UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 97-40030
	)	
DOUGLAS A. GROVENBURG	)	Chapter 13
Soc. Sec. No. [redacted]-0845	)	
and	)	
KATHY A. GROVENBURG	)	
Soc. Sec. No. [redacted]-8479	)	
Debtors.	)	
	)	
DOUGLAS A. GROVENBURG	)	Adv. No. 97-4021
KATHY A. GROVENBURG and	)	
MINOR UNNAMED CHILDREN	)	
Plaintiffs,	)	PROPOSED FINDINGS AND
-vs-	)	CONCLUSIONS RE: CROSS
HOMESTEAD INSURANCE COMPANY	)	MOTIONS FOR SUMMARY
and	)	JUDGMENT REGARDING DUTY
NORTH STAR MUTUAL INSURANCE	)	OF INSURER TO DEFEND
COMPANY	)	
Defendants.	)	

The matters before the Court are the parties' cross motions for summary judgment regarding whether the defendant insurance companies have a duty to defend Debtor Kathy A. Grovenburg in certain lawsuits. This is a non core, related matter considered under 28 U.S.C. § 157(c)(1). These Proposed Findings and Conclusions shall be submitted to the District Court for consideration and entry of a final order and judgment, as provided by § 157(c)(1).[1] As discussed below, the Court concludes that under Debtors' homeowner's policy with Defendant North Star Mutual Insurance Company, North Star does *not* have a duty to defend Debtor Kathy Grovenburg in any of the negligence actions brought, or to be brought, by the Plaintiff Minor Children against her. Accordingly, summary judgment as to North Star's duty to defend Debtor Kathy

[1] Not all parties consented to entry of a final judgment by the Bankruptcy Court, as provided by 28 U.S.C. § 157(c)(2).

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Grovenburg shall be entered for North Star. Under Debtor Kathy Grovenburg's day care policy with Defendant Homestead Insurance Company, Homestead has a duty to defend her against Plaintiff Minor Children's negligence claims until it is shown that no coverage exists for the alleged liability. Accordingly, summary judgment as to Homestead's duty to defend Debtor Kathy Grovenburg shall be entered for Plaintiffs.

FINDINGS OF FACT

In 1995 and early 1996, Kathy A. Grovenburg operated a day care facility in her home. In September 1996, two law suits were filed against her by some day care children who alleged Kathy Grovenburg's son had sexually abused them while they were in Kathy Grovenburg's care due to her negligence. Relief was not sought from the son.

On January 15, 1997, Kathy Grovenburg and her husband Douglas A. Grovenburg (Debtors) filed a Chapter 13 petition. On April 10, 1997, Debtors and certain unnamed, minor children commenced an adversary proceeding against two insurance companies, Homestead Insurance Company (Homestead) and North Star Mutual Insurance Company (North Star), seeking a declaratory ruling that the policies they provided to Debtors required them to defend Debtor Kathy Grovenburg against the sexual abuse lawsuits -- both those filed to date and those that had not yet been filed due to the imposition of the automatic stay in bankruptcy. The policies of insurance and the existing underlying state court complaints were attached to the adversary proceeding complaint.

Homestead sought withdrawal of the adversary proceeding. The motion was denied April 16, 1997 by the United States District Court for the District of South Dakota.

After a request from some plaintiffs that the matter be heard expeditiously due to a pending relief from stay motion by Homestead, a trial was scheduled April 23, 1997.

North Star filed an Answer and Counterclaim on April 18, 1997. In its Answer, North Star admitted that it provides homeowner's insurance for Debtors, including some personal liability coverage, but denied that it had a duty to defend Debtor Kathy Grovenburg from the day care related law suits. In its Counterclaim, North Star alleged that it is not obligated to defend or indemnify Debtor Kathy Grovenburg on the grounds that (1) there was no bodily injury as defined and required by the homeowner's policy; (2) the alleged harm sustained by the Plaintiff Minor Children was not the result of an occurrence as defined and required by the homeowner's policy; (3) the claims and demands resulted directly or indirectly from activities related to the day care business; and (4) the claims and demands result from bodily injury expected or intended from the standpoint of the insured.

