STATE OF IDAHO )
County of KOOTENAI )ss

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CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE**

**STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

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| **THOMAS VAN FOSSEN dba ANSWERS AND ALTERNATIVES**,<br><br>*Plaintiff*,<br>vs.<br><br>**PHILADELPHIA INSURANCE COMPANY,**<br><br>*Defendant*. | Case No. **CV 2013 4850**<br><br>**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |

## I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Philadelphia Insurance Company's (Philadelphia) Motion for Summary Judgment filed on March 3, 2014. Philadelphia seeks: 1) summary judgment dismissing Van Fossen's damages claims against Philadelphia, and 2) summary judgment on Philadelphia's Counterclaim that it is entitled to declaratory judgment that Philadelphia's policy with Van Fossen excludes coverage for the reimbursement claim made against Van Fossen by the State of Idaho Department of Health and Welfare. Defendant's Amended Answer and Counterclaim, p. 2.

Philadelphia issued a "Professional and Supplemental Liability Insurance Policy" to the plaintiff Thomas Van Fossen (Van Fossen), doing business as Answers and Alternatives LLC, on February 24, 2006. Complaint for Damages, p. 2 ¶ III; Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit

A. Van Fossen is a “marriage and family” counselor. Affidavit of Thomas Van Fossen in Opposition to Defendant’s Motion for Summary Judgment, p. 2, ¶ 7. It appears from the documents provided to the Court, Van Fossen was insured at all times relevant to this action (February 24, 2009 to February 24, 2013, per Certificate of Insurance) under policy number PHCP061812. Affidavit of Jacqueline Holeman in Support of Defendant’s Motion for Summary Judgment, Exhibit A. A copy of that Policy and Certificate of Insurance are attached to that affidavit. *Id.*

In his “Complaint for Damages” Van Fossen alleges that he was covered under policy number PHCP078768. Complaint for Damages, p. 2 ¶ III. A copy of this document has not been provided to the Court. Van Fossen’s “Complaint for Damages” does not seek declaratory judgment, but only seeks damages against Philadelphia. The “Complaint for Damages” does not mention “negligence” of Philadelphia as a cause of action, but Van Fossen’s Brief in Opposition to Motion for Summary Judgment is couched almost solely in terms of negligence.

Van Fossen asserts Philadelphia is required to pay insurance proceeds under the policy. Complaint for Damages, p. 2, ¶¶ III-IV. Philadelphia has asserted a Counterclaim, seeking declaratory judgment that Philadelphia’s policy with Van Fossen excludes coverage for the reimbursement claim made against Van Fossen by the Idaho Department of Health and Welfare. Defendant’s Amended Answer and Counterclaim, p. 2. Philadelphia seeks summary judgment dismissing Van Fossen’s claims and entry of declaratory judgment in favor of Philadelphia. *Id.*

On July 27, 2012, the Idaho Department of Health and Welfare, Medicaid Program Investigation Unit, Bureau of Audits and Investigations sent a letter to Van Fossen, informing him it had conducted a review of services billed by Van Fossen and Answers and Alternatives LLC and found the plaintiff had submitted billings and been

paid "for billing services contrary to rule, terms or the provider agreement and/or the provider handbook" of the Idaho Department of Health and Welfare. Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit. B, p. 5.

On May 10, 2013, the Idaho Department of Health and Welfare sent another letter to Van Fossen informing him that:

> Answers and Alternatives repeatedly and substantially failed to comply with Medicaid rules and regulations by not obtaining required Healthy Connections referrals, billing for undocumented services, billing for overlapping services, billing for more service time than was documented, documenting services with cloned notes, and providing and billing services without Individualized Service Plans. These were repeated violations over an extended period of time.

Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit C, p. 7; Complaint for Damages, p. 2, ¶ IV. Based on the foregoing, the Idaho Department of Health and Welfare was requesting to recoup $35,261.98 for overpayment, plus a civil monetary penalty in the amount of $8,815.50, for a total of $44,077.48. *Id.* at p. 1. Van Fossen mischaracterizes this May 10, 2013, letter from the Idaho Department of Health and Welfare as follows: "The Plaintiff received notice and demand from the Idaho Department of Health and Welfare alleging professional malpractice (see attachment)." Complaint for Damages, p. 2, ¶ IV, and "attachment" thereto. This Court has reviewed such May 10, 2013, letter, and can find no "professional malpractice" claim made by the Idaho Department of Health and Welfare in that letter.

Upon receiving this notice and demand for payment, Van Fossen submitted a claim to Philadelphia, pursuant to his professional liability insurance policy, requesting it defend him against the Idaho Department of Health and Welfare recoupment claim and pay any amounts he owed. Affidavit of Jacqueline Holeman in Support of Defendant's

Motion for Summary Judgment, p. 2 ¶ 2. Philadelphia denied the request, maintaining the claim was excluded from coverage under the professional liability insurance policy because the claim for damages did not arise out of a professional incident, but rather was incurred due to an accounting problem. *Id.* at p. 2 ¶ 3; Complaint for Damages, p. 2 ¶ IV.

On June 28, 2013, Van Fossen initiated the instant action against Philadelphia for monetary damages for failure to pay him insurance proceeds he alleges are owed under his professional liability insurance policy. Complaint for Damages, pp. 1-3. Van Fossen does not seek declaratory judgment; Van Fossen only seeks monetary damages. *Id.,* p. 3, Prayer for Relief, ¶¶ 1-3. Philadelphia has moved for summary judgment, requesting a declaratory judgment decreeing the professional liability insurance policy excludes coverage for reimbursement to the Idaho Department of Health and Welfare and a dismissal of Van Fossen's claims for damages. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 2; Defendant's Amended Answer to Plaintiff's Complaint for Damages and Counterclaim, p. 4 ¶ IV.

