

3. Defendants Cox, Owen Cox, and Denise Cox (collectively, the “Coxes”) are each individual residents and citizens of Fort Bend County, Texas. They have appeared and answered.

JURISDICTION AND VENUE

4. Plaintiff’s citizenship is diverse from defendants’ citizenships and the amount in controversy exceeds \$75,000, exclusive of interest and costs. The Court, therefore, has subject-matter jurisdiction over this lawsuit under 28 U.S.C. § 1332(a)(1).

5. The Court has personal jurisdiction over Zinkweg because he has performed business in Texas within the meaning of Texas Civil Practice & Remedies Code § 17.042 by committing or allegedly committing a tort in this State, which tort is the subject of the underlying lawsuit and settlement that are the subjects of this declaratory judgment action. Alternatively, Zinkweg has been a party to a Texas contract because he is insured under the Occidental Policy that is the subject of this lawsuit and was to be performed in whole or in part in this State.

6. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this lawsuit occurred in this district and division. Specifically, the insurance policy was delivered to Dirk and Andrea Zinkweg, Zinkweg’s parents, at 5415 Tyler Park Lane, Katy, Texas 77494 (the “Zinkweg residence”). Moreover, the underlying settled lawsuit, *Christoffer Cox, et al. v. Ryan Zinkweg, et al.*, Cause No. 21-DCV-284061 (the “underlying lawsuit”), that is the subject of this action was filed against Zinkweg in the 458th District Court of Fort

Bend County, Texas.

FACTS

A. The Policy and Its Controlled Substance Exclusion

7. Occidental issued Homeowners Insurance Policy No. TXH2732553 (the “Policy”) to Dirk and Andrea Zinkweg for the policy period of May 24, 2019 to May 24, 2020. The Policy includes a Personal Liability limit of \$1,000,000. A true copy of the Policy is attached as Exhibit 1.

8. The Policy defines an “insured” as “[y]ou and residents of your household who are: (1) Your relatives; or (2) Other persons under the age of 21 and in your care or the care of a resident of your household who is your relative. . . .” At all times relevant to this lawsuit, Zinkweg was an “insured” under the policy.

9. The Policy includes the following insuring agreement:

SECTION II – LIABILITY COVERAGES

A. Coverage E – Personal Liability

If a claim is made or a suit is brought against an “insured” for damages because of “bodily injury” or “property damage” caused by an “occurrence” to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an “insured” is legally liable. Damages include prejudgment interest awarded against an “insured”; and
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the “occurrence” has been exhausted by payment of a judgment or settlement.

10. The Policy, however, also contains this Controlled Substance exclusion:

8. Controlled Substance
“Bodily injury” or “property damage” arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance as defined by the Federal Food and Drug Law at 21. U.S.C.A. Sections 811 and 812. Controlled Substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the lawful orders of a licensed health care professional.

B. The Original Petition

11. The Coxes filed the underlying lawsuit on June 4, 2021. A true copy of the original petition is attached as Exhibit 2.

12. The original petition, though later superseded by amendment, remains a subject of this declaratory judgment action because Occidental and Zinkweg disagree whether Occidental owed Zinkweg a defense under that pleading. The original petition also states true facts that formed the basis for the underlying lawsuit’s settlement, despite the downplaying of those facts in the amended pleading.

13. In their original petition, the Coxes alleged that on July 14, 2019, Cox and Zinkweg ingested lysergic acid diethylamide (“LSD”), a hallucinogenic drug allegedly purchased by Zinkweg.

14. The original petition further alleged that, during the night while the room was dark, Cox fell two feet from Zinkweg’s bed to the floor. Zinkweg heard Cox fall, turned on the light, and observed Cox laying on the floor with his chest to ground.

15. The original petition alleged that Cox remained on the floor until

approximately 7:30 a.m., when Zinkweg called Sammy Azhar (“Azhar”), a defendant in the underlying lawsuit. Azhar climbed a rope to the second floor of the Zinkweg residence to let himself in so as not to alert Zinkweg’s parents.

16. The original petition asserted that both Zinkweg and Azhar picked Cox up off of the floor and placed him back on Zinkweg’s bed.

17. At approximately 9:30 a.m., Zinkweg notified his parents of what had transpired during the night and Cox’s parents were contacted. Upon arrival at the Zinkweg residence, Cox’s parents called 911.

18. The original petition contended that, at approximately 11:45 a.m., EMS personnel arrived at the Zinkweg residence, stabilized Cox, and transported him to a nearby hospital. It was later determined that Cox suffered a complete cervical spinal cord injury, resulting in Cox having been rendered a quadriplegic.

C. The Amended Original Petition

19. The Cox Defendants amended their petition on October 14, 2022 in a manner calculated to minimize the role of controlled substances in Cox’s injury. The new pleading downplayed the role so effectively that Occidental agreed to defend Zinkweg under it, as necessary under the Texas “eight corners” rule, which determines an insurer’s duty to defend based on allegations, not facts. Because of that agreement, the amended petition is not at issue in this suit.