In its Answer filed April 18, 1997, Homestead conceded that it had provided Debtor Kathy Grovenburg with a family day care insurance policy but it denied that it had an obligation to defend her. Homestead further denied that any current Plaintiff Minor Children were injured or suffered damages while Homestead's policy was in effect. Homestead directed the Court to Exclusion (m) of the policy, which states that the policy does not provide coverage

"[f]or any bodily injury, property damage or personal injury to a daycare child arising from an occurrence caused by a family member not employed as a care provider" and argued that Debtors' son was not employed as a day care provider.

The parties filed stipulated facts on April 22, 1997. In addition to the facts set forth above, the parties agreed that Debtor Kathy Grovenburg's son was a minor who resided with her and that her son was not paid wages by her. For the purpose of this adversary proceeding only, if Plaintiff Minor Children prove that sexual contact or abuse by Debtors' son occurred, then the parties also agreed that the claimants were harmed by that contact or abuse. Finally, the parties agreed that Debtors' son was adjudicated in the juvenile court system, that this Court may obtain a copy of that file for an *in camera* review, and that this Court may take judicial notice of that file. Attached to the stipulation were the insurance policies and copies of the two complaints that had been filed in state court.

At the request of all parties, the April 23, 1997 trial was postponed. In substitute, the parties agreed that Defendants would file summary judgment motions regarding their duty to defend Debtor Kathy Grovenburg under the insurance policies. A joint response and a cross-motion for summary judgment were received from Plaintiffs, briefs were received from all parties, and an affidavit by a Guardian Ad Litem of two Plaintiff Minor Children was received on behalf of all Plaintiff Minor Children. Some Plaintiff Minor Children, who had been unable to file their respective state court complaints because of the automatic stay, filed exemplary

complaints for the Court to consider under the summary judgment motions.[2]

NORTH STAR'S HOMEOWNER'S POLICY. Under the homeowner's policy issued by North Star, the insured include Debtors and their son, since he is a relative who resides in the home. The policy states that each family member "is a separate *insured*."

> Liability coverage includes
>
> all sums for which an *insured* is liable by law because of *bodily injury* . . . caused by an *occurrence* to which this coverage applies. [North Star] will defend a suit seeking damages if the suit resulted from *bodily injury* . . . not excluded under this coverage.

"Bodily injury" is defined and limited in an AMENDATORY ENDORSEMENT as

> bodily harm to a person and includes sickness, disease or death. This also includes required care and loss of services.
>
> *Bodily injury* does not means bodily harm, sickness, disease or death that arises out of:
>
> . . . .
>
> any actual, alleged or threatened sexual misconduct. Sexual misconduct includes, but is not limited to, sexual molestation, sexual touching, sexual harassment, assault of a sexual nature, unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or any act, conduct or communication which is of a sexual or seductive nature.

Relevant exclusions that apply to the liability coverage include

> *bodily injury* . . . which results directly or indirectly from the rendering or the failing to render a professional service; . . . results directly or indirectly from activities related to the *business* of an *insured*, except as provided for by an Incidental Business Coverage; [or] . . . is expected or intended from the

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[2] H.B. and B.B.'s exemplary complaint, labeled an "Amended Complaint" under the caption of this adversary proceeding, was received on May 7, 1997 but was docketed with H.B. and B.B.'s brief on May 23, 1997.

> standpoint of an *insured*.

An exclusion from coverage for Medical Payment to Others, a provision of the liability coverage, includes

> *bodily injury* to . . . a person who is on the *insured premises* because a *business* is conducted or professional services are rendered on the *insured premises*[.]

The "insured premises" for the purpose of liability coverage under the homeowner's policy includes Debtors' home. "Business" is defined in the policy as

> a trade, a profession or an occupation . . . , all whether full or part time.
>
> *Business* includes services regularly provided by an *insured* for the care of others and for which an *insured* is compensated.

Some business related coverage is provided. North Star will

> pay for the *bodily injury* which results from: . . . the incidental activities that are usually performed by minors; or . . . activities that are related to *business*, but are usually viewed as *non-business* in nature.

