

[Texto original en español](#)

122 D.P.R. 105, 1988 WL 580770  
(P.R.), 22 P.R. Offic. Trans. 96

Lisa Pagán Caraballo et al., Plaintiffs  
v.  
Roberto Silva Delgado, Dr. Héctor Ortiz  
Pérez, et al., Defendants-appellants  
Corp. Insular de Seguros, Inc.,  
Third-party defendant-appellee

En El Tribunal Supremo De Puerto Rico.  
No. R-84-482 Review  
San Juan, Puerto Rico, June 30, 1988

1. INSURANCE -- INSURANCE CONTRACT  
-- NATURE, REQUISITES, AND VALIDITY --  
INSURANCE CONTRACT -- IN GENERAL.

Section 11.020(1) of the Insurance Code of Puerto Rico, 26 L.P.R.A. § 1102(1), provides that a contract of insurance may be made with respect to any subject and the hazards therein stated, as to which the possibility of damnification or an insurance interest exists. No person shall be insured against the penal consequences of an offense; but this provision shall not be deemed to prohibit contracts providing for bail and expenses of defense as to penal offenses resulting from traffic accidents on land, sea, or in the air.

2. ID. -- ID. -- CONSTRUCTION AND OPERATION  
-- PARTIES TO CONTRACT AND RELATIONS  
BETWEEN THEM -- DUTY TO DEFEND INSURED  
AGAINST LEGAL ACTION.

An insured's right to legal representation by its insurer is a contractual right that arises from the insurance contract.

3. ID. -- ID. -- ID. -- ID. -- ID.

The purpose of the policy is to protect the insured; thus, the duty to defend the insured in actions against him is an essential part of the coverage contracted with the insurance company.

4. ID. -- ID. -- ID. -- APPLICATION OF RULES OF  
CONSTRUCTION -- IN GENERAL.

Insurance contracts should be generally understood and construed within their most common and usual meaning, not paying much attention to grammatical rigour, but to the general use and popular meaning of the idioms. The

insured who acquires a policy is entitled to rely on the coverage offered to him when reading its clauses in the light of the popular meaning of the words used therein.

5. ID. -- ID. -- ID. -- ID. -- STRICT CONSTRUCTION  
AGAINST INSURER.

Exclusionary clauses in insurance contracts are not favored and should be strictly construed in such a way that the policy's purpose of protecting the insured is met. Any ambiguity shall be resolved in favor of the insured.

6. ID. -- ID. -- ID. -- PARTIES TO CONTRACT  
AND RELATIONS BETWEEN THEM -- DUTY TO  
DEFEND INSURED AGAINST LEGAL ACTION.

An insurer has the obligation to cover and defend the insured. If it fails to comply, imposition of costs and attorney's fees on the former lies. The remedy will be granted if there is a duty to defend the insured, and a breach of contract resulting from noncompliance with that duty.

7. ID. -- ID. -- ID. -- ID. -- ID.

The duty to defend the insured in actions covered by the policy should be measured, at first instance, by the allegations made in the complaint. The court should examine all the allegations made by the plaintiff and, based on a joint interpretation of the same, determine whether there is a possibility that the insured is protected by the policy issued in his favor. When making this determination, it must be borne in mind that the duty to defend is ampler than the duty to compensate, and that it is independent from the outcome of the suit and from the imposition of liability finally made by the court.

8. ID. -- ID. -- ID. -- ID. -- ID.

If some of the pleadings in the complaint are covered by the policy, and others are not covered or could not be covered, the insurance company has the duty to assume the insured's defense even in those claims not covered by the policy.

9. ID. -- ID. -- ID. -- ID. -- ID.

The insurer's duty to defend against a claim coming within the policy coverage is not discharged by the fact that the plaintiff's pleading is not perfect: that is, the insurer's obligation is not merely to defend in cases of perfect declarations, but also in cases where by any reasonable intendment of the pleadings liability of the insured can be inferred.

10. ID. -- ID. -- ID. -- ID. -- ID.

Neither ambiguity, inconsistency, nor duplicity in the plaintiffs' complaint or declaration can justify escape of the insurer from its obligation to defend. Any doubt as to whether there is a duty to defend must be solved in the insured's favor.

