ins. Co., supra* [91 NY2d 169, 175 (1997)]; *Deetjen v Nationwide Mut. Fire Ins. Co., supra* [302 AD2d 350 (2003)])" (*City of New York v Insurance Corp. of New York*, 305 AD2d 443, 443-444 [2003]).

The allegations in the *Jeffreys'* action arguably arise from a covered event and the indemnity determination "must await the outcome of the underlying action" (*id.* at 444). Consequently, defendants must alternatively show that the allegations in the *Jeffreys'* underlying action fall wholly within a policy exclusion.

The Court of Appeals has explained that "[t]o be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion [and] that the exclusion is subject to no other reasonable interpretation" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d at 175 [1997]). More specifically, the expected or "intentional act exclusion could apply only if the injury were 'inherent in the nature' of the wrongful act (*see Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 161 [1992]) (*Slayko v Security Mut. Ins. Co.*, 98 NY2d at 293 [2002]).

However, as a "general rule . . . 'more than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended' (*id.* [*Allstate Ins. Co. v Mugavero*, 79 NY2d 153 (1992)] at 160)" (*id.*). Consequently, the Court of Appeals has found that child molestation falls within the intentional act exclusion (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153 [1992]) but pointing a gun falls outside the exclusion "as the gun could have been empty" (*Slayko v Security Mut. Ins. Co.*, 98 NY2d at 293 [2002]).

Here, the actions by the City, as alleged in the *Jeffreys'* complaint, which evidence a concern for child protection, fail to qualify as "inherently harmful" to invoke the intentional act exclusion. Defendants, in other words, fail to meet their "heavy burden" of showing that

the *Jeffreys'* complaint comes wholly within the expected or intended act exclusion as judicially interpreted.

The "Professional Services" Exclusion

(a)

Safeco's exclusion for "the rendering of or failure to render any professional services" also fails to nullify its defense obligations. The *Jeffreys'* complaint makes no allegation that "professional services" or the "failure to render professional services" partially or completely caused the resulting harm. Instead, the complaint alleges that liability resulted from the City's and the ACS' actions. Safeco nonethless contends that those actions fall within the exclusion's broad description of professional services; namely, "[a]ll services provided by an insured or services provided by others for which an insured is responsible."

The *Jeffreys'* complaint could potentially cover liability resulting from ordinary negligence, rather than professional services or the absence of professional services, thereby making the professional services' exclusion inapplicable as the Appellate Division, Second Department has held (*Hartford Acc. and Indem. Co. v Regent Nursing Home*, 67 AD2d 935, 936 [1979]). Indeed, the Court of Appeals has repeatedly stated that "to 'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case' (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993])" (*Belt Painting Corp. v TIG Ins. Corp.*, 100 NY2d 377, 383 [2003]).

Consequently, "the insurer has the burden of demonstrating 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.*, 35 NY2d 322, 325 [1974])" (*Technicon Electronics Corp. v American Home Assur. Co.*, 74 NY2d 66, 73-74 [1989]). Here, the arguable possibility exists that negligent action by the City and the ACS, or their inaction, rather than their professional services, created liability in dealing with the Jeffreys. The failure to sooner reunite the children with their family, for instance, could provide a basis for liability under the complaint without necessarily involving the issue of providing or failing to provide professional services.

(b)

In addition, "[a]ny 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" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). The professional services exclusion herein, while captioned "*Designated* Professional Services" [emphasis added], broadly embraces "all services provided." Hence, the exclusion violates the Court of Appeals' limitations, thus negating its enforcement.

The policy also fails to specify or define the meaning of "services" under the exclusion. The Appellate Division, Second Department, following Court of Appeals case law, has reiterated that "[w]here the language of the policy 'is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer' (*see*

Westview Assocs. v Guaranty Natl. Ins. Co., supra [95 NY2d 334] at 340 [2000])" (*Village Mall at Hillcrest Condominium v Merrimack Mut. Fire Ins. Co.*, 309 AD2d 857, 857 [2003]). "It follows that policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer (*Thomas J. Lipton, Inc. v Liberty Mut. Ins. Co.*, 34 NY2d 356, 361 [1974])" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d at 383 [2003]).

Consequently, narrowly construing the term "services" means that the challenged acts or omissions by the City or the ACS fail to fall completely within the professional services exclusion and remain covered. This same principle of resolving ambiguities against the insured avoids the adoption of Safeco's additional argument of coordinately interpreting professional services under Safeco's Professional Liability Insurance policy, which is not in issue, as necessarily and expressly excluded from the general liability policy. Here, then, where "the exclusionary clause does not include the particular loss that the insurance company alleges . . . the insured is entitled to be defended and possibly indemnified (*Seaboard Sur. Co. v Gillette Co., supra* [64 NY2d 304, 311 (1984)]; *Prashker v United States Guar. Co.*, 1 NY2d 584, 590 [1956])" (*Westview Assocs. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 [2000]).

The "Emotional Damages" Issue

Safeco's further argues that coverage for "bodily injury," as defined in its general liability policy,[11] fails to include emotional and/or mental distress damages "where no

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[11] Safeco's policy in this regard provides that "'[b]odily injury' means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

physical injury or contact is involved."[12] However, the *Jeffreys'* complaint, in fact, alleges physical strain and stress[13] and thus moots this argument. The Court of Appeals, even more significantly, as Safeco itself recognizes, specifically rejected the above argument and held in *Lavanant v General Acc. Ins. Co. of America*, 79 NY2d 623, 626, 630 [1992]) that the policy language herein covers purely emotional distress. The language requires no prior physical contact for compensable mental injury.

Safeco's reference to *First Investors Corp. v Liberty Mut. Ins. Co.*, 152 F3d 162 [2d Cir 1998]) as questioning the scope and applicability of the *Lavanant* decision is inapplicable. There, the Circuit Court surmised that *Lavanant* fails to extend "to emotional distress injuries not caused by an 'accident' [as that term has been construed by New York courts]" (*id.* at 167). Here, though, the City's acts, as analyzed above, constitute a covered occurrence or accident making *Lavanant* controlling, *First Investors Corp.* irrelevant and emotional damages covered under the general liability policies in this case. Accordingly, it is

ORDERED that the City's summary judgment motion is granted; and it is further

ORDERED that National Union's and Safeco's summary judgment cross motions are denied; and it is further

ORDERED, ADJUDGED and DECLARED that each defendant insurer, National Union and Safeco, is obligated to defend and, if necessary, indemnify the City in the

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[12] Safeco's Memorandum of Law, Point I, Heading C, p. 20.

[13] Paragraph 46 of the complaint pertinently provides that "[t]he supervision put an emotional and physical strain on the whole family." The third cause of action similarly states that "[t]he defendants' combined action caused physical stres[s], emotional pain and suffering[.]"

underlying action entitled *Jeffrey, et al. v Guiliani, et al.*, (Kings County, Index No. 47924/01).

This constitutes the decision, order and judgment of this court.

E N T E R,

J. S. C.

HON. MARK I. PARTNOW