

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

TRINITY UNIVERSAL INSURANCE :
COMPANY, :

Plaintiff, :

v. :

No. 1:02-cv-231

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TURNER FUNERAL HOME, INC.; :
ROBERT K. SCHRADER; LARRY :
T. DOWDEN; and JAMES M. TURNER :

Defendants. :

-and-

NATIONAL GRANGE MUTUAL :
INSURANCE COMPANY, :

Plaintiff, :

v. :

No. 1:02-cv-298

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TURNER FUNERAL HOME, INC.; :
MIKE J. TURNER; VIRGINIA :
TURNER; LARRY T. DOWDEN; :
and ROBERT K. SCHRADER, :

Defendants. :

-and-

STATE AUTO INSURANCE :
COMPANIES, :

Plaintiff, :

v. :

No. 1:02-cv-083

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TURNER FUNERAL HOME, INC.; :
ROBERT K. SCHRADER; LARRY :
T. DOWDEN; and JAMES M. TURNER :
:

Defendants.

:
MEMORANDUM

I. Introduction

In the first of these three consolidated actions, Case No. 1:02-cv-231, plaintiff, Trinity Universal Insurance Company (“Trinity”), seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201, that Trinity is not obligated under certain insurance policies purchased by defendants, Turner Funeral Home and its principals (“Turner”), either to defend or to indemnify Turner for various claims arising out of the alleged mishandling of human remains at the Tri-State Crematory (“Tri-State”) in Noble, Georgia. In the second of these three consolidated actions, Case No. 1:02-cv-298, National Grange Mutual Insurance Company (“NGMIC”), seeks a declaratory judgment under 28 U.S.C. § 2201, that NGMIC is not obligated under the second businessowners policy it issued to Turner, either to defend or indemnify Turner for various claims arising out of the alleged mishandling of uncremated human remains at Tri-State. In the third of these three consolidated actions, Case No. 1:03-cv-83, State Auto Insurance Company (“SAIC”) also seeks a declaratory judgment under 28 U.S.C. § 2201, that SAIC is not obligated under the policies of insurance issued to Turner, either to defend or indemnify Turner for various claims arising out of the alleged mishandling of uncremated human remains at Tri-State.

Currently pending before the Court is Trinity’s motion for a summary judgment pursuant to Fed. R. Civ. P. 56. [Case No. 1:02-cv-231, Court File No. 5]. The policies at issue in Trinity’s motion for a summary judgment were in effect between September 15, 1997 and March 1, 2001. During this time period, Trinity issued twelve policies of insurance to Turner Funeral Home: (1) four Businessowners Policies; (2) four Professional Liability Policies; and (3) four Commercial Umbrella Policies [Court File No. 5, Exhibit B, C and D]. The policies were issued to Turner in Tennessee.

There are six class action suits and numerous individual suits filed against the named defendants in the instant declaratory judgment action. [Court File No. 5, Exhibit A].

Also pending before the Court is NGMIC's motion for a partial summary judgment [Case No. 1:02-cv-298, Court File No. 30]. As is noted above, in its motion for a partial summary judgment, NGMIC seeks a declaration that it is neither obligated to defend or indemnify Turner under the businessowners policy issued to Turner effective March 1, 2002, for claims arising out of the mishandling of human remains at Tri-State.

Likewise pending before the Court is SAIC's motion for a summary judgment [Case No. 1:03-cv-038, Court File No. 12]. In its motion for a summary judgment, SAIC contends there is no coverage for the Tri-State related claims currently pending against Turner in the underlying actions under either the preferred businessowners policies and/or the commercial umbrella policies it issued to Turner. *Id.*

Background

Turner is organized under the laws of Tennessee with its principal place of business in Chattanooga, Tennessee. Defendants Robert K. Schrader, Larry T. Dowden, James Turner and Sandy Turner are residents of Tennessee. Trinity is organized under the laws of Texas with its principal place of business in Dallas, Texas. NGMIC is organized and exists under the laws of New Hampshire. SAIC is organized under the laws of Ohio and has its principal place of business in Columbus, Ohio.