Hearing on the motion for summary judgment seeking declaratory judgment was held on April 1, 2014. The matter is currently set for a court trial on October 6, 2014.

## II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The

burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

"Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing *Atwood v. Smith,* 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the

pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. *See id.* "Questions of law are subject to free review." *Halvorson v. North Latah County Highway Dist.,* 151 Idaho 196, 201, 254 P.3d 497, 502 (2011).

**III. ANALYSIS.**

Philadelphia seeks relief under the Idaho Uniform Declaratory Judgment Act, Idaho Code § 10-1201 *et seq.* Defendant's Amended Answer to Plaintiff's Complaint for Damages and Counterclaim, p. 4 ¶ IV. "Action for declaratory judgment may invoke either remedial or preventive relief, and may relate to right that has been breached or is yet in dispute, or status that is undisturbed but endangered, but generally cannot be maintained unless involving some specific adversary question or contention based on existing state of facts." *Wood v. Class A. Sch. Dist. No. 25*, 78 Idaho 75, 78, 298 P.2d 383, 385 (1956) (citing *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, syl. 5, 52 P.2d 141 (1935); *Ayers v. General Hospital*, 67 Idaho 430, 182 P.2d 958 (1947)). A "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." I.C. § 10-1206. "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." I.C. § 10-1212.

"An insurer's duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be

covered by the insured's policy." *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001) (citing *Kootenai County v. Western Cas. & Sur.,* 113 Idaho 908, 910, 750 P.2d 87, 89 (1988); *State of Idaho v. Bunker Hill Co.,* 647 F. Supp. 1064, 1068 (D. Idaho 1986)). This duty is imposed upon the insurer when there is a genuine dispute surrounding the facts giving rise to coverage or the application of the policy to those facts. *Constr. Mgmt. Sys., Inc.,* 135 Idaho 680, 682-83, 23 P.3d 142, 144-45. Doubts as to whether an insurer must provide coverage are resolved in favor of the insured. 135 Idaho 680, 683, 23 P.3d 142, 145 *(citing Continental Cas. Co. v. Brady,* 127 Idaho 830, 833, 907 P.2d 807, 810 (1995)). An insurer can overcome this burden if it demonstrates the insurance policy clearly and unambiguously excludes coverage. 135 Idaho 680, 685, 23 P.3d 142, 146 (citing *Pacific Indem. Co. v. Linn,* 766 F.2d 754, 761 (3d Cir.1985); *Avondale Industries, Inc. v. Travelers Indem. Co.,* 887 F.2d 1200 (2d Cir.1989)).

"In construing an insurance policy, the Court must look to the plain meaning of the words to determine if there are any ambiguities." *Dave's Inc. v. Linford*, 153 Idaho 744, 751, 291 P.3d 427, 434 (2012). "Whether a provision in an insurance policy is ambiguous is a question of law . . . ." *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 109, 279 P.3d 93, 95 (2012) (citing *Purdy v. Farmers Ins. Co. of Idaho,* 138 Idaho 443, 445, 65 P.3d 184, 186 (2003)). In resolving this question of law, the Court must review the insurance policy in its entirety, reading provisions in context. *Dave's Inc.*, 153 Idaho at 751, 291 P.3d at 434 (citing *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.,* 141 Idaho 660, 663, 115 P.3d 751, 754 (2005); *Purvis v. Progressive Cas. Ins. Co.,* 142 Idaho 213, 216, 127 P.3d 116, 119 (2005)). "A provision is ambiguous if it is reasonably subject to differing interpretations." *Markel Int'l Ins. Co.,*

153 Idaho 107, 109, 279 P.3d 93, 95 (citing *Purdy,* 138 Idaho 443, 445, 65 P.3d 184, 186). "When confronted with ambiguous language in an insurance contract, [the Court] must determine what a reasonable person would have understood the language to mean." *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 235, 912 P.2d 119, 122 (1996) (citing *AID Ins. Co. v. Armstrong,* 119 Idaho 897, 900, 811 P.2d 507, 510 (Ct. App. 1991) ). However, "[i]f the language of a policy is susceptible to only one meaning this meaning must be given effect for a court may not, by construction, create liability in a contract where none exists." *Mutual of Enumclaw Ins. Co.,* 128 Idaho 232, 236, 912 P.2d 119, 123 (citing *Thomas v. Farm Bureau Mutual Ins. Co. of Idaho,* 82 Idaho 314, 318, 353 P.2d 776, 778 (1960) (quoting *Miller v. World Ins. Co.,* 76 Idaho 355, 357, 283 P.2d 581, 582 (1955)); *Burgess Farms v. New Hampshire Inc. Group,* 108 Idaho 831, 834, 702 P.2d 869, 872 (Ct. App. 1985)).

The Court agrees with Philadelphia's observation that "Plaintiff does not appear to argue that the insurance policy is ambiguous." Reply Memorandum in Support of Defendant's Motion for Summary Judgment, p. 3. The professional liability policy issued by Philadelphia to Van Fossen provides, in pertinent part:

> SECTION I – COVERAGE
>
> A. ALLIED HEALTHCARE PROVIDERS PROFESSIONAL AND SUPPLEMENTAL LIABILITY
>
> 1. INSURING AGREEMENT
>
> a. Coverage A – Professional Liability
>
> (1) INDIVIDUAL COVERAGE
> The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** because of a **Professional Incident** that occurs during the policy period. The **Professional incident** must result from the practice of the profession shown in the Declarations.
>
> * * *

(2) ASSOCIATION, PARTNERSHIP OR CORPORATION COVERAGE
The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** because of a **Professional Incident** that occurs during the policy period. The **Professional Incident** must result from the practice of the profession shown in the Declarations.