All the words in the homeowner's policy that are emphasized above were emphasized in the original and denote terms defined within the policy, except "non-business," which was not separately defined in the policy.

North Star conceded that Debtors' son is an insured under the homeowner's policy. However, North Star argued that the homeowner's policy does not cover the alleged sexual abuse by Debtors' son because the policy's definition of "bodily injury" excludes claims that arise out of sexual misconduct, the claims arose within excluded business pursuits, and the injuries were excluded as expected or intended.

Plaintiff A.H., joined by others, emphasized that the cause of

action is against Debtor Kathy Grovenburg for negligence because her lack of supervision created the "exposure to condition" that is covered by the homeowner's policy. Plaintiffs B.B. and H.B. also argued that Kathy Grovenburg had a fiduciary duty to the day care children under South Dakota law that she breached.

Homestead's Day Care Policy. The day care policy issued by Homestead provides that Debtor Kathy Grovenburg is the only insured. In part I. INSURING AGREEMENTS, Homestead agreed

> [t]o pay on behalf of the Insured all sums that the Insured shall be legally obligated to pay for bodily injury, property damage, or personal injury resulting from an occurrence arising out of the Insured's activities as a Family Child Care Provider inclusive of any violation of any statute relating to child abuse or endangerment. . . .
>
> The insurance afforded by this Coverage Part applies to bodily injury, property damage or personal injury which occurs anywhere in the world . . . .
>
> [Homestead] has the . . . duty to defend the Insured with respect to a suit that satisfies all the conditions set forth in I. INSURING AGREEMENTS.

Exclusions set forth in part II. of the policy included "[f]or any bodily injury, property damage or personal injury to a daycare child arising from an occurrence caused by a family member not employed as a care provider."

Homestead argued that the day care policy does not cover the alleged sexual abuse by Debtors' son because injuries caused by family members not employed by the day care are specifically excluded. Homestead also argued that a negligence claim against Debtor Kathy Grovenburg is not covered since it is a related, interdependent claim arising from her son's actions, which are not

covered. Homestead emphasized that the exclusion for injuries by family members is not really reached because Debtor Kathy Grovenburg is the only insured under the policy. Homestead further argued that even if the son is covered by the policy, his actions were intentional and therefore also excluded from coverage.

Plaintiff A.H., joined by others, argued in response that the term "family member" under the relevant exclusion is not defined and, therefore, must be interpreted to mean a family member of a day care child, not a family member of the day care provider, since that interpretation is more favorable to the insureds. Plaintiffs emphasized that the claims are against Kathy Grovenburg for negligence, not against her son for his intentional acts, and, therefore, coverage under the day care policy exists.

APPLICABLE LAW[3]

DUTY TO DEFEND. A liability insurer's duty to defend its insured is measured by the terms of the policy and the complaint.

> It is the general rule that the duty of an insurance company to defend its insured is to be determined by the allegations of the complaint or petition in the action brought against the insured. An insurer must defend its insured if the pleadings in the action against the insured allege facts which, if established, would support a recovery under the policy.

U.S. Fidelity & Guaranty Co. v. Louis A. Roser Co., 585 F.2d 932, 936 (8th Cir. 1978)(as quoted in *American Universal Ins. Co. v. Whitewood Custom Treaters, Inc.*, 707 F.Supp. 1140, 1145 (D.S.D.

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[3] The parties do not dispute that South Dakota law governs this action and that this Court is obligated to ascertain and apply it. *See St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361, 368 (8th Cir. 1966).

1989), and *Hawkeye Security Ins. Co. v. Clifford*, 366 N.W.2d 489, 491 (S.D. 1985)). The duty to defend and the duty to pay are severable and independent duties. *Hawkeye Security*, 366 N.W.2d at 490. The duty to defend is broader. *Id.* If it is clear or arguably appears from the face of the pleading against the insured that the alleged claim, if true, falls within the coverage provided by the policy, the insurer must defend. *Id.* at 491.

> The review then ends, even though the pleadings are ambiguous or reveal other claims not covered in the policy, and notwithstanding that extraneous facts indicate the claim is false, groundless, or even fraudulent.