### Synopsis

JUDGMENT OF *José F. Rodríguez Rivera*, Judge (Bayamón), which held that an insurance company did not have to represent an insured in a litigation. *Reversed*.

*\*97 Carlos N. Souffront, Héctor Santiago Rivera, and Sandra Santiago Rivera*, for appellant Héctor E. Ortiz Pérez. *José A. González Villamil* for appellee.

*\*98 JUSTICE NAVEIRA DE RODÓN* delivered the opinion of the Court.

In this case we examine the scope of an insurance company's duty to afford legal representation to its insured.

### I

The facts giving rise to the appellant's claim for legal representation are the following. Lisa Pagán Caraballo and her parents, Eduardo Pagán Ventura and Luz H. Caraballo,<sup>1</sup> filed a complaint for damages against Dr. Héctor Ortiz Pérez and others. In the first cause of action they alleged, insofar as pertinent, that Lisa was taken to the office of Dr. Ortiz Pérez by codefendant Jenny Rivera “who ‘advised’ her to lie and say she was 18 years old [and that she was] married.” They also said that Lisa “was induced, obliged [and] forced to submit herself to the abortion by [codefendants] Jenny Rivera and Antonio Silva Delgado.” In the second cause of action they alleged that *\*99* Dr. Ortiz Pérez acted illegally and criminally upon performing an abortion on Lisa, a 14-year-old minor, without her consent or that of her parents. They claimed \$250,000 for the mental suffering and anguish, and bodily injuries caused by the acts of codefendant Dr. Ortiz Pérez. [1] Dr. Ortiz Pérez asked Corporación Insular de Seguros, Inc. (Insular) to assume his legal representation under their insurance contract. Insular refused to defend him because the facts alleged in the complaint were not covered by the policy, inasmuch

as no damages for medical malpractice were claimed; the damages claimed were for the commission of an abortion. Insular contended that under the insurance policy and art. 11.020(1) of the Insurance Code, Act No. 77 of June 19, 1957<sup>2</sup> (26 L.P.R.A. § 1102), coverage or legal representation were not in order. It did not interview Dr. Ortiz Pérez or investigate the facts. In view of this, Dr. Ortiz Pérez retained private attorneys and answered the complaint. In his answer he included a third-party complaint against Insular for breach of contract.

*\*100* About two years later, the plaintiffs amended the complaint to allege specifically that the abortion was negligently performed by the codefendant physician. In view of this amendment, the insurance company informed Dr. Ortiz Pérez that it would assume his legal representation and went on to answer the amended complaint adopting the answers that Dr. Ortiz Pérez had filed under the same. Later on, the plaintiffs filed a motion for voluntary dismissal with prejudice. Dr. Ortiz Pérez agreed to the voluntary dismissal. The action against the insurer for the physician's attorney's fees continued. After a hearing on the merits, the trial court ruled that the insurer did not have to represent codefendant Dr. Ortiz Pérez because the original complaint alleged that the damages were caused by the performance of a criminal and illegal abortion and that the policy only covered professional liability claims. The court dismissed the complaint and ordered the payment of \$500 for attorney's fees.

Dr. Ortiz Pérez takes appeal from this judgment, assigning three errors that question the court's finding that the insurer did not have to assume legal representation from the filing of the original complaint, and that imposition of attorney's fees did not lie. We agreed to review.<sup>3</sup>

### *\*101 II*

The pertinent clause of the insurance policy reads:

The Company will pay on behalf of the insured *with respect only to his professional liability involving his practice* within the Commonwealth of Puerto Rico, all sums which the insured shall be legally obligated to pay as damages because of *injury arising out of the rendering of or failure to render, during the policy period, professional services in the practice of the profession* described in the declarations by any persons whose

acts or omissions the partnership insured is legally responsible, and the Company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent. . . . (Underscore supplied.)