* * *

2. EXCLUSIONS
This insurance does not apply to **Claims** or **Suits** for **Damages**:

* * *

n. arising out of the inability or failure of the **Insured** or others to collect or pay money, including fee disputes and third party reimbursement agreements;
o. arising out of an **Insured** gaining any personal profit or advantage to which they are not legally entitled.

* * *

q. arising out of any criminal, dishonest, fraudulent or malicious act or omission. This exclusion does not apply to any **Insured** who did not:
(1) personally participate in committing any such act, or
(2) remain passive after having personal knowledge of any such act or omission.

* * *

SECTION V – DEFINITIONS

* * *

F. **Damages** means monetary:
1. judgment,
2. award or
3. settlement,

but does not include fines, sanctions, penalties, punitive or exemplary damages or the multiple portion or any damages.

G. **Insured** means the individual or the association, partnership, or corporation named in the Declarations or qualifying as an **Insured** under the WHO IS AN **INSURED** provision of this form. . . .

M. **Professional Incident** means any actual or alleged negligent:
1. act,
2. error or
3. omission

in the actual rendering of professional services to others in your capacity as an **Insured** including professional services performed as a member of a crediting group or utilization review panel, as a case management reviewer or clinical evaluator, or as a member of a board or committee of a hospital or professional society where similar services are performed by the **Insured**. Any or all **Professional Incidents** arising from interrelated or a series of acts, errors or omissions shall be deemed to be one **Professional Incident** taking place at the time of the earliest **Professional Incident**.

Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit. A, pp. 2, 7-8 (emphasis in original).

Philadelphia maintains the above-stated provisions are clear and unambiguous and Van Fossen's claims do not fall within the scope of coverage under the professional liability policy. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 7. Specifically, it contends the claim fails to arise out of a "professional liability incident" because the basis of the Idaho Department of Health and Welfare's action for recoupment stems from noncompliant billing practices, which are not professional services. *Id.,* p. 8. It also contends the claim does not constitute "damages" because recoupment of the overpayment of $35,261.98 does not constitute a "judgment", "award" or "settlement" and the imposition of $8,815.50 has been assessed as a civil monetary penalty, all of which are specifically excluded under the professional liability policy. *Id.,* p. 9. Finally, it contends the professional liability policy specifically excludes coverage for the claim because it does not apply to claims for damages arising from the insured getting personal profit in which he is not legally entitled, claims for damages arising out of the insured's inability to collect fees, or claims for damages arising from criminal, dishonest, fraudulent or malicious acts or omissions, all of which Philadelphia contends are the basis for the claim in this case. *Id.*, pp. 10-11.

In turn, Van Fossen asserts he was not the person who improperly billed for services provided or submitted the billings under his contract with the Idaho Department of Health and Welfare. Brief in Opposition to Defendant's Motion for Summary Judgment, p. 5. Rather, he contends it was subcontractors who provided professional services and submitted billings to the Idaho Department of Health and Welfare. *Id.* Because of this, he has filed suit against the subcontractors in Kootenai County Case

number CV-2012-6443, for falsifying billings to the Idaho Department of Health and Welfare either negligently or intentionally. *Id.* at pp. 5-6. Affidavit of Thomas Van Fossen in Opposition to Defendant's Motion for Summary Judgment, Exhibit A. In that suit, Van Fossen admits to negligently supervising his subcontractors. *Id.,* p. 6. Van Fossen maintains in the present lawsuit that his negligent supervision of his subcontractors is covered under the professional liability policy. *Id.* Van Fossen claims a negligent act is a professional incident and the professional liability policy covers damages that arise under a professional incident, so any negligent behavior alleged by the Idaho Department of Health and Welfare is covered by the policy. *Id.* Moreover, Van Fossen contends billing for services is "part of the delivery of professional services incident to the conduct of his professional practice." Brief in Opposition to Defendant's Motion for Summary Judgment, p. 4. Since his failure to comply with the Department of Health and Welfare rules was negligent and not intentional, he contends his claims should be covered by the professional liability policy. *Id.,* p. 7. Van Fossen cites only two cases as "Applicable Law":

> Brizendine v. Namp[a] Meridian Irrigation Dist., 97 Idaho 580, 548, 548 P.2de [sic] 80 (1976), The elements of a cause of action based upon negligence can be summarized as (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty, (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage.
> Coghlan v. Beta Thea Pi F[r]aternity, 133 Idaho 388, 399, 987 P.2d 300, 311 [(1999)] (O)ne owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury.

Brief in Opposition to Motion for Summary Judgment, p. 5. This Court is simply unable to see the applicability of either case to the present facts of this case and Philadelphia's Motion for Summary Judgment. The fact that Van Fossen was not the one who billed

the Idaho Department of Health and Welfare, but rather it was independent contractors, does not create coverage under Philadelphia's policy. The fact that Van Fossen was negligent, or these independent contractors were negligent, in billing the Idaho Department of Health and Welfare, does nothing to create coverage under Philadelphia's policy.

The first three pages of Van Fossen's Brief in Opposition to Defendant's Motion for Summary Judgment is captioned "Facts". Upon reading such, it contains "assertions" and "claims", and little in the way of "facts". The next section of Van Fossen's brief is captioned "Objection of Defendant's Statement of Undisputed Facts". In spite of the caption, Van Fossen agrees with all of Philadelphia's undisputed facts, except Van Fossen disagrees *he* was the one who improperly billed Health and Welfare, instead it was his "independent contractors" who submitted billings to Health and Welfare. *Id.,* p. 3.