Id. at 491-92. Under South Dakota law, the courts equate "arguably appears" with an ambiguous pleading. *Id.* at 492 n.4. Once the duty to defend is imposed, it continues until the Court finds that the insurer is relieved of that duty because of noncoverage under the policy. *Id.* at 492.

The insurer has the burden of showing that it has no duty to defend. *Id.* The insurer may meet that burden by showing that the claim clearly falls outside of policy coverage. *Id.*

The plain, ordinary meaning must be ascribed to the words of the policy. *O'Neill v. Blue Cross of Western Iowa & South Dakota*, 366 N.W.2d 816, 818 (S.D. 1985). The canon of *noscitur a sociis* -- words or terms ought to take import from their companion words and terms -- is "wisely applied where a word [or phrase] is capable of many meanings in order to avoid the giving of unintended breadth" to a policy. *Opperman v. Heritage Mutual Ins. Co.*, 566 N.W.2d 487,

490 (S.D. 1997) (quoting, in part, *Jarecki v. G.D. Searle Co.*, 367 U.S. 303, 307 (1961)).

If there is ambiguity -- and only if there is ambiguity -- in the policy, any doubt about whether the claim against the insured arguably falls within the policy coverage must be resolved in favor of the insured, especially where this doubt exists pre-trial. *Hawkeye Security*, 366 N.W.2d at 492 (several cites therein); *Vern Eide Buick, Inc. v. United States Fidelity & Guaranty Co.*, 273 N.W.2d 116, 117 (S.D. 1978). However, extrinsic evidence cannot be used to interpret an unambiguous policy. *See Ford v. Moore*, 552 N.W.2d 850, 854 (S.D. 1996). Moreover, the Court cannot "seek out a strained or unusual meaning for the benefit of the insured." *Opperman*, 566 N.W.2d at 489 (quoting *American Family Mutual Ins. Co. v. Purdy*, 483 N.W.2d 197, 199 (S.D. 1992)(cite therein)). "[I]nsurance policies must be subject to a reasonable interpretation and not one that amounts to an absurdity." *Farm Mutual Auto Ins. Co. v. Vostad*, 520 N.W.2d 273, 275 (S.D. 1994)(quoted in *Olson v. United States Fidelity and Guaranty Co.*, 549 N.W.2d 199, 200 (S.D. 1996)).

SUMMARY JUDGMENT. Entry of summary judgment is appropriate when the moving party shows that there is no genuine issue of material fact and that it, the moving party, is entitled to judgment on the merits as a matter of law. *Elrod v. General Casualty Co. of Wisconsin*, 566 N.W.2d 482 (S.D. 1997). The evidence must be viewed

most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. *Id.*

CONCLUSIONS OF LAW

DUTY OF NORTH STAR TO DEFEND UNDER HOMEOWNER'S POLICY

Under the homeowner's policy, North Star agreed to defend an insured from a "suit seeking damages if the suit resulted from *bodily injury* . . . not excluded under this coverage." As the parties have agreed, while Debtors' son is an insured under this policy, coverage for him is clearly excluded because the alleged sexual abuse by him does not fall within the narrow definition of "bodily injury" covered by the policy. Coverage for the son's actions is also excluded because his acts were intentional. *Purdy*, 483 N.W.2d at 199-201. ("[A]cts of criminal sexual contact are of such a nature that the intention or expectation to inflict bodily injury will be inferred as a matter of law."); and *State Farm Mutual Automobile Ins. Co.* v. Wertz, 540 N.W.2d 636, 639-40 (S.D. 1995). Consequently, Plaintiffs argue that the Court must consider Debtor Kathy Grovenburg's negligence as a separate cause of action. They argue it was her lack of supervision that created an "exposure to condition" which is covered by the homeowner's policy.