20. The amended petition did nothing to change the actual facts, however, and those are the topic of the next section. The actual facts formed the basis for the underlying settlement.

D. Facts Forming the Basis for the Underlying Settlement

21. The facts forming the basis for the underlying settlement are the ones the Coxes freely admitted in their original petition, outlined above; the additional facts to which Cox, Zinkweg, Azhar and Owen Cox testified at their depositions in the underlying lawsuit; and the facts in Cox's medical records.

Cox's Deposition

22. Cox testified at his deposition as set out below.

- Cox arrived at Zinkweg's house on the evening of July 13, 2019.
- Cox and Zinkweg planned to take LSD that night, and no one else was supposed to participate.
- Cox took two squares of LSD around midnight. They also consumed THC gummies that Zinkweg provided.
- Cox experienced effects from the LSD about an hour after taking it.
- Cox experienced hallucinations and a "zoom-out" effect from the LSD and THC, respectively.
- Cox fell off the bed and hit his head on the dresser or nightstand. He felt a shock through his body when he fell.
- Azhar and Zinkweg lifted Cox off the floor.
- When asked multiple times if he believes there is anything that Zinkweg could have done to prevent the accident from occurring, Cox responds that he is unsure, but acknowledges there are "things" that could have been done.
- Cox eventually offers two examples: he could have not gone to Zinkweg's house that night, or Zinkweg could have not given him LSD.

Zinkweg's Deposition

23. Zinkweg testified at his deposition as set out below.

- Zinkweg and Cox both took LSD on the night of July 13, 2019.

- Cox took two tabs of LSD, while Zinkweg took only one.
- Cox also ingested THC gummies that night, which Zinkweg did not.
- Zinkweg felt the effects of the LSD about an hour after taking it, noting that it was difficult to focus and lights appeared brighter and more colorful.
- Zinkweg and Cox spent the night talking and laughing, with Zinkweg noting that their thoughts were not coherent.
- Zinkweg's next memory is of Cox "laying down unable to move," talking loudly, and asking for help.
- Zinkweg called Sammy Azhar for help around 6:00 a.m. using Cox's phone. Azhar arrived shortly after the call and helped move Cox to the bed.
- Zinkweg and Azhar discussed the type of LSD that Cox had taken earlier in the night.
- Zinkweg confirms that the spot on his tongue in an exhibit is from taking LSD.
- Zinkweg agrees that if he had not given Cox the drugs, Cox would not have been injured.
- Zinkweg accepts responsibility for providing the drugs to Cox, but says that both he and Cox were responsible for their own actions.
- Zinkweg is asked about the location of Cox when he first noticed something was wrong. He is unable to provide a clear answer due to the effects of LSD.
- Zinkweg was heavily intoxicated and still "up very high" on drugs when he first saw Cox on the floor.
- Zinkweg's first inclination that something was wrong was when he called Azhar to come over.
- Zinkweg made the judgment call that the issue was likely due to the drugs.
- Zinkweg has feelings of guilt over the incident, but maintains that no one forced either of them to take drugs.

- Zinkweg recalls that when a police officer asked what happened, Zinkweg explained that they had taken drugs.

Azhar's Deposition

24. Azhar testified at his deposition as follows.

- Azhar did not know Zinkweg before receiving a call from him on July 13, 2019.
- Azhar received a call from Cox around midnight on July 13, 2019, in which Cox told Azhar he had taken one tab of LSD and wasn't feeling any effects.
- Azhar received a call from Zinkweg around 5:00 a.m. on July 14, 2019 while he was with Cox. Zinkweg was "freaking out" because Cox was acting erratically and making noise.
- Azhar spoke with both Zinkweg and Cox for around two hours, trying to calm them down and gather information.
- Azhar describes Cox as being incoherent for much of the call, speaking in "gibberish" at times.
- Azhar asked Cox if he could move, and Cox responded that he couldn't feel anything.
- Azhar also asked Zinkweg how Cox ended up on the floor, and Zinkweg said that Cox had fallen.
- Azhar did not call 911 or seek medical help, as he believed Cox's condition was drug-induced.
- Azhar eventually went to Zinkweg's house to check on Cox. Azhar arrived at Zinkweg's house around 7:00 a.m. By then, Cox's speech had become more coherent.
- Azhar still believed that Cox's condition was related to drug ingestion, despite the improvement in his speech.
- Azhar thought Chris's physical problems were caused by drugs, and this influenced his decision not to seek medical intervention.
- Azhar confirms that Chris refused help multiple times, insisting that his condition would "wear off."

Owen Cox's Deposition

25. Owen Cox testified at his deposition that when EMS arrived, EMS asked Christoffer Cox what happened, and Christoffer responded that he had fallen out of bed and there was LSD usage.