The professional liability policy in this case is clear and unambiguous. Under the professional liability policy in this case "[Philadelphia] will pay those sums that the **Insured** becomes legally obligated to pay as **Damages** because of a **Professional Incident**..." Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit A, p. 2 (emphasis in original). A professional incident is defined as "any actual or alleged negligent: 1. act, 2. error or, 3. omission in the actual rendering of professional services..." *Id.* p. 8. The term "professional services" is not defined by the professional liability policy. However, the Idaho Court of Appeals provided guidance on what constitutes a "professional service" in *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Ct. App. 1984):

The scope of "professional services" does not include all forms of a doctor's conduct simply because he is a doctor. As noted by the Supreme Court of Nebraska:

> The insurer's liability is thus limited to the performing or rendering of "professional" acts or services. Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. [Citations omitted.] In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

*Hirst*, 106 Idaho 792, 796, 683 P.2d 440, 444 (citing *Marx v. Hartford Accident and Indemnity Co.,* 157 N.W.2d 870, 871-72 (Neb. 1968)). In *Marx*, the question involved in the declaratory judgment action was whether Hartford, plaintiffs' malpractice insurer, was liable for fire damage to plaintiffs' offices resulting from the negligence of an employee technician who put benzene in a sterilizer (instead of water), which caused an explosion. The Supreme Court of Nebraska reversed the trial court, holding:

> The boiling of water for sterilization purposes alone was not an act requiring any professional knowledge or training. It was a routine equipment cleaning act which any unskilled person could perform. The act was not a part of any patient's treatment per se any more than any other routine cleaning or arranging procedure incidental to the proper general operations of the plaintiffs' offices. It was no more of a 'professional service' than the routine activity of a housewife engaged in sterilizing baby bottles or canning jars. We come to the conclusion that the negligent act performed here required no special training or professional skill and in no sense constituted the 'rendering or failing to render professional services.' Consequently there is no liability under the express terms of the risk assumed under the policy, and the judgment must be reversed.

157 N.W.2d 870, 872.

Van Fossen argues: "Plaintiff asserts that billing practices are part of the delivery of professional services incident to the conduct of his professional practice." Brief in Opposition to Defendant's Motion for Summary Judgment, p. 4, ¶ 5. Van Fossen later repeats this theme: "Plaintiff's profession is that of a marriage and family counselor, and billing for his services is an integral part of his professional responsibilities." *Id.,* p. 6. Repetition will not make this claim become true. In Philadelphia's opening brief, it cited *Hirst*. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 8. At no point does Van Fossen discuss *Hirst*.

Based on the above-stated definition in *Hirst*, billing practices do not constitute "professional services". Again, *Hirst* states: "Something more than an act flowing from mere employment or vocation is essential." 106 Idaho 792, 796, 683 P.2d 440, 444. Van Fossen's billing the Idaho Department of Health and Welfare is nothing more than an act flowing from his employment or his vocation as a marriage counsellor. "The act or service must be such as exacts the use or application of special learning or attainments of some kind." *Id.* Van Fossen has not made any cogent argument as to how billing Health and Welfare exacted the use or application of special learning or attainments of some kind. "The term 'professional' in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities." *Id.* Billing the Idaho Department of Health and Welfare is much more akin to "an occupation for production for sale of commodities" as compared to his work as a licensed marriage counselor which involves "intellectual skill". "A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill

involved is predominantly mental or intellectual, rather than physical or manual." *Id.* Van Fossen has not provided any evidence as to how billing the Idaho Department of Health and Welfare involved a "specialized knowledge, labor or skill" which was "predominantly mental or intellectual, rather than physical or manual."

*Hirst* convinces this Court that because billing for professional services rendered by or under the direction of Van Fossen is merely an act flowing from his being a marriage counselor or running a marriage counseling business, those billing practices do not constitute professional services. Thus, any negligent act, error or omission regarding billing practices are not a professional incident and, thus, are not covered by Philadelphia's professional liability policy. *Hirst* and *Marx* are on point by analogy. Additionally, there is case law directly on point from other jurisdictions.

In *Gregg & Valby, LLP v. Great American Insurance Co.*, 316 F.Supp.2d 505, (S.D. Tex. 2004), the federal district court was presented with a situation where a law firm which had been sued for misrepresenting attorney fees, and then sued the law firm's malpractice carrier for declaratory relief on that policy for indemnification and the duty to defend the firm in those lawsuits. The federal district judge discussed what constitutes "professional services" in a manner similar to that found in *Hirst* and *Marx,* above:

> **2. Professional Services**
>
> The next issue for the court to determine is whether Plaintiff's billing and fee-setting practices are considered "professional services" triggering coverage under the Policy.
>
> In *Atlantic Lloyd's Insurance Co. of Texas v. Susman Godfrey, L.L.P.,* 982 S.W.2d 472 (Tex.App.-Dallas 1998, pet. denied), the court provided a thorough description of what constitutes a "professional service" in the context of insurance contracts:
>
> > [I]t is clear that a professional must perform more than an ordinary task to perform a professional service. To

qualify as a professional service, the task must arise out of acts particular to the individual's specialized vocation. We do not deem an act a professional service merely because it is performed by a professional. Rather, it must be necessary for the professional to use his specialized knowledge or training.