The facts surrounding this action are well-known and have been widely reported. Namely, in February 2002, various media organizations reported that several hundred corpses were discovered on the grounds of the Tri-State Crematory ("Tri-State") in Noble, Georgia. These corpses were sent to Tri-State for cremation by various funeral homes, including Turner. Further, Turner is alleged to have

sent corpses to Tri-State during the period in which it was insured by Trinity, i.e., between September 15, 1997 and March 1, 2001.

As noted previously, there are a number of underlying actions brought against Turner as a result of the Tri-State situation. The plaintiffs in each of the underlying actions allege they are the family members or representatives of estates of decedents whose remains were sent to Tri-State by Turner for cremation, and they either (1) received confirmation that the purported remains they received were not human in origin; (2) received confirmation that the purported remains were human but were impossible to identify as the deceased; or (3) were informed that the remains had been found on the grounds of Tri-State in Noble, Georgia.

II. Trinity's Motion for a Summary Judgment [Case No. 1:02-cv-231, Court File No. 5].

In its motion for a summary judgment, Trinity alleges that all of the policies it issued to Turner require it to pay on Turner's behalf sums it becomes liable to pay because of property damage and bodily injury, but only if the property damage and/or bodily injury occurs during the policy period. Trinity alleges that as a matter of law, there is no coverage under the Trinity policies because none of the damages claimed by the plaintiffs in the underlying actions are for bodily injury which occurred during the policy period. Rather, Trinity asserts that the damages are for mental distress resulting in the plaintiffs learning of the failure to cremate the bodies of their decedents by Tri-State following media reports concerning Tri-State's operations in February 2002. Accordingly, Trinity asserts none of the plaintiffs can have suffered mental distress or anguish until February 2002 which is nearly a year after the last of the policies issued by Trinity to Turner expired. [Court File No. 5, pp. 1-2].

A. Standard of Review

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *National Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To refute such a showing, the non-moving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material, factual dispute. *Celotex Corp.*, 477 U.S. at 322. A mere scintilla of evidence is not enough. *Anderson*, 477 U.S. at 252; *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). The Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 248, 249; *National Satellite Sports*, 253 F.3d at 907.

B. Analysis

Because the policies at issue in this action were issued and delivered in Tennessee, Tennessee law governs the construction and interpretation of the policies. *U.S. Fidelity & Guar. Co. v. Murray Ohio Mfg. Co.*, 693 F. Supp. 617, 619-20 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989)(citing *Hutchison v. Tennessee Farmer Mutual Ins. Co.*, 652 S.W.2d 904, 905 (Tenn. App. 1983)). Moreover, the scope of coverage and the insurer's duty to defend are questions of law, which can appropriately be resolved by a summary judgment when, as is the situation in the instant action, the

relevant facts are undisputed. *American Indem. Co. v. Foy Trailer Rentals, Inc.*, No. W200000397COAR3CV, 2000 WL 1839131 at *2 (Tenn. Ct. App. Nov. 28, 2000)(unpub.)(citing *Standard Fire Ins. Co. v. Chester-O'Donley & Assoc. Inc.*, 972 S.W.2d 1, 5 (Tenn. Ct. App. 1998); *St. Paul Fire and Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 834 (Tenn. 1994)).