[2-3] An insured's right to legal representation by its insurer arises from the insurance contract. The purpose of the policy is to protect the insured, thus the duty to defend the insured in actions against him is an essential part of the coverage contracted with the insurance company. *Barreras v. Santana*, 87 P.R.R. 227 (1963); 7C Appleman, *Insurance Law and Practice* § 4684.01; *N.Y. International Paper Co. v. Continental Gas Co.*, 320 N.E.2d 618 (1974).

[4-5] With regard to the interpretation of insurance contracts, we have held that these “should be generally understood within their most common and usual meaning, not paying much attention to grammatical rigour, but to the general use and popular meaning of the idioms. The insured who acquires a policy is entitled to rely on the coverage offered to him when reading its clauses in the light of the popular meaning of the words used therein.” *Morales Garay v. Roldán Coss*, 110 D.P.R. 701, 706 (1981). Besides, exclusionary clauses are not favored, should be strictly construed and in such a way that the policy's purpose of protecting the insured is met. Any ambiguity shall be resolved in favor of the insured. *The London Assurance v. Superior Court*, 95 P.R.R. 295 (1967); *Barreras v. Santana*, *supra*; *Couch, On Insurance 2d*, § 51:49; Appleman, *supra*, § 4683.

\*102 [6] Now then, with regard to an insurer's obligation to cover and defend the insured, we have held that if this one fails to comply, imposition of costs and attorney's fees on the former lies. However, the remedy will be granted if there is a duty to defend the insured, and a breach of contract resulting from noncompliance with that duty. *Municipality of San Juan v. Great American Insurance Co.*, 117 D.P.R. 632 (1986); *Vega Arriaga v. Pepsi-Cola Bottling Co.*, 118 D.P.R. 661 (1987), *Couch, supra*, § 51:54, at 509; Appleman, *supra*, § 4691, at 238.

[7] The duty to defend the insured in actions covered by the policy should be measured, at first instance, by the allegations in the complaint filed in the specific case. The court should examine all the allegations made by the plaintiff and, based on a joint interpretation of the same, determine whether there is a possibility that the insured

is protected by the policy issued in his favor. *Fernández v. Royal Indemnity Co.*, 87 P.R.R. 819 (1963); *Morales Garay v. Roldán Coss*, *supra*; *Vega Arriaga v. Pepsi-Cola Bottling Co.*, *supra*; Appleman, *supra*; *Couch, supra*; *U.S. Fidelity and Guaranty Co. v. Louis A. Roser Co., Inc.*, 585 F.2d 932 (1978); *Travelers Indem. Co. v. Obenshain*, 245 S.E.2d 247 (1978); *Truchinski v. Cashman*, 257 N.W.2d 286 (1977). When making this determination, we must bear in mind that the duty to defend is ampler than the duty to compensate; it is independent from the outcome of the suit and from the imposition of liability finally made by the court. Appleman, *supra*, § 4683.01; *Couch, supra*, § 51:42; Comment, *The Insurer's Duty to Defend under a Liability Insurance Policy*, 114 U. Pa. L. Rev. 734 (1966).

\*103 [8-10] If some of the pleadings in the complaint are covered by the policy, and others are not covered or could not be covered, the insurance company has the duty to assume the insured's defense even in those claims not covered by the policy. The fact that the complaint contains ambiguous or inconsistent allegations does not release the insurer of its duty to defend because “[t]he insurer's duty to defend against a claim coming within the policy coverage is not discharged by the fact that the plaintiff's pleading is not perfect: that is, the insurer's obligation is not merely to defend in cases of perfect declarations, but also in cases where by any reasonable intendment of the pleadings liability of the insured can be inferred, and neither ambiguity, inconsistency, nor duplicity in the plaintiff's complaint or declaration can justify escape of the insurer from its obligation to defend.” *Couch, supra*, § 51:49. Any doubt as to whether there is a duty to defend must be solved in the insured's favor. *Barreras v. Santana*, *supra*; *The London Assurance v. Superior Court*, *supra*; *Couch, supra*, § 51:49; Appleman, *supra*, § 4683. *Ladner & Co., Inc. v. Southern Guaranty Ins. Co.*, 347 So.2d 100 (1977).