Medical Records

26. The Fort Bend County EMS report states:

Pt's chief complaint is fall injury. Pt admits neck pain: has stiffness and pain on movement; recreational drugs: admits to two tabs of LSD and one THC gummy; recent trauma: fell from bed to the floor.

27. A consultant note states:

History of Present Illness:

Patient Christopher Cox is a 18 year old male was brought to MHSW on 7/14/19 after he was found on the floor face down the side of bed s/p fall from the bed and hitting his head. Per the report he was gymnast and has history of LSD/marijuana use the night before.

28. The records of Memorial Hermann Southwest Hospital show the following:

Chief Complaint:

Pt took LSD, THC last night, attempted to get out of bed this AM and fell to floor, Priapism x unknown hours, abrasion to chin, no feeling in arms or legs,

* * *

18M no prior hx used marijuana/LSD per report and woke up this morning with arm and leg weakness bilaterally and lack of sensation. suspected fall or trauma. found to have C5-6 anterior subluxation and quadriplegic exam.

* * *

Plan: Patient is a 18 year old with a history of LSD/Marijuana use who presents with an unknown exact time spinal cord injury (C5-C6 anterior subluxation). Per patient and parents, patient went to bed on 07/13/2019. Patient was found face down at the side of the bed and was placed back in the bed by his friends. Patient woke up on 07/14/2019 with quadriplegia. Now close to 48 hours post surgically. MAPs steady overnight, fevers. Significant abdominal distension. BM x 4 yesterday, though small volumes throughout.

E. The Settlement

29. On May 8, 2023, Occidental, the Coxes and Zinkweg completed signatures on a settlement agreement for the underlying lawsuit. A copy of the settlement agreement is attached as Exhibit 3. The copy has signatures redacted to protect the signatories but is otherwise a true copy.

30. Mindful of the coverage dispute in this federal court lawsuit, the parties used neutral language in referring to the Coxes' claims against Zinkweg for "bodily injury and other loss ... arising out of events transpiring on July 13 and 14, 2019 at Zinkweg's home."

31. The settlement agreement's terms chiefly involve (1) Zinkweg's agreement to pay Cox "\$1 million solely from funds to be supplied by Occidental"; (2) Zinkweg's request to Occidental to fund the payment; (3) Occidental's acceptance of that request conditioned upon establishment of Occidental's indemnity obligation to Zinkweg through a final judgment or settlement entered in this federal court suit; (4) the Coxes' release of Zinkweg, his parents and Occidental; and (5) the Coxes' dismissal of the underlying lawsuit.

**COUNT 1 – DECLARATORY JUDGMENT AS TO
DUTY TO DEFEND UNDER ORIGINAL PETITION**

32. Occidental brings this claim for declaratory judgment under both Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201-2202.

33. Occidental seeks a declaration that Occidental did not owe Zinkweg a defense under the original petition in the underlying lawsuit.

34. The allegations in the original petition fall squarely within the Policy’s Controlled Substance exclusion.

35. The Controlled Substance exclusion, as noted above, states that the Policy does not apply to “bodily injury” arising out of the use of certain controlled substances, including LSD and marijuana.

36. Though Occidental agreed to defend Zinkweg under the subsequent, amended petition, Occidental and Zinkweg continue to have a dispute over whether Occidental owed a defense to Zinkweg under the original petition. Occidental asks the Court to enter declaratory judgment establishing the answer is no.

**COUNT 2 – DECLARATORY JUDGMENT AS TO
INDEMNITY FOR THE SETTLEMENT**

37. Occidental brings this claim for declaratory judgment under both Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201-2202.

38. Occidental seeks a declaration that Occidental does not owe a duty to indemnify Zinkweg, or pay Cox, for the underlying settlement.

39. The facts underlying the settlement, as outlined above, fall squarely within the Policy’s Controlled Substance exclusion.

40. The Controlled Substance exclusion, as noted above, states that the Policy does not apply to “bodily injury” arising out of the use of certain controlled substances, including LSD and marijuana.

41. Because Cox’s bodily injury arose out of the use, by both him and Zinkweg, of LSD and marijuana, the Controlled Substance exclusion bars coverage, and Occidental asks the Court to enter a declaratory judgment saying so.

JURY DEMAND

42. Occidental demands a trial by jury on all issues of fact.

CONCLUSION AND PRAYER

43. Because the Policy affords no coverage for the allegations in the original petition filed underlying lawsuit, and no coverage for the settlement, Occidental asks this Court for:

- a. a declaration that Occidental did not have a duty to defend Zinkweg under the original petition in the underlying lawsuit;
- b. a declaration that Occidental does not owe a duty to indemnify Zinkweg, or pay Cox, for the underlying settlement;
- b. court costs; and
- c. all other relief to which Occidental may show itself to be entitled.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a true copy of this document is being served on all counsel of record on June 29, 2023 through the Court's electronic filing service.

s/ Joseph A. Ziemianski

Joseph A. Ziemianski