Issues concerning the coverage provided by a policy of insurance and the insurer's duty to defend under the policy require the interpretation of the policy in light of the claims asserted against the insured. *Standard Fire Ins.*, 972 S.W.2d at 5 (citing *Drexel Chem. Co. v. Bituminous Ins. Co.*, 933 S.W.2d 471, 480 (Tenn. Ct. App. 1996); *American Nat'l Property & Cas. Co. v. Gray*, 803 S.W.2d 693, 695-96 (Tenn. Ct. App. 1990)). Thus, in *St. Paul Fire and Marine Ins. Co.*, the Tennessee Supreme Court stated:

It is accepted in the overwhelming majority of jurisdictions that the obligation of a liability insurance company to defend an action brought against the insured by a third party is to be determined *solely* by the allegations contained in the complaint in that action . . . Accordingly, if the allegations . . . are within the risk insured against and there is a potential basis for recovery, then [the insurer] must defend . . . regardless of the actual facts or the ultimate grounds on which . . . liability to the injured parties may be predicated In any event, the pleading test for determination of the duty to defend is based exclusively on the facts as *alleged* rather than on the facts as they actually are

Id., 879 S.W.2d at 835.

An insurer must defend its insured in an action “unless ‘it is plain from the face of the complaint that the allegations fail to state facts that bring the case within or potentially within the policy’s coverage.’” *Id.* (quoting *Drexel*, 933 S.W. 2d at 480). Thus, “[a]n insurer cannot be obliged to defend if there is no legal or factual allegation in the underlying complaint for which the insurer might eventually have to indemnify the insured.” *Commercial Union Assur. Co., PLC v. Oak Park Marina, Inc.*, 198 F.2d 55, 59 (2nd Cir. 1999).

Further, the insurer's duty to defend is distinct from the insurer's obligation to pay valid claims under the policy. Namely, "[t]he insurer has the duty to defend against even those claims that are without merit." *Jackson Housing Authority v. Auto-Owners Ins. Co.*, 686 S.W.2d 917, 922 (Tenn. Ct. App. 1984). Finally, if the allegations in a complaint are ambiguous and some doubt exists as to whether the allegations state a cause of action which the insurer has a duty to defend under the policy, such "doubt should be resolved in favor of the insured." *State Auto Ins. Companies v. Gordon Const., Inc.*, No. M1999-00785-COA-R3CV, 2001 WL 513884 at *3 (Tenn. Ct. App. May 15, 2001)(unpub.).

An insurance policy is subject to the same basic rules of construction and enforcement as are used for contracts in general. *American Indem.*, 2001 WL 1839131 at *3 (citing *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990)). Absent fraud or mistake, the insurance policy will be interpreted as written, with the ordinary and natural meaning accorded to its terms. *Id.* at *3 (citing *Allstate Ins. Co. v. Wilson*, 856 S.W.2d 706, 708 (Tenn. Ct. App. 1992); *Drexel*, 933 S.W.2d at 477). Ambiguous terms, if any, in the policy should be construed "against the insurer and in favor of the insured." *Id.* (citing *Harrell v. Minnesota Mut. Life Ins. Co.*, 937 S.W.2d 809, 814 (Tenn. 1996)). An insurance policy "should be construed as a whole and in a reasonable and logical manner." *Id.* (citing *English v. Virginia Sur. Co.*, 268 S.W.2d 338, 340 (Tenn. 1954)).

The four businessowners policies issued by Trinity to Turner appear in the record as exhibit B to Trinity's summary judgment motion. [Case No. 1:02-cv-231, Court File No. 5, Exhibit B]. The first policy, BOA 4414616-03, was issued for the policy period from September 15, 2000 to September 15, 2001. *Id.*, Exhibit B(1). However, it was cancelled effective March 1, 2001. *Id.* The second policy, BOA 4414616-01, was issued for the period from September 15, 1999 to September 15, 2000. *Id.*, Exhibit B(2). The third policy, BOA 4414616-00 was issued for the policy period from September 15,

1998 to September 15, 1999. *Id.*, Exhibit B(3). The fourth policy, also BOA 4414616-00, was issued for the policy period from September 15, 1997 to September 15, 1998. *Id.*, Exhibit B(4).