*Id.* at 476–77. Other courts have espoused virtually identical definitions. *See, e.g., Duncanville Diagnostic Ctr., Inc. v. Atlantic Lloyd's Ins. Co. of Tex.,* 875 S.W.2d 788, 790 (Tex.App.-Eastland 1994, writ denied) ("[A] profession involves labor, skill, education, special knowledge and compensation or profit."); *Med. Records Assocs., Inc. v. Am. Empire Surplus Lines Ins. Co.,* 142 F.3d 512, 514–17 (1st Cir.1998) ("'[P]rofessional services' ... embrace those activities that distinguish a particular occupation from other occupations—as evidenced by the need for specialized learning or training—and from the ordinary activities of life and business."); *Visiting Nurse Ass'n of Greater Phila. v. St. Paul Fire & Marine Ins. Co.,* 65 F.3d 1097, 1101 (3rd Cir.1995) (quoting *Harad v. Aetna Cas. & Sur. Co.,* 839 F.2d 979, 984–85 (3rd Cir.1988)) ("A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill.").

Professional services are "those acts which use the inherent skills *typified* by that profession, not *all* acts associated with the profession." *Atlantic Lloyd's,* 982 S.W.2d at 477 (emphasis in original). When determining whether a particular act is a "professional service," the court "must look not to the title or character of the party performing the act, but the act itself." *Marx v. Hartford Accident & Indem. Co.,* 183 Neb. 12, 157 N.W.2d 870, 871–72 (1968). Thus, even tasks performed by lawyers are not considered "professional services" if they are ordinary activities that can be completed by those lacking legal knowledge and skill. *See Atlantic Lloyd's,* 982 S.W.2d at 476–77.

316 F.Supp.2d 505, 513. The federal district judge then discussed whether the attorneys' billing were "professional services":

**3. Billing and Fee-setting**

With these criteria in mind, the court has little trouble concluding that Plaintiff's billing and fee-setting practices are not "professional services". Contrary to Plaintiff's conclusory contentions, **nothing suggests that billing or fee-setting require specialized legal skill and**

**knowledge, nor are they acts particular to the legal profession**. *See Med. Records Assocs.,* 142 F.3d 512 ("Indeed, setting a price for services and sending bills are functions of every business"). Simply put, **they are merely administrative tasks inherent to all businesses**. *See Visiting Nurse Ass'n,* 65 F.3d at 1101 (recognizing the billing/ professional services dichotomy, and classifying the act of billing as a commercial, rather than professional, aspect of practicing law).

This court's determination that billing and fee-setting are not "professional services" is in accord with the opinions of other courts that have considered the issue. For instance, in a recent Massachusetts case, *Reliance National Insurance Co. v. Sears, Roebuck & Co.,* 58 Mass.App.Ct. 645, 792 N.E.2d 145 (2003), an attorney sought coverage under a professional liability insurance policy for a claim brought against him alleging he had fraudulently billed for attorney's fees. The court held that the attorney's billing practice was not part of his professional legal services and, therefore, that the underlying claim was not covered by his insurance policy:

> [w]e decide that the billing function of a lawyer is not a professional service. Billing for legal services does not draw on special learning acquired through rigorous intellectual training. We are not aware that courses in billing clients appear in law school curricula. The billing function is largely ministerial. There are elements of experience and judgment in billing for legal services, but the same goes for pricing shoes. As billing is not a professional service, it does not come within the coverage of a professional liability insurance policy.

*Id.* at 148. This court also finds instructive the reasoning employed in another case with similar circumstances, *PMI Mortgage Insurance Co. v. American International Specialty Lines Insurance Co.,* 2002 WL 32065867 (N.D.Cal.2002). In that decision, PMI, a company providing insurance to real estate lenders, was sued by a putative class of plaintiffs alleging it had violated RESPA by undercharging its lenders in exchange for referrals on mortgage insurance. *Id.* at *1. The court determined that PMI's billing was not a "professional service" because such act was only incidental to the real estate services PMI provided to its clients. *Id.* at *2. Because the underlying claim was based solely on PMI's billing practice, i.e., undercharging its clients, and not from any alleged professional malpractice, the court found it was not covered by PMI's insurance policy. *Id.*

In addition to these two decisions, courts have also concluded outside the legal context that billing and fee-setting are not professional services. For example, in *Medical Records Associates,* the First Circuit Court of Appeals held that setting a fee for photocopies of medical records was not part of the "professional services" provided by a medical records processing company but, instead, was merely a generic business practice. 142 F.3d at 514–17. The court pointed out **that fee-setting and billing did not require any specialized learning or training** and that, "[a]s in most other businesses, **the bill is an effect of the service provided, not part of the service itself**." *Id.* at 515–16. Similarly, in *Jerome Group, Inc. v. Cincinnati Insurance Co.,* 257 F.Supp.2d 1217, 1223–25 (E.D.Mo.2003), the court held that billing was not part of the professional printing services provided by the insured printing company and was, therefore, not covered by the insured's professional liability insurance policy. In addition, **in *Horizon West Inc. v. St. Paul Fire & Marine Insurance Co.,* 214 F.Supp.2d 1074, 1078–79 (E.D.Cal.2002), the underlying suit alleged that the insured nursing home submitted fraudulent claims to Medicare and Medicaid for services it did not provide. The court rejected the nursing home's argument that its billing activities constituted professional services covered by the policy, stating that billing was only an effect of the professional medical services the home provided, not part of the services itself**. *Id.*

Plaintiff argues that its determination of the document preparation fee required legal skill and knowledge of real estate law and, therefore, was a "professional service". Plaintiff also maintains it had to research pertinent provisions of state and federal law before advising its lender clients as to the legality of the document preparation arrangement. Plaintiff directs the court to two legal opinion letters written to its clients in which it analyzed whether the arrangement with the lender was legally viable. These letters, Plaintiff maintains, "clearly involved legal research and examination" and therefore demonstrate that the claims in the underlying suits were based on its professional services. Plaintiff's argument misses the point. The plaintiffs in the underlying suits did not complain of any legal advice Plaintiff gave its clients in the letters. There were no complaints that Plaintiff committed malpractice. *See Sullivan v. Bickel & Brewer,* 943 S.W.2d 477, 481 (Tex.App.-Dallas 1995, writ denied) ("A cause of action for legal malpractice arises out of an attorney's bad legal advice or improper representation."). Instead, the claims in the underlying suits complained of Plaintiff's billing practice as manifested through the fee on the HUD–1 Settlement Statement and the

document preparation arrangement. As specified above, a party's characterization of a claim cannot conceal its true nature. *Tacon Mech. Contractors,* 65 F.3d at 488. The court finds no merit to Plaintiff's contentions in this regard.