South Dakota case law provides guidance. In *Great Central Ins. Co. v. Roemmich*, 291 N.W.2d 772 (S.D. 1980), the insurance company, who had issued a homeowner's policy, argued that it had no duty to defend a liability suit against the parents of a minor who wrecked the family car and injured the defendant-claimant. The insurance company relied on an exclusion in the policy for injuries

arising from the owning, operation, rental, or lending of an automobile. *Id.* at 773-74. The claimant argued that the parents had been negligent in allowing their son to operate the car. *Id.* at 774. The court recognized that a cause of action for negligent entrustment or negligent supervision is derived from the more general concept of ownership and use of the vehicle. *Id.* at 775. Since coverage for the general concepts of ownership and use were excluded, coverage for the parent's alleged negligent entrustment or supervision of the minor and the auto also were excluded. *Id.*

While the facts in this case are not identical, the *Roemmich* decision does establish that a cause of action for parental negligence cannot be separated from the underlying cause of the injury by the injured child. Here, the injury to the Plaintiff Minor Children was the result of sexual misconduct by Debtors' son. That type of bodily injury was specifically not covered under the policy. Following the rationale in *Roemmich*, this Court must conclude that a separate negligent supervision cause of action against Debtor Kathy Grovenburg, an insured, also falls outside the homeowner's policy's coverage because the injury to Plaintiff Minor Children was the result of the sexual misconduct by the son, also an insured. Without alleging the molestation and injury caused by Debtors' son, Plaintiff Minor Children could not have stated a complete cause of action for negligence against Debtor Kathy Grovenburg. *All American Ins. Co. v. Burns*, 971 F.2d 438, 443 (10th Cir. 1992). Accordingly, there is no homeowner's policy coverage for the negligence claim against Debtor Kathy Grovenburg.

It is important to note that the definition of "bodily injury" for which coverage is *not* provided is broad. The policy does not provide coverage for any bodily injury that "arises out of" . . . "sexual misconduct."[4] As discussed in *Auto-Owners Ins. Co. v. Transamerica Ins. Co.*, 357 N.W.2d 519, 521 (S.D. 1984), "arising out of" is more encompassing than "caused by." *Id.* Therefore, through the use of "arises out of" in the AMENDATORY ENDORSEMENT, North Star specifically narrowed the policy's definition of "bodily injury" that is covered by the policy.

There is also no homeowner's policy coverage for the negligence claims against Debtor Kathy Grovenburg because of the exclusion for intentional acts. This exclusion applies equally to Debtors' son and Debtor Kathy Grovenburg. See *Roemmich*, 291 N.W.2d at 775. A substantial number of courts have reached the same conclusion in insurance cases involving vehicle accidents, as well as those involving child molestation. *See Allstate Ins. Co. v. Steele*, 74 F.3d 878, 880-81 (8th Cir. 1996); *Burns*, 971 F.2d at 443 n.1 (cites therein); *Standard Mutual Ins. Co. v. Bailey*, 868 F.2d 893, 898 (7th Cir. 1989) (cites therein); *Jessica M.F. v. Liberty Mutual Fire Ins. Co.*, 561 N.W.2d 787 (Wis. Ct. App. 1997); *American Family Mutual Ins. Co. v. Copeland-Williams*, 941 S.W.2d 625 (Mo. Ct. App. 1997); *Johnson v. Allstate Ins. Co.*, 687 A.2d 642 (Me. 1997); *Northwest G.F. Mutual Ins. Co. v. Norgard*, 518 N.W.2d 179

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[4] North Star's homeowner's policy also broadly defines "sexual misconduct."

