

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DOVER DOWNS, INC.,                    )  
  )  
                  Plaintiff,            )  
  )  
          v.                            )  Civ. No. 04-199-SLR  
  )  
TIG INSURANCE CO.,                    )  
  )  
                  Defendant.         )

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David Kyle Sheppard, Esquire, Blank Rome LLP, Wilmington,  
Delaware.  Counsel for Plaintiff.

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Wilmington, Delaware.  Counsel for Defendant.

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**MEMORANDUM OPINION**

Dated: August 11, 2004  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

On March 31, 2004, Dover Downs, Inc. ("plaintiff") filed the present action against TIG Insurance Company ("defendant"), seeking a declaratory judgment and damages for breach of contract and bad faith denial of insurance coverage.<sup>1</sup> (D.I. 1) Plaintiff claims that it was insured by defendant under a general liability policy that "covered claims alleging the loss of use of property and the wrongful eviction from property." (Id. at ¶ 1) On November 5, 1999, plaintiff was sued by three individuals who alleged that they had been improperly excluded from engaging in harness racing at plaintiff's track.<sup>2</sup> (Id. at § B) Plaintiff

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<sup>1</sup>Plaintiff also named TIG Specialty Insurance Solutions ("TIG Solutions") as a defendant. Defendant TIG Insurance Company claims that TIG Solutions is "not a corporation or entity, but, instead, is simply a trade style for TIG Insurance Company. TIG Insurance Company issued the insurance policy at issue in the present action; [TIG Solutions] did not. As a non-entity, [TIG Solutions] is not properly a [d]efendant in this action." (D.I. 9 at 1 n.1) Plaintiff subsequently acknowledged defendant's allegation (D.I. 11 at 3 n.1), but has made no effort to refute it. Indeed, plaintiff's complaint makes little mention of TIG Solutions at all. The business addresses for defendant and TIG Solutions, as identified by plaintiff in its complaint, are the same. (D.I. 1 at ¶¶ 5-6) It appears to the court that plaintiff only named TIG Solutions as a party because it received a letter from defendant's counsel, dated December 29, 2003, bearing a logo with the phrase "TIG Specialty Insurance Solutions" at the top. (D.I. 1 at ¶ 46; 9, Ex. F at 1) Defendant's name, however, appears in the footer of this letter, thereby bolstering defendant's claim that TIG Solutions is merely a "trade style." (D.I. 9, Ex. F at 1) Based upon this, the court shall consider TIG Solutions to be the same entity as defendant TIG Insurance Company.

<sup>2</sup>Crissman v. Dover Downs, Inc., 83 F. Supp.2d 450 (D. Del. 2000).

claims that the money it spent defending itself in that suit is covered by the insurance policy issued to it by defendant. (Id. at ¶ 2) Defendant has repeatedly denied plaintiff's requests for coverage. (Id. at ¶¶ 27, 32, 37)

Plaintiff is a Delaware corporation with its principal place of business in Dover, Delaware. (Id. at ¶ 4) Defendant is a California corporation with its principal place of business in Irving, Texas. (Id. at ¶ 5) The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because this controversy exceeds the value of \$75,000, exclusive of interest and costs,<sup>3</sup> and involves citizens of different states. Venue is proper under 28 U.S.C. § 1391(a)(2) because "a substantial part of the events or omissions giving rise to the claim occurred" in the District of Delaware.

On May 14, 2004, defendant filed a motion to dismiss plaintiff's complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (D.I. 8) For the reasons to follow, defendant's motion to dismiss is granted.

## **II. BACKGROUND**

### **A. The Insurance Policy In Dispute**

Plaintiff operates a horse racing facility in Dover, Delaware, and is a member of Harness Tracks of America ("HTA").