Based on the court's conclusion that billing and setting fees are not acts constituting "professional services," as well as the court's determination that all claims in the underlying suits arose out of Plaintiff's billing and/or fee-setting, it becomes clear that no "claim," as defined by the Policy, was ever alleged against Plaintiff. Plaintiff therefore did not meet its burden of establishing an entitlement to coverage. Consequently, Defendant had no duty to defend Plaintiff and did not breach the insurance contract by denying coverage.

Further, because Defendant did not have a duty to defend, it also had no duty to indemnify Plaintiff for any expenses Plaintiff incurred as a result of the two suits. *Bailey,* 133 F.3d at 368 ("Logic and common sense dictate that if there is no duty to defend, then there must be no duty to indemnify.").

Because the court's conclusions entitle Defendant to judgment as a matter of law, it will not consider the parties' remaining arguments regarding Policy coverage.

316 F.Supp.2d 505, 513-15. (bold added). The federal district judge in *Gregg & Valby* cited *Horizon West Inc. v. St. Paul Fire & Marine Insurance Co.,* 214 F.Supp.2d 1074 (E.D.Cal.2002). The federal district judge in *Horizon West* wrote:

*4. Professional services*

In *Bank of California v. Opie,* 663 F.2d 977 (9th Cir.1981), the Ninth Circuit discussed the definition of "professional services" in the context of an insurance policy covering such services:

> Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual (citations omitted). In

> determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.
>
> *Bank of California,* 663 F.2d at 981 (holding that the mortgage banker's management of loan proceeds was a professional service because his activities as a mortgage banker "largely consisted of management of credit"). *See also Inglewood Radiology Med. Group, Inc. v. Hosp. Shared Services, Inc.,* 217 Cal.App.3d 1366, 1370, 266 Cal.Rptr. 501 (1989) (holding that a physician's decision to terminate an employee constituted an administrative decision rather than a professional service).
>
> In *Medical Records Assoc., Inc. v. American Empire Surplus Lines Ins. Co.,* 142 F.3d 512 (1st Cir.1998), the First Circuit, using the same definition of professional services as the Ninth Circuit in *Bank of California,* held that **billing for services rendered is not a professional service**. There, a medical records processor that had allegedly overcharged clients for copying sued its insurer for failing to defend it against a claim for including improper charges on its bills. The court held that **billing was not a professional service, explaining that "[a]s in most other businesses, the bill is an effect of the service provided, not part of the service itself**." *Id.* at 516. This conclusion is even more compelling when applied to the circumstances of this case, as a retirement home's submission of claims for medical services is even more attenuated from its professional function than a medical records processor's billing of clients for making copies of medical records.
>
> Horizon West contends that the submission of Medicare and Medicaid claims constitutes a professional service because the complexity of the billing and claims process requires that the individuals submitting the claims have specialized knowledge. (*See* Opp. 19–20.) Horizon West, however, fails to offer any legal authority that submission of Medicare and Medicaid claims constitutes anything other than "ordinary activities achievable by those lacking the relevant professional training and expertise." *Medical Records,* 142 F.3d at 514.

214 F.Supp.2d 1074, 1078-79. (bold added). In the present case, Van Fossen has not made any factual argument about the complexity of the billings involved. Any such argument would be misplaced under the case law quoted above. Another case factually on point is *Zurich American Insurance Company v. O'Hara Regional Center for Rehabilitation, et al.,* 529 F.3d 916 (10th Cir. 2008). In that case, the Tenth Circuit Court of Appeals held:

***2. Billing Practices***

O'Hara alternatively argues the insurers had a duty to defend the company because its billing practices constitute professional services covered by the policies.

Professional liability policies do not insure against all liability incurred by the insured. *E.g. Medical Records Assocs., Inc. v. Am. Empire Surplus Lines Ins. Co.,* 142 F.3d 512, 513 (1st Cir.1998) (applying Massachusetts law); 23 *Appleman on Insurance* § 146.3[A] (2d ed., 2003). Instead, such policies often use the term “professional services” or an equivalent phrase to describe the scope of the coverage. 23 *Appleman on Insurance* § 146.3[A]. Zurich's policies refer to “any service ... of a professional nature.” R., Vol. 27, at 4667, 4757. Valley Forge's policy uses the phrase “professional services.” R., Vol. 28, at 4815. And, Lloyd's policy refers to “professional health care services.” R., Vol. 29, at 4912–13. The terms are not defined in any of the policies, and Colorado courts have not clarified the meaning of the phrase.

The definition of professional services most frequently relied on by courts was first set forth in *Marx v. Hartford Accident & Indemnity Co.,* 183 Neb. 12, 157 N.W.2d 870, 871–72 (1968); 23 *Appleman on Insurance* § 146.3[A]. “A ‘ professional’ act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.” *Marx,* 157 N.W.2d at 872; *see also Noyes Supervision, Inc. v. Canadian Indem. Co.,* 487 F.Supp. 433, 438 (D.Colo.1980) (applying Colorado law) (relying in part on *Marx* to determine the meaning of the term “professional services” in an insurance contract); *cf. Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am.,* 181 P.3d 303, 307–08 (Colo.Ct.App.2007) (declining to rely on *Marx* and other cases in determining the meaning of the term “professional services” because the phrase was defined in the policy).