(N.D. 1994); *Mutual of Enumclaw v. Wilcox*, 843 P.2d 154, 159 (Idaho 1992); *Swentkowski v. Dawson*, 881 P.2d 437, 438-39 (Colo. Ct. App. 1994); *see also Colorado Farm Bureau Mutual Ins. Co. v. Snowbarger*, 934 P.2d 909 (Colo. Ct. App. 1997); *Cuervo v. Cincinnati Ins. Co.*, 665 N.E.2d 1121, 1122-23 (Ohio 1996)(limited discussion); *Taryn E.F. v. Joshua M.C.*, 505 N.W.2d 418, 420-21 (Wis. Ct. App. 1993); *but see Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F.Supp 1151, 1159-66 (W.D. Ark.)(cases cited therein), *aff'd*, 33 F.3d 1476 (1994); Hanover Ins. Co. v. Crocker, 688 A.2d 928 (Me. 1997); and *Premier Ins. Co. v. Adams*, 632 So.2d 1054 (Fla. Dst. Ct. App. 1994). If presented with the facts herein, this Court concludes that the courts of South Dakota would follow the reasoning set forth in the above-cited cases -- that a negligence claim against one insured is excluded if the intentional act of another insured is excluded when the injury for which damages is sought is the same. While the North Star homeowner's policy used the term "an insured" in the exclusionary clause for intentional acts, the Court agrees with the reasoning in *Johnson*, 687 A.2d at 644 (cites therein), that exclusion of coverage for an intentional act by "an insured" equates with an exclusion of coverage for an intentional act by "any insured." *But see Taryn E.F.*, 505 N.W.2d at 421 ("an insured" in an exclusionary clause equated with "the insured" but distinguished from "any insured"); *compare Allstate Ins. Co. v. Worthington*, 46 F.3d 1005, 1008-1010 (10th Cir. 1995).

This interpretation gives full effect to the exclusionary clause for intentional acts and does not create any ambiguity in the policy's short severability clause. *See Roemmich*, 291 N.W.2d at 774-75; *Copeland-Williams*, 941 S.W.2d at 628-630

Plaintiffs could also make some argument that Debtor Kathy Grovenburg's negligent supervision of the day care children is a separate occurrence from the negligent supervision of her son and must be considered independently. When that is done, however, it is clear that Debtor Kathy Grovenburg's supervision and care for her day care children is a business -- an activity that too is excluded from the policy coverage. *See American Family Mutual Ins. Co. v. Elliot*, 523 N.W.2d 100, 102-03 (S.D. 1994). Plaintiff Minor Children's argument that Debtor Kathy Grovenburg was not pursuing her day care business when she left home to run errands ignores why the day care children were in her home in the first place. Moreover, the policy's business exclusion is very broad. Even "indirect" business activities are not covered.

Plaintiff Minor Children's additional argument that Debtor Kathy Grovenburg knew of her son's proclivity and still failed to protect the day care children, also does not alter the conclusions reached herein. Plaintiff Minor Children's complaints against her is still one for negligence and this negligence cause of action is not covered under this policy, as discussed above. If Debtor Kathy Grovenburg's actions were something more deliberate, then they may be denominated intentional and still excluded from coverage under the homeowner's policy.

Further, the Court can find no distinguishable cause of action covered by the homeowner's policy with North Star that would require North Star to defend Debtor Kathy Grovenburg from Plaintiff R.C.'s separate cause of action arising from Debtors' son's sexual abuse of R.C. in R.C.'s own home.[5] The babysitting of R.C. was performed solely by Debtor's son. The resulting harm to R.C. does not fall within the narrow definition of covered "bodily injury." Further, the sexual abuse of R.C. by Debtors' son was an intentional act.[6] Thus, no coverage is provided for the abuse that occurred when Debtors' son babysat in R.C.'s home. Even assuming, as Plaintiff R.C. argues, that Debtors' son babysat for R.C. because of Debtor Kathy Grovenburg's personal and business relationship with R.C.'s family and that it was Debtor Kathy Grovenburg's attendant negligence in preventing this babysitting arrangement that lead to the sexual abuse of R.C., that cause of action for negligence would still not be covered under the homeowner's policy. Just as her alleged negligence regarding the sexual abuse that occurred during day care hours is not covered by the homeowner's policy, Debtor Kathy Grovenburg's alleged negligence surrounding her son's babysitting of R.C. is not covered by the homeowner's policy because the injuries to R.C. do not fall within the narrow definition of covered "bodily injury" and because

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[5] R.C.'s brief indicates that R.C. asserts this "unique" claim only against the North Star homeowner's policy, not against Homestead's day car policy.

[6] The homeowner's policy does cover "incidental activities that are usually performed by minors." Thus, Debtors' son's business pursuit of babysitting may have been covered but for the narrow definition of covered "bodily injur[ies]" and the exclusion for intentional acts.

the sexual abuse of R.C. by Debtors' son was an intentional act of an insured that is excluded from coverage.