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<sup>3</sup>The attorneys' fees and expenses that plaintiff claims are covered under its insurance policy with defendant total "nearly \$130,000." (D.I. 9, Ex. F at 1)

(D.I. 1 at ¶ 10) HTA formed a "risk purchasing group" called Wagering Insurance North America Risk Purchasing Group, Inc. ("WINARP Group") in order to buy insurance for its members. (Id.) With K & K Insurance, a wholesale insurance broker, acting as an intermediary, WINARP Group obtained a Commercial General Liability Policy, policy number T7 0003750426400 (the "policy"), from defendant.<sup>4</sup> (Id. at ¶¶ 9, 11, 13) Plaintiff is a named insured under the policy held by WINARP Group. (Id. at ¶ 12) The policy includes "Coverage A," which insures against bodily injury and property damage, and "Coverage B," which protects against liability for personal or advertising injury.<sup>5</sup> (Id. at ¶ 13)

Coverage A addresses, among other things, defendant's potential liability in cases involving "property damage." (Id. at § A p. 1) The policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," or "[l]oss of use of tangible property that is

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<sup>4</sup>In its motion to dismiss, defendant asserts that the copy of the policy provided by plaintiff in its complaint (D.I. 1 at § A), "is not a complete copy of the actual [p]olicy." (D.I. 9 at 4 n. 3) Defendant has determined, however, that "for present purposes, . . . this form document is sufficient to frame the issues." (Id.) The court, therefore, will consider this document to be the policy at issue in the case at bar.

<sup>5</sup>The policy's definitions of "bodily injury" and "advertising injury" are not in dispute in the case at bar. Therefore, the court will focus its analysis entirely on the terms "property damage" and "personal injury."

not physically injured.” (Id. at § A p. 21) According to the policy, “property damage” is only insured if it “is caused by an ‘occurrence’ that takes place in the ‘coverage territory’” and “occurs during the policy period.”<sup>6</sup> (Id. at § A p. 1) The policy defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” (Id. at § A p. 20) Likewise, the policy does not cover “property damage” which was “expected or intended from the standpoint of the insured.” (Id. at § A p. 2)

Coverage B insures against “‘[p]ersonal injury’ caused by an offense arising out of [an insured’s] business,” if the offense was committed in the “coverage territory” during the “policy period.” (Id. at § A p. 7) According to the policy, “‘[p]ersonal injury’ means injury, other than ‘bodily injury,’ arising out of . . . [t]he 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[.]” (Id. at § A p. 20)

Under the policy, defendant “has the right and duty to defend the insured against any ‘suit’<sup>7</sup> seeking [damages for

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<sup>6</sup>Defendant has not suggested that the events for which plaintiff was sued and is claiming coverage happened either outside of the coverage territory or before or after the policy period. Therefore, the court will not address those two factors.

<sup>7</sup>Under the policy, a “suit” is “a civil proceeding in which damages because of . . . ‘property damage’ [or] ‘personal injury’

liability covered under Coverages A and B]. However, [defendant has] no duty to defend the insured against any 'suit' seeking damages for [injury or damage] to which this insurance did not apply." (Id. at § A p. 1) The policy also includes defendant's assurance that, in the event of a "suit" against an insured that it decides to defend, defendant will pay "[a]ll reasonable expenses incurred by the insured at [defendant's] request to assist . . . in the investigation or defense of the claim or 'suit.'" (Id. at § A p. 9)

The policy devotes an entire section to the insured's duties in the event of an "occurrence," "offense," "claim," or "suit." (Id. at § A p. 14) According to the policy, the insured must "see to it that [defendant is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim," providing defendant with as many details as possible. (Id.) In addition, "[i]f a claim is made or 'suit' is brought against any insured," the insured must "[i]mmediately record the specifics of the claim or 'suit' and the date received; and . . . [n]otify [defendant] as soon as practicable." (Id.) The policy then lists several actions that the insured must take in order to assist defendant with "the investigation or settlement of the claim or defense against the 'suit,'" including immediately

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. . . to which this insurance applies are alleged." (D.I. 1 at § A p. 22)

sending defendant copies of documents related to the claim and authorizing defendant "to obtain records and other information." (Id. at § A pp. 14-15) Lastly, the policy states that "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [defendant's] consent." (Id. at § A p. 15)

### **B. Related Litigation**

On November 5, 1999, Charles, Wendy, and Christine Crissman (collectively, "the Crissmans") filed suit against plaintiff in this court,<sup>8</sup> alleging that plaintiff

violated [their] constitutional rights by depriving them of liberty and property interests, i.e., their right to pursue their chosen occupation of racing horses owned and/or trained by them, and to maintain