**Although processing Medicare and Medicaid claims may be difficult and time consuming, the activity does not characterize a “professional service.”** The court in *Horizon West* reached a similar conclusion. *Horizon West,* 214 F.Supp.2d at 1079 (“Horizon West ... fails to offer any legal authority that submission of Medicare and Medicaid claims constitutes anything other than ‘ordinary activities achievable by those lacking the relevant professional training and expertise.’ ”) (quoting *Medical Records,* 142 F.3d at 514 (applying Massachusetts law)).[FN9]

FN9. **Nor has O'Hara created a material fact dispute by proffering an affidavit claiming that Medicare**

> **and Medicaid billing practices are difficult and complex. Preparing bills is an ordinary activity of business, and, while federal regulations may be complex, such an activity does not constitute a part of the professional services of a nursing home.**

In fact, **courts generally have concluded the preparation of bills or invoices does not qualify as professional services**. 23 *Appleman on Insurance* § 146.3 [B] (collecting cases); *see, e.g., Medical Records,* 142 F.3d at 515–16; *see also Cohen v. Empire Cas. Co.,* 771 P.2d 29, 31 (Colo.Ct.App.1989). For example, in *Medical Records,* a law firm sued a medical records processing business, alleging the company overcharged for copies. The company referred the claim to its insurer, arguing the applicable policy covered "[l]oss which the Insured shall become legally obligated to pay ... by reason of any actual or alleged negligent act, error or omission committed in the rendering or failure to render the Professional Services stated in the Declarations." *Medical Records,* 142 F.3d at 514. The Declarations only identified the professional services as "Medical Records Processor." *Id.*

In determining whether the policy covered the underlying lawsuit, the court relied in part on the definition of professional services articulated in *Marx. Id.* at 515 (citing *Marx,* 157 N.W.2d at 872). It concluded the insurer did not have a duty to defend the company because setting a price for photocopies and producing accurate invoices did not require the level of particularized knowledge necessary to be characterized as a professional service. *See id.* at 516, 157 N.W.2d 870. The processing of Medicare and Medicaid claims likewise does not require a specialized professional service.

Nor does Colorado law support a professional malpractice theory. For example, in a case involving a claim of a lawyer refusing to pay for the legal services of co-counsel, the Colorado Court of Appeals considered whether such a claim could be covered as "arising out of any act or omission of the Insured in rendering or failing to render *professional services* for others in the Insured's capacity as a lawyer." *Cohen,* 771 P.2d at 30 (emphasis added). Although the court did not define the phrase "professional services," it explained billing practices were not covered by the policy,

> Expenses incurred by a lawyer for maintaining his office, hiring secretaries, investigators, consultants, expert witnesses, and associates are incidental to a lawyer's *business.* His failure to pay either the cost of, or the reasonable value for, such *business* expenses cannot

> rationally be deemed a failure to provide legal advice or assistance to others *in his professional capacity as a lawyer.*
>
> In much the same way, O'Hara's billing practices are incidental to its business as an operator of a nursing facility. O'Hara's failure to file accurate reimbursement claims with the government is not a failure to provide services in its professional capacity.
>
> Because the underlying lawsuit does not allege an injury caused by an activity covered by the insurance policies at issue in this case, the insurers do not have a duty to defend or indemnify O'Hara.

529 F.3d 916, 924-26. (bold added).

Moreover, the recovery Van Fossen seeks does not constitute "damages" under the professional liability policy. The professional liability specifically policy does not cover "fines, sanctions, penalties, punitive or exemplary damages . . . ." Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit A, p. 7. The Idaho Department of Health and Welfare clearly informed Van Fossen it was assessing him $8,815.50 for a civil monetary penalty. This is clearly excluded from the professional liability policy. Similarly, recoupment of $35,261.98, which the Idaho Department of Health and Welfare overpaid Van Fossen, is not covered under the professional liability policy. The policy clearly and specifically excludes damages "arising out of an **Insured** gaining any personal profit or advantage which they are not legally entitled." *Id.,* p. 2. (bold in original). The Idaho Department of Health and Welfare is alleging that due to acts by Van Fossen he has been overpaid $35,261.98. Therefore, if the Idaho Department of Health and Welfare prevails, Van Fossen is not legally entitled to this money which Van Fossen gained from the Department of Health and Welfare for personal profit. The professional liability policy also specifically and clearly excludes fee disputes regarding the failure of the insured to collect or pay money, which is exactly what the Idaho Department of Health and Welfare seeks to

recover in the first instance, and exactly what Van Fossen seeks to recover from Philadelphia under this lawsuit in the second instance.

Philadelphia also made a claim that the policy does not cover claims for damages arising from criminal, dishonest, fraudulent or malicious acts or omissions. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 11; Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit. A, p. 2 (§ I(A)(2)(q)). However, that provision goes on to state "[t]his exclusion does not apply to any **Insured** who did not: (1) personally participate in committing any such act, or (2) remain passive after having personal knowledge or any such act or omission." Affidavit of Jacqueline Holeman in Support of Defendant's Motion for Summary Judgment, Exhibit A, p. 2. (bold in original). Having field suit against his subcontractors in Kootenai County case number CV-2012-6443, Van Fossen has demonstrated that there is a dispute whether he personally participated in the acts alleged by the Idaho Department of Health and Welfare. That suit further demonstrates he did not remain passive when he learned of their request for recoupment. As such, the Court cannot consider this argument when making its determination.