In the case at bar, taking into consideration all the allegations in the original complaint and liberally construing the insurance policy in favor of the insured, we conclude that the claim at issue was covered by the policy. Although plaintiff alleged that codefendant Dr. Ortiz Pérez had performed a criminal abortion, it also stated that coplaintiff Lisa had lied about her age and civil status, and that she was induced or forced to submit herself to the abortion by other codefendants. \*104 Certainly, the allegations charging liability on codefendant Dr. Ortiz Pérez are ambiguous and very far from perfect. However, we can reasonably infer from them that Dr. Ortiz Pérez is

being charged with liability in relation to his professional practice, and that the damage claimed stems from the professional service rendered. This claim is covered by the policy.

It bears noting that the defense laid down in art. 11.020(1) of the Insurance Code cannot be invoked because, according to the facts alleged in the complaint, the damage claimed was not a criminal consequence of an offense. Codefendant did not attempt any crime against coplaintiff Lisa. *Morales Garay v. Roldán Coss*, *supra*, at 709.

In view of the foregoing, we hold that Insular failed to comply with its obligation to represent Dr. Ortiz Pérez. Insular must reimburse the amounts he paid for attorney's fees for defending himself in the suit, plus the costs. *Municipality of San Juan v. Great American Insurance Co.*, *supra*; *Vega Arriaga v. Pepsi-Cola Bottling Co.*, *supra*.

*Judgment will be rendered reversing the judgment below.*

Justice Negrón García issued a dissenting opinion in which Justices Rebollo López and Ortiz join.

**\*105** JUSTICE NEGRON GARCIA, with whom JUSTICE REBOLLO LOPEZ and JUSTICE ORTIZ join, dissenting.

#### Footnotes

- 1 The parents filed the complaint on their own behalf and in representation of their minor daughter and of their marital community.
- 2 Insofar as pertinent, this article provides:  
 “Sec. 1102. *Insurable subjects*  
 “Subject to the provisions of this title, a contract of insurance may be made with respect to any subject and the hazards therein stated, as to which the possibility of damnification or an insurable interest exists, except that:  
 “(1) No person shall be insured against the penal consequences of an offense; but this provision shall not be deemed to prohibit contracts providing for bail and expenses of defense as to penal offenses resulting from traffic accidents on land, sea, or in the air.”
- 3 Appellee alleges that under [Rules 53.1](#) and [67.1 of Civil Procedure](#), and Rule 17(h) of the Rules of the Supreme Court, we lack jurisdiction because appellant failed to notify the petition for review to all the parties to the suit within thirty (30) days after a copy of the notice of the Superior Court judgment was filed in the record. Appellant only notified appellee Insular. We do not agree.  
 Plaintiffs voluntarily dismissed the original complaint with prejudice. There was only one claim which was in the third-party complaint, and there was only one plaintiff, Dr. Ortiz Pérez, and one defendant Insular. Appellant's service of notice was correct.

We cannot subscribe to the opinion of the Court. From a liberal viewpoint, and seen from the broadest stand, the pleadings in the *original* complaint against Dr. Héctor Ortiz Pérez did not constitute a claim for medical malpractice, but only for the performance of a criminal and illegal abortion. There are no ambiguities or inconsistencies as to this point.

In view of this fact, we cannot hold Corporación Insular de Seguros liable for the attorney's fees incurred by Dr. Ortiz Pérez *before* the complaint was amended. The medical malpractice policy did not cover that risk because it would violate art. 11.020 of the Insurance Code, [26 L.P.R.A. § 1102](#), which “bars insurance ‘against the penal consequences of an offense.’” *Morales Garay v. Roldán Coss*, [110 D.P.R. 701, 709 \(1981\)](#).

Neither can we impose such liability under the thesis that the insurer should have investigated. Its duty is evaluated from the face of the allegations in the complaint. If they only show a willful criminal act, the insurer is under no obligation to investigate the truthfulness or falsehood of the same. *7C Appleman, Insurance Law & Practice* 51 (1979). Neither should it furnish or pay legal representation.