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<sup>8</sup>See supra note 2. The Crissmans were horse owners and trainers who wished to engage in harness racing at plaintiff's facility, one of only two authorized harness racing tracks in the State of Delaware. (D.I. 1 at § B ¶¶ 5, 7) Plaintiff's track in Dover and the other track in Harrington are each permitted to operate for only six months out of every year, and neither facility is permitted to hold races while the other is in operation. (Id. at § B ¶ 8) On October 27, 1997, plaintiff sent the Crissmans a letter stating that they were "not welcome" at plaintiff's track, and that plaintiff would not "accept[] any horses owned or trained by [them]." (Id. at § B, Ex. A) On October 25, 1999, plaintiff reaffirmed this decision in a letter sent to the Crissmans' lawyer, stating that plaintiff's decision-makers "[chose] not to debate the merits of [their] decisions with regard to [their] right to exclude individuals from [their] facility," and that all future requests for written explanation of that subject would be ignored. (Id. at § B, Ex. B) Because the Crissmans were effectively barred from harness racing in the State of Delaware for six months out of every year, they filed suit against plaintiff. (Id. at § B ¶ 15)

their employment reputation, without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

(Id. at § B ¶ 14) Plaintiff filed a motion for summary judgment, which this court granted on February 17, 2000. Crissman v. Dover Downs, Inc., 83 F. Supp.2d 450 (D. Del. 2000). The Crissmans appealed this decision to the United States Court of Appeals for the Third Circuit. Crissman v. Dover Downs Entm't, Inc., 239 F.3d 357 (3d Cir. 2001). On January 29, 2001, a panel of three circuit judges reversed this court's ruling. Id. On April 30, 2002, the Third Circuit, sitting en banc, vacated the panel's decision, thereby affirming this court's ruling. Crissman v. Dover Downs Entm't, Inc., 289 F.3d 231 (3d Cir. 2002) (en banc). On October 7, 2002, the Supreme Court denied the Crissmans' petition for certiorari.<sup>9</sup> Crissman v. Dover Downs, Inc., 537 U.S. 886 (2002).

### **C. Communications Between the Parties**

Plaintiff formally notified defendant of the Crissman Action in August 2002 and requested indemnity under the policy for expenses it had incurred in defending itself in that litigation. (D.I. 1 at ¶ 25) K & K Insurance, acting as an intermediary, sent plaintiff a letter soon thereafter explaining that before it could respond to plaintiff's request, defendant had to render an

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<sup>9</sup>Hereinafter, the Crissmans' suit will be referred to as "the Crissman Action."

opinion as to the scope of the policy's coverage. (Id. at ¶ 26) On September 30, 2003, plaintiff received a coverage opinion letter ("coverage opinion") from defendant stating that plaintiff's expenses in the Crissman Action were not covered under the policy. (Id. at ¶ 27; D.I. 9, Ex. C) The coverage opinion stated, however, that defendant would "reconsider its position" if plaintiff could provide any additional information or analysis that might indicate a "potential for coverage for the claims made in this matter." (D.I. 1 at ¶ 29) The coverage opinion instructed plaintiff to send any additional information to K & K Insurance. (Id.)

On November 12, 2002, plaintiff sent a letter and additional exhibits disputing defendant's denial of indemnification to K & K Insurance. (Id. at ¶ 30; D.I. 9, Ex. D) Plaintiff also sent defendant a copy of its November 12, 2002 letter. Neither K & K Insurance nor defendant responded. (D.I. 1 at ¶ 30) On January 22, 2003, plaintiff informed K & K Insurance that it had not received a response. (Id. at ¶ 31) On January 29, 2003, plaintiff received a letter from defendant's counsel which asserted for a second time that plaintiff's expenses from the Crissman Action were not covered under the policy. (Id. at ¶ 32; D.I. 9, Ex. E) In the same letter, defendant also suggested that plaintiff might have violated the terms of the policy by waiting nearly three years to notify defendant of the Crissman Action.