DUTY OF HOMESTEAD TO DEFEND UNDER DAY CARE POLICY

The Homestead day care policy differs from the North Star homeowner's policy in four important respects. First, Debtor Kathy Grovenburg is the only insured under the policy. Second, the policy covers personal injuries that arise out of the policy holder's day care business "*inclusive* of any violation of any statute relating to child abuse or endangerment. . ." [emphasis added]. Third, Plaintiffs claim there is an ambiguity in the policy that must be construed in their favor. Fourth, the intentional acts exclusion clause applies to "the" insured, rather than "an" insured. It is these differences that establish Homestead's duty to defend Debtor Kathy Grovenburg under the day care policy until Homestead shows that no coverage under the policy exists.

Initially, the Court notes that under part "I. INSURING AGREEMENTS[,] A. COVERAGE," the policy does not strictly foreclose coverage for the injuries caused by Debtor's son's sexual abuse of the children *if* Debtor Kathy Grovenburg is legally obligated to pay for damages arising from that occurrence. Instead, the policy states it will cover the insured if the insured is legally obligated to pay for an occurrence that arises out of the insured's day care activities, inclusive of any violation of a child abuse statute.

The policy's definition of "occurrence" is an "accident,

including continuous or repeated exposure to conditions . . . which results in [injury or damages] neither expected nor intended from the standpoint of the Insured." Plaintiff Minor Children argue that Debtor Kathy Grovenburg's negligence in leaving the day care children with her son constitutes a covered "exposure to conditions." A virtually identical definition of "occurrence" was considered in *Western Casualty & Surety Co. v. Waisanen*, 653 F.Supp. 825, 827 (D.S.D. 1987). There the court noted, quoting *Triple U Enterprises, Inc. v. New Hampshire Ins. Co.*, 576 F.Supp. 798, 808 (D.S.D. 1983), that in a general comprehensive liability policy, "occurrence" is broader than "accident." *Id.* at 830. "The definition of 'occurrence' eliminates any need for an exact finding of the cause of the alleged damage, but only requires that such damage is neither expected [n]or intended from the standpoint of the insured." *Triple U*, 576 F.Supp. at 808[7], *modified on other grounds*, 766 F.2d 1278 (8th Cir. 1985). In *Waisanen*, the court went on to hold that under the policy's definition of "occurrence" coverage would not be denied under South Dakota law simply because intentional conduct constituted the underlying conduct. *Waisanen*, 653 F.Supp at 830. Instead, the court said coverage depended on whether the resultant injury was intended or expected by the insured. *Id.*

The parties have agreed for the purpose of this summary

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[7] The North Star homeowner's policy included a similar definition for occurrence. However, the narrow definition of covered bodily injuries in that policy did not result in a broad application of "occurrence" in this case.

judgment motion that Debtor Kathy Grovenburg did not intend the injuries to occur. Accordingly, the next consideration is whether the occurrence arose out of her day care operation, as required by "I. INSURING AGREEMENTS[,] A. COVERAGE" of the policy. The facts are clear on that. The children were in her home for that purpose. As noted above, the fact that she absented herself from the home to run business and non business errands does not change the day care status of the children in her home or alter the fact that the children were there for a business purpose. Further, as discussed above, "arising out of" is also a broad term. By using it, Homestead agreed to broadly cover occurrences related to Debtor Kathy Grovenburg's day care. *See Auto-Owners Ins. Co.*, 357 N.W.2d at 519.