All four businessowners policies have virtually the identical relevant policy language. The relevant language in the policies state:

A. COVERAGES

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury,” “property damage,” “personal injury” or “advertising injury” to which this insurance applies. . .
- b. This insurance applies:
 - (1) To “bodily injury” and “property damage” only if: . . .
 - (b) The “bodily injury” or “property damage” occurs during the policy period . . .

Id., Exhibits B(1),B(2), B(3) and B(4). The policies also contain the following exclusions. Exclusion B.1.b excludes “‘Bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” *Id.* Exclusion B.1.j excludes “‘Bodily injury’, ‘property damage’, ‘personal injury’ or ‘advertising injury’ due to rendering or failure to render any professional service.” *Id.*

Further, exclusion B.1.n applies to

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms . . .

Id.

Likewise, the Businessowners Liability Coverage Form which accompanies the policies Trinity issued to Turner states that the insurance applies “to ‘bodily injury’ or property damage’ only if: (a) “[t]he ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’; and (2) the ‘bodily injury’ or ‘property damage’ occurs during the policy period.” [Court File No. 5, Exhibit B, Businessowners Liability Coverage Form, Section A.1.b(1) & (2)]. The Form defines an “occurrence” as an “accident”. *Id.*, Section F.12.

In addition, the Form states that the insurance does not apply to: (1) “‘Bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured”; and (2) “‘Bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” *Id.*, Section B.1.(a) & (b). Finally, the Form also excludes coverage for “[b]odily injury’ or ‘property damage’, ‘personal injury’ or ‘advertising injury’ due to rendering or failure to render any professional service.” *Id.*, Section B.1.j.

The four professional liability policies also appear in the record. [Case No. 1:02-cv-231, Court File No. 5, Exhibit C]. The first policy, PL 4415153, covered the policy period from September 15, 2000 to September 15, 2001. *Id.*, Exhibit C(1). However, it was cancelled effective March 1, 2001. *Id.* The second policy covered the policy period from September 15, 1999 to September 15, 2000. *Id.*, Exhibit C(2). The third policy covered the policy period from September 15, 1998 to September 15, 1999. *Id.*, Exhibit C(3). The fourth covered the policy period from September 15, 1997 to September 15, 1998. *Id.*, Exhibit C(4).

The four professional liability policies provide coverage for:

Morticians Malpractice Liability. To pay on behalf of the insured: (1) all sums which the insured becomes legally obligated to pay as damages for (a) **bodily injury, sickness, disease or death, including mental anguish** or (b) **for injury to or destruction of property of others** which is not in the care custody or control of the **insured** because of any professional malpractice, error or mistake in the embalming, handling, disposition, burial, disinterment or removal of any **deceased human body** or any conduct of any memorial service by the insured, even though no **deceased human body** actually be present, or because of any injury to, destruction of or interference with the right of burial of a **deceased human body**. . . (3) such sums which the **insured** becomes legally obligated to pay as damages because of liability assumed under any contract made in the usual course of the **insured's** business as a funeral director for the embalming, burial, care, handling, or disposition of a **deceased human body** or the transportation thereof by another.

Id., Exhibits C(1), C(2), C(3) and C(4)(emphasis in originals). The “Definitions” section of the policies also state that the “term ‘**bodily injury**’ means bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom”. *Id.* (emphasis in originals).

The four commercial umbrella policies also appear in the record [Case No. 1:02-cv-231, Court File No. 5, Exhibit D]. The first umbrella policy, UO4414774 covered the period from September 15, 2000 to September 15, 2001, but was cancelled on March 1, 2001. *Id.*, Exhibit D(1). The second commercial umbrella policy covered the period from September 15, 1999 to September 15, 2000. *Id.*, Exhibit D(2). The third commercial umbrella policy covered the period from September 15, 1998 to September 15, 1999. *Id.*, Exhibit D(3). The fourth commercial umbrella policy covered the period from September 15, 1997 to September 15, 1998. *Id.*, Exhibit D(4).