(D.I. 1 at ¶ 32) On February 26, 2003, plaintiff responded by letter, explaining how the Crissman Action was covered under the policy. (Id. at ¶ 35) Despite this explanation, in a letter dated March 14, 2003, defendant denied coverage for expenses related to the Crissman Action for a third time. (Id. at ¶ 37)

On or about June 11, 2003, defendant's counsel contacted plaintiff's counsel via e-mail, requesting billing information related to the Crissman Action. (Id. at ¶ 38) On June 20, 2003, plaintiff's counsel sent the requested information, but received no response. (Id. at ¶ 39) On September 9, 2003, plaintiff's counsel contacted defense counsel in order to inquire about the status of plaintiff's request for indemnification. (Id. at ¶ 40) Defendant's counsel explained that they had not yet received the billing information that plaintiff's counsel had sent on June 20, 2003. (Id.) After receiving this information, plaintiff's counsel immediately re-sent their billing information. (Id.) On September 15, September 24, and September 26, 2003, plaintiff and defendant exchanged additional letters regarding billing information for the Crissman Action. (Id. at ¶¶ 41-43) On October 14, 2003, in response to a request from defendant, plaintiff forwarded additional billing information to defendant and asked defendant to promptly respond to its request for indemnity. (Id. at ¶ 44) On December 29, 2003, plaintiff received a letter from defendant questioning the validity of the

notice that plaintiff had provided to defendant. (Id. at ¶ 46; D.I. 9, Ex. F) This was the final communication between the parties before plaintiff filed the present action on March 31, 2004.

### **III. STANDARD OF REVIEW**

In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

#### **IV. DISCUSSION**

##### **A. The Parties' Contentions**

Plaintiff claims that defendant had the duty to defend and indemnify it for expenses it incurred in the Crissman Action. Specifically, plaintiff asserts that the allegations made in the Crissman Action are covered under the policy with defendant, both under Coverage A's "property damage" clause and Coverage B's "personal injury" clause. (D.I. 11 at 4-5) Likewise, plaintiff claims that even if it were late in notifying defendant of the Crissman Action, defendant has not shown that it was prejudiced by this lack of notice and, as such, must indemnify plaintiff. (Id. at 4) Plaintiff further alleges that defendant waived any "lack of notice" defense it may have had by failing to assert such a defense in its first coverage opinion. (Id.)

Defendant maintains that the allegations made in the Crissman Action are covered neither by the "property damage" clause of Coverage A nor the "personal injury" clause of Coverage B. (D.I. 9 at 2-3) As a result, defendant asserts that it had no duty to defend or indemnify plaintiff for any expenses related to the Crissman Action. (Id.) Defendant also claims that it is not responsible for plaintiff's "pre-tender defense costs," to wit, those expenses that plaintiff incurred before it notified defendant of the Crissman Action.

##### **B. Principles of Contract Interpretation**

According to the well-settled rules of contract construction, "the language of a contract is to be given its plain and ordinary meaning. Accordingly, where the provisions of a contract are plain and unambiguous, 'evidence outside the four corners of the document as to what was actually intended is generally inadmissible.'" Universal Studios, Inc. v. Viacom, Inc., 705 A.2d 579, 589 (Del. Ch. 1997) (quoting Weissman v. Sinorm Deli, Inc., 88 N.Y.2d 437, 446 (1996) (citation omitted)). Contract language "is not rendered ambiguous simply because the parties in litigation differ concerning its meaning." City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191, 1198 (Del. 1993).

### **C. Insurance Contracts Under Delaware Law**

The insurance contract dispute at bar is governed by the laws of the State of Delaware. New Castle County, DE v. Nat'l Union Fire Ins. Co. of Pittsburgh, 243 F.3d 744, 749 (3d Cir. 2001) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)). In Delaware, the insured bears the burden of proving that a claim is covered by an insurance policy. New Castle County v. Hartford Accident and Indem. Co., 933 F.2d 1162, 1181 (3d Cir. 1991). An insurer, in turn, has a duty to defend the insured if the allegations in the underlying complaint fall within the terms of the insurance policy. Cont'l Cas. Co. v. Alexis I. DuPont Sch. Dist., 317 A.2d 101, 103 (Del. 1974). To make this

determination, the court must assess whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy. Id. at 105. The Delaware Supreme Court has articulated the following principles to be applied when performing this analysis:

- (1) when there exists some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured;
- (2) any ambiguity in the pleadings should be resolved in favor of the insured; and
- (3) if even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend arises.