Nowhere in Van Fossen's Complaint for Damages does Van Fossen allege a **duty** by Philadelphia **to defend** Van Fossen in his litigation with the Idaho Department of Health and Welfare resulting from Van Fossen's alleged overbilling. The Court finds this is unusual because the standard for an insured to prove a duty by his insurer to defend the insured is much lower than the standard for a duty to indemnify the insured for damages. Philadelphia correctly cites the applicable law: "The duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy." Memorandum in Support of Defendant's Motion for Summary Judgment, p. 7, citing

*AMCO Ins. Co. v. Tri-Spur Inv. Co.,* 140 Idaho 733, 737, 101 P.3d 226 (2004). Counsel for Van Fossen failed to address this issue in Van Fossen's Brief in Opposition to Defendant's Motion for Summary Judgment, and failed to mention this issue at oral argument. Perhaps the fact that Van Fossen does not seek a defense from Philadelphia underscores the brazen nature of Van Fossen's lawsuit. Since Van Fossen only sues Philadelphia for damages, the damages being what the Idaho Department of Health and Welfare seeks to reclaim due to Van Fossen's allegedly fraudulent billing, and since Van Fossen does not even *mention* Philadelphia's duty to defend (let alone make a claim for such), is Van Fossen capitulating that he owes the Idaho Department of Health and Welfare $44,077.48?

This in turn raises yet another reason to grant summary judgment in favor of Philadelphia. How can Van Fossen seek $44,077.48 in damages from Philadelphia when Van Fossen has yet to pay those monies to the Idaho Department of Health and Welfare? At oral argument, the Court asked counsel for Van Fossen if his lawsuit for damages was premature, and his response was "Summary judgment is probably premature, but not the lawsuit." When pressed by the Court for counsel's reasoning on that response, counsel gave none. This lawsuit clearly is premature. Van Fossen seeks $44,077.48 in damages from Philadelphia when Van Fossen still has not paid that sum to the Idaho Department of Health and Welfare.

Finally, the Court must comment on the overarching absurdity of Van Fossen's lawsuit. As stated above, Van Fossen is only suing Philadelphia for damages. Van Fossen seeks $44,077.48 from Philadelphia. Complaint for Damages, p. 2, ¶ VI. The damages Van Fossen claims Philadelphia owes him, are the monies that the Idaho Department of Health and Welfare seeks to recoup because Van Fossen received $35,261.98 from the Idaho Department of Health and Welfare by allegedly submitting

fraudulent billings to the Idaho Department of Health and Welfare, and now the Idaho Department of Health and Welfare wants that money, and a penalty, back from Van Fossen. Van Fossen hasn't given the Idaho Department of Health and Welfare the money yet. So, Van Fossen is suing Philadelphia for money Van Fossen hasn't yet lost, and that money which Van Fossen currently has should have never have been received by Van Fossen from the Idaho Department of Health and Welfare in the first place! If at some point in time **in the future**, Van Fossen actually pays these monies over to the Idaho Department of Health and Welfare, Van Fossen would only do so because the Idaho Department of Health and Welfare succeeded on its claims that Van Fossen fraudulently billed or that Van Fossen negligently supervised his subcontractors who fraudulently billed. In what parallel universe would a malpractice insurance carrier have a duty to reimburse its insured, for monies the insured has subsequently lost but which it only obtained in the first place by an illegal act? Why is a professional malpractice carrier being asked to replace ill-gotten funds that, if ever lost, were lost only due to Van Fossen's bad conduct?

Van Fossen's brazenness gets even better when Van Fossen claims in his Complaint for Damages that Philadelphia owes him attorney fees and costs because Philadelphia refused to pay Van Fossen for monies Van Fossen has not yet paid to the Idaho Department of Health and Welfare, as a result of Van Fossen's alleged fraudulent conduct. Complaint for Damages, p. 2, ¶ VII. Van Fossen also seeks in his Complaint for Damages interest on the $44,077.48 he claims he is damaged, at the statutory rate of 12% per year under I.C. § 28-22-104, amounting to $16.08 per day. Complaint for Damages, p. 2, ¶ VI. Van Fossen does not state what date the interest runs from. *Id.* Perhaps the absence of a date should have been a clue to Van Fossen's counsel back on July 2, 2013, when he filed this Complaint for Damages, that

his client Van Fossen had yet to be damaged, and even to the present date, has yet to be damaged.

## IV. CONCLUSION AND ORDER.

Based on the above, the Court finds that the language of the Philadelphia policy clearly and unambiguously excludes coverage in this case. As the Court cannot create coverage where none exists, it must grant defendant's request for declaratory judgment and dismissal of plaintiff's claims.

For the reasons stated above,

IT IS HEREBY ORDERED Philadelphia's motion for summary judgment dismissing Van Fossen's damages claims against Philadelphia is GRANTED; all of plaintiff's claims are DISMISSED;

IT IS FURTHER ORDERED summary judgment on Philadelphia's Counterclaim that it is entitled to declaratory judgment that Philadelphia's policy with Van Fossen excludes coverage for the reimbursement claim made against Van Fossen by the Idaho Department of Health and Welfare is GRANTED.

IT IS FURTHER ORDERED the Court finds Philadelphia to be the prevailing party as to all issues, for purposes of costs and fees.

Entered this 2nd day of April, 2014.

________________________________
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the _______ day of April, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

| Lawyer | Fax # | Lawyer | Fax # |
| --- | --- | --- | --- |
| R.D. Watson | 765-5079 | Gregory J. Arpin | (509) 838-0007 |

________________________________
Jeanne Clausen, Deputy Clerk