The Commercial Umbrella policies are follow form policies. Thus, with regard to the professional liability policies described above, the Commercial Umbrella follow form provides that: “[t]he insurance afforded by this policy does not apply to any claim for loss or expense for which insurance is not afforded by the professional liability insurance described in the schedule of ‘underlying

insurance’ or by any renewals or replacements thereof.” *Id.*, Exhibits D(1), D(2), D(3) and D94).

Likewise the “General Liability Following Form” of the Commercial Umbrella Policy states that

where General Liability “underlying insurance” is written with terms or conditions providing greater protection of indemnity or more limited protection or indemnity to the insured than the terms or conditions of this policy, this insurance shall indemnify the insured upon the same terms, conditions and limitations of the applicable General Liability “underlying insurance.”

Id.

In this instance, the Court has reviewed the complaints attached as exhibit A to plaintiff’s motion for a summary judgment. [Court File No. 5, Exhibit A]. The complaints are identified by the plaintiff’s name or, in actions involving multiple plaintiffs – including, class action lawsuits, the name of the first named plaintiff; the case number; and the court in which the action is pending. The complaints are:

1. *Alex Kitchens, et al.*, Case No. 02-cv-59637, Walker County, Georgia, Superior Court;
2. *Barbara Berry*, Case No. 02-C-633, Hamilton County, Tennessee, Circuit Court;
3. *Barbara Shivelle, et al.*, Case No. 02-C-633, Hamilton County, Tennessee, Circuit Court;
4. *Belinda Hixson*, Case No. 02-C-633, Hamilton County, Tennessee, Circuit Court;
5. *Beverly Burns*, Case No. 02-C-716 Hamilton County, Tennessee, Circuit Court;
6. *B. Peton Brien*, Case No. 02-C-744, Hamilton County, Tennessee, Circuit Court;
7. *Carol Bechtel, et al.*, Case No. 4:02-cv-041, U.S. District Court, Northern District of Georgia;
8. *Diane Ballew, et al.*, Case No. 02-cv-4512, Walker County, Georgia, Superior Court;
9. *D. Dwayne Lee, et al.*, Case No. 02-cv-59075, Walker County, Georgia, Superior Court;
10. *Gladys Gomez, et al.*, Case No. 02-C-628, Hamilton County, Tennessee, Superior Court;
11. *Glen Burks*, Case No. 02-C-1390, Hamilton County, Tennessee, Superior Court;
12. *Joanne Hobbs*, Case No. 02-C-752, Hamilton County, Tennessee, Superior Court;
13. *Joe C. Oden, Jr.*, Case No. 02-C-414, Hamilton County, Tennessee, Superior Court;
14. *Lee Hughes*, Case No. 02-C-698, Hamilton County, Tennessee, Superior Court;¹
15. *Libby Workman, et al.*, Case No. 02-C-420, Hamilton County, Tennessee, Circuit Court;
16. *Libby Workman, et al.*, Case No. 02-C-4422, Walker County, Georgia, Superior Court;²
17. *Lisa Marie Cash*, Case No. 02-C-631, Hamilton County, Tennessee, Circuit Court;
18. *Marlene Elsass*, Case No. 02-C-632, Hamilton County, Tennessee, Circuit Court;
19. *Mary Ann Schenk*, Case No. 02-C-792, Hamilton County, Tennessee, Circuit Court;

¹The Court has reviewed both the original and amended complaint in this case.

²The Court has reviewed both the original and amended complaint in this case.

20. *Mary Neiswender*, Case No. 02-C-735, Hamilton County, Tennessee, Circuit Court;
21. *Patricia J. Kecskes*, Case No. 02-C-1059, Hamilton County, Tennessee, Circuit Court;
22. *Peggy Eugenia Cook*, Case No. 02-C-733, Hamilton County, Tennessee, Circuit Court;
23. *Rhonda Dunn*, Case No. 02-C-1391, Hamilton County, Tennessee, Circuit Court