Id. In sum, an insurer's duty to defend its insured arises when the allegations of the underlying complaint show a potential that liability within coverage will be established. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poulenc Basic Chems. Co., No. 87C-SE-11, 1992 WL 22690, \*7 (Del. Super. Jan. 16, 1992); see also C.H. Heist Caribe Corp. v. Am. Home Assur. Co., 640 F.2d 479, 483 (3d Cir. 1981) (stating that the duty to defend arises "if the allegations of the complaint state on their face a claim against the insured to which the policy potentially applies," and that "the factual allegations of [the third party's] complaint against [the insured] are controlling") (citation omitted); New Castle County v. Hartford Accident and Indem. Co., 673 F. Supp. 1359, 1367 (D. Del. 1987) (recognizing that under Delaware law "insurers are required to defend any action which potentially

states a claim which is covered under the policy”).

**D. Defendant’s Liability Under Coverage A**

**1. Definition of “Property Damage”**

Plaintiff claims that the Crissmans’ allegations are sufficient to satisfy the second prong of the policy’s definition of “property damage,” to wit, “loss of use of tangible property that is not physically injured.” (D.I. 11 at 25) In this regard, plaintiff points out that the Crissmans alleged that plaintiff “violated [their] constitutional rights by depriving them of liberty and property interests, i.e., their right to pursue their chosen occupation of racing horses owned and/or trained by them, and to maintain their employment reputation.” (D.I. 1 at § B ¶ 14) Plaintiff also emphasizes that the Crissmans sought to recover damages for their lost income because “they [had] been precluded from practicing their chosen occupation within the State of Delaware for a six-month period for two consecutive years.” (Id. at § B ¶ 15) In rebuttal, defendant argues that the Crissmans’ allegations as to liberty and property interests and lost profits do not involve “tangible property” and, thus, do not satisfy the requirements of Coverage A. (D.I. 14 at 9-10)

The court agrees with defendant. “Tangible property” is defined as “[p]roperty that has physical form and characteristics.” Black’s Law Dictionary 988 (7th ed. 2000).

Given this definition, the court concludes that, in order to qualify for coverage under the "property damage" clause of Coverage A, the Crissmans' allegations must necessarily have involved the loss of use of property with physical form. Neither the Crissmans' right to retain their chosen occupation nor their ability to maintain their employment reputation implicates a physical form. As such, the court finds that the Crissmans' allegations as to liberty and property interests do not qualify as "tangible property."

The court, likewise, is not persuaded that the Crissmans' lost income qualifies as "property damage" under the policy. While plaintiff asserts that various courts have "found that claims of lost profits or lost income would be covered under a 'property damage' clause of a general liability policy" (D.I. 11 at 26), all of the cited cases deal either with damages resulting from the loss of use of physical property or actual physical injury to tangible property. The cases, therefore, are inapplicable to the facts of the case at bar.<sup>10</sup> Accordingly, the

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<sup>10</sup>Plaintiff also claims that, in its letter of September 25, 2002, defendant "conceded that the [Crissmans'] claims of lost income arising from their exclusion from [plaintiff's property] would be covered under 'property damage' if the claims also resulted from an 'occurrence.'" (D.I. 11 at 25-26) The language of the September 25, 2002 letter reveals, however, that defendant did not make such a statement. The letter merely states that "[t]hough allegations of lost income **could** qualify as 'property damage,' it did not result from an occurrence[.]" (D.I. 9 at § C p. 3 (emphasis added)) Unlike plaintiff, the court declines to turn a qualified statement into an admission.

court concludes that the alleged damage was caused neither by physical injury to tangible property nor the loss of use of tangible property. Therefore, the damages alleged in the Crissman action fail to qualify as "property damage" under the language of the policy.