The breadth of the day care policy's duty to defend is the next consideration. The policy with Homestead will defend Debtor Kathy Grovenburg "with respect to a suit that satisfies all the conditions set forth in I. INSURING AGREEMENTS." Since, coverage under part I. has been established, it appears that Homestead will have a duty to defend if no exclusions remove that coverage.[8]

It is in determining the breadth of the key exclusion that the Court finds an ambiguity that must be resolved in favor of Debtor Kathy Grovenburg. The exclusion provides the policy does not cover injury or damages to a day care child "arising from an occurrence

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[8]Interestingly, part I. does not specifically incorporate the exclusions under part II. However, the Court does not find that an ambiguity exists. When the policy is read as a whole, it is clear that the exclusions in part II. modify the coverage and duty to defend set forth in part I. *Elliot*, 523 N.W.2d at 102.

caused by a family member not employed as a care provider." "Family member" is not defined by the policy. There is nothing in the exclusionary clause itself that provides a clue on whether the family member is someone from the insured's family or a member of the day care child's family. This clause is the only place in the policy where "family" is used [that the Court could find]. Further, a family member of a day care child could cause an "occurrence" at the day care site just as could a member of insured's family. Depending on the facts of the particular case, an insured could be faced with a lawsuit involving either. In this case, however, when that ambiguity is construed in favor of Debtor Kathy Grovenburg, the "family member" to which the exclusionary clause refers must be a family member of the day care child. Hence, this provision does not exclude coverage under the day care policy although Plaintiff Minor Children's injuries were caused by the insured's son. Therefore, Homestead has a duty to defend Debtor Kathy Grovenburg against Plaintiff Minor Children's complaints.

The Court does not find that this interpretation of "family member" contravenes the "plain, ordinary meaning" of the words in the exclusion, *see Hawkeye Security*, 366 N.W.2d at 492, nor results in a strained or unusual meaning for the benefit of the insured. *Opperman*, 566 N.W. 2d at 489. Moreover, the interpretation does not give unintended breadth to the policy. *Id.* at 490. The policy already broadly defined "occurrence," the occurrence only had to arise out of the day care operation, the policy only specifically

denied coverage for the expected or intended acts of "the" insured, and, finally, coverage under the policy included violations of statutes related to child abuse.

Under this day care policy, the question of whether coverage of a negligence claim against Debtor Kathy Grovenburg is excluded because the son's acts were intentional is not reached. The day care policy had only one insured, Debtor Kathy Grovenburg, and only intentional acts of "the" insured are not covered. In contrast, under the North Star homeowner's policy discussed above and the homeowner's policy discussed in *Roemmich*, 291 N.W.2d at 775, both the parents and the child were insureds and the policies excepted coverage for certain acts committed by any insured.

While Homestead's duty to defend Debtor Kathy Grovenburg under the day care policy has been established at this early stage of the proceeding, that duty extends only until no coverage is shown. *Hawkeye Security*, 366 N.W.2d at 492. If, for example, Homestead establishes that Debtor Kathy Grovenburg knew with a "substantial probability" that the day care children would be harmed by her son, Homestead's duty to defend her may end since coverage for expected acts of the insured are not covered. *Waisanen*, 653 F.Supp. at 830-31. Under these present summary judgment motions, the record is not sufficiently settled nor complete to permit such a determination now.

DEBTOR KATHY GROVENBURG'S ALLEGED FIDUCIARY DUTY

Finally, the Court concludes that neither the nature of Debtor Kathy Grovenburg's duty to her day care children nor the expanse of

the coverage under either policy are altered solely because Debtor Kathy Grovenburg may be denominated a "fiduciary" of the Plaintiff Minor Children, as argued by Plaintiff Minor Children B.B. and H.B. The insurance companies' respective duties to defend are defined only by the policies, any relevant insurance laws, and the underlying complaints. *American Universal Ins. Co.*, 707 F.Supp. at 1145, and *Hawkeye Security Ins. Co.*, 366 N.W.2d at 491(both quoting *U.S. Fidelity & Guaranty Co.*, 585 F.2d at 936).

Dated this 29th day of August, 1997 and respectfully submitted to the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA for consideration and entry of a final order and judgment pursuant to 28 U.S.C. § 157(c)(1) and F.R.Bankr.P. 9033(d) after parties in interest timely file any specific objections and responses pursuant to F.R. Bankr. P. 9033(b).

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

AUG 29 1997

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: _____
Date: _____

Case: 97-04021 Form id: 122 Ntc Date: 08/29/97 Off: 4 Page : 1
Total notices mailed: 13

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