## **2. Definition of "Occurrence"**

Even if plaintiff could prove that the Crissmans alleged "property damage" as contemplated by the policy, its request for indemnity would still fail because the "property damage" was not caused by an "occurrence." Coverage A states that defendant must defend any "suit" against plaintiff that seeks damages because of "property damage" caused by an "occurrence." Coverage A of the policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (D.I. 1 at § A pp. 1, 20) Plaintiff places emphasis on the latter part of the definition, claiming that it had repeatedly exposed the Crissmans to harmful conditions by excluding them from its facilities over a period of two years. (D.I. 11 at 23) In contrast, defendant claims that the "occurrence" must have been an accident, regardless of whether the Crissmans' exposure to harmful conditions was "continuous" or "repeated." (D.I. 9 at 13) Because plaintiff purposefully barred the Crissmans from its facilities, defendant contends that there was no "accident" and, therefore, no "occurrence." (Id. at

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The court agrees with defendant. The term "accident" is defined as "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated." Black's Law Dictionary 11-12 (7th ed. 2000). Based upon this definition, the court construes the term "occurrence," as used in Coverage A, to mean a sudden event, not a happening resulting from a planned, conscious decision. The situation that led to the Crissman Action was clearly within the control of plaintiff. Indeed, plaintiff acted with purpose in barring the Crissmans from racing at its track, knowing that the Crissmans would subsequently be unable to race their horses in Delaware for six months out of every year. Plaintiff could have reasonably anticipated that the Crissmans would suffer economic damages as a result of this exclusion. Accordingly, the situation leading to the Crissman Action was not an "occurrence" as contemplated by the language of Coverage A. As a result, the court concludes that the Crissman Action is not covered under Coverage A's "property damage" clause.

### **3. "Expected or Intended Injury" Exclusion**

Even if plaintiff could show that the Crissman Action alleged "property damage" caused by an "occurrence," its claims for indemnification would be precluded by one of the policy's

exclusion clauses. The language of Coverage A includes a clause that excludes from coverage “‘property damage’ expected or intended from the standpoint of the insured.” (D.I. 1 at § A p. 2) Plaintiff contends that defendant cannot avail itself of this exclusion provision because plaintiff did not expect or intend the damage that befell the Crissmans. Plaintiff avers that it was concerned that the Crissmans “had been engaging in illegal activity regarding the use and treatment of the horses that they ran at [plaintiff’s] track.” (D.I. 11 at 28) Plaintiff asserts that by excluding the Crissmans from racing at its facility it was merely protecting itself from their wrongdoing. Plaintiff therefore suggests that it was acting in something similar to self-defense by barring the Crissmans from its track, rather than attempting to harm them. (Id.) Plaintiff cites Deakyne v. Selective Ins. Co., 728 A.2d 569 (Del. Super. 1997), as authority for its assertion that, in Delaware, “in order to trigger the ‘expected or intended’ exclusion an insured must intend a result that is wrongful in the eye of the law of torts.” Id. at 573 (cited in D.I. 11 at 27, 28 n.19). More specifically, Deakyne addresses “[w]hether an act of self-defense triggers the ‘expected or intended’ exclusion of an insurance policy.” Id. at 572. The court finds the facts at bar distinct from those in Deakyne, in which a man injured his attacker in an act of self-defense. Id. at 570. Plaintiff was not acting in true self-

defense by excluding the Crissmans from its track. Instead, plaintiff was merely acting in what it believed to be its own "best interests." (D.I. 11 at 28) For this reason, the court is unwilling to extend the self-defense exception from Deakyne to the case at bar.

Plaintiff also cites Farmer in the Dell Enterprises, Inc. v. Farmers Mut. Ins. Co., 514 A.2d 1097 (Del. 1986), as additional authority for its self-defense theory. This case, however, supports defendant's position that the Crissman Action falls under the policy's "expected or intended" exclusion. The court in Farmer in the Dell held that the proper standard was one

which permits application of the exclusion upon the showing of an intentional act coupled with an intent to cause some injury or damage so long as it is reasonably foreseeable that the damage which actually followed would in fact occur. . . . Thus it is the unintentional, but foreseeable, scope of the intentional act which controls.

Id. at 1099-1100 (internal citations omitted). In the case at bar, plaintiff purposefully excluded the Crissmans from its facilities, thereby ensuring that the Crissmans would only be able to race horses in Delaware for, at most, six months out of every year. Plaintiff's intentional actions made it reasonably foreseeable that the Crissmans would suffer damages. Therefore, the damages alleged in the Crissman Action were "expected and intended" from plaintiff's standpoint. As a result, the Crissman Action is excluded from coverage under the policy.

### **E. Defendant's Liability Under Coverage B**

Under Coverage B, defendant states that it "will pay those sums that [plaintiff] becomes legally obligated to pay as damages because of 'personal injury' . . . to which this insurance applies." (D.I. 1 at § A p.7) Coverage B applies to "'[p]ersonal injury' caused by an offense arising out of [plaintiff's] business." (Id.) According to the policy, "personal injury" is defined as injury which arises out of, among other things, "[t]he 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[.]" (Id. at § A p. 20) Plaintiff claims that the Crissman Action alleges "wrongful eviction" and that, as a result, the Crissman Action should be covered under Coverage B's "personal injury" clause. (D.I. 11 at 29) Plaintiff points to the original complaint filed by the Crissmans, which alleged that the Crissmans had "suffered damages generally, from being wrongfully excluded from [plaintiff's] premises." (D.I. 1 at § B ¶ 19, quoted in D.I. 11 at 29) In the alternative, plaintiff claims that the term "wrongful eviction" is ambiguous and "has not been conclusively resolved under Delaware law." (D.I. 11 at 30) Therefore, since "any ambiguities in the insurance contract must be resolved in favor of the insured," plaintiff argues that the term "wrongful eviction" should be interpreted in its favor.

(Id.) In contrast, defendant argues that the Crissmans were not “wrongfully evicted,” as the term has been interpreted by the Third Circuit. (D.I. 14 at 15)

In New Castle County, DE v. National Union Fire Ins. Co. of Pittsburgh, 243 F.3d 744 (3d Cir. 2001), the Third Circuit analyzed a “personal injury” clause with the same language as the one in the case at bar in order to determine whether the phrase “invasion of the right of private occupancy” was ambiguous. Id. at 748. Recognizing that the Delaware Supreme Court had not yet addressed the issue, the Third Circuit “look[ed] outside of Delaware, to other state court decisions and relevant public policy, to reach a decision.” Id. at 750. During the course of its discussion, the Third Circuit compared some states’ definition of the phrase in question to “offenses, **similar to eviction or wrongful entry**, that include a violation of the claimant’s possessory interest in real property.” Id. at 751 (emphasis added).<sup>11</sup> A “possessory interest” is defined as “[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner,” as well as a present or future right to the exclusive use and possession of

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<sup>11</sup>While the court in New Castle County, DE v. National Union Fire Ins. Co. of Pittsburgh, 243 F.3d 744 (3d Cir. 2001), ultimately held that the phrase “invasion of the right of private occupancy” was ambiguous, id. at 756, the parties in the case at bar have focused their arguments only on the term “wrongful eviction.”

property.” Black’s Law Dictionary 950 (7th ed. 2000). The Crissmans held no possessory interest in plaintiff’s track and, thus, were not “wrongfully evicted” under the language of the policy. As a result, the Crissman Action is not covered under the “personal injury” clause of Coverage B.

In sum, the court finds that the Crissman Action fails to satisfy the policy’s requirements for coverage under both Coverage A and Coverage B. Defendant is not required to indemnify plaintiff for its defense costs in the Crissman Action. As such, defendant’s motion to dismiss is granted.<sup>12</sup>

## **V. CONCLUSION**

For the reasons stated above, the court concludes that the costs plaintiff incurred in defending itself in the Crissman Action are not covered by its insurance agreement with defendant. Defendant’s motion to dismiss is granted. An appropriate order shall issue.

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<sup>12</sup>If the Crissman Action had been covered by the policy, the court’s next step would have been to consider whether plaintiff’s three-year delay in notifying defendant of the Crissman Action violated the policy’s notice requirement. However, because the court has found that the Crissman Action was not covered, the court need not address the issue of notice.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DOVER DOWNS, INC.,                    )  
  )  
                  Plaintiff,            )  
  )  
                  v.                    ) Civ. No. 04-199-SLR  
  )  
TIG INSURANCE CO.,                    )  
  )  
                  Defendant.         )

**O R D E R**

At Wilmington, this 11th day of August, 2004,  
consistent with the memorandum opinion issued this same day;

IT IS ORDERED that defendant's motion to dismiss (D.I.  
8) is granted.

\_\_\_\_\_  
Sue L. Robinson  
United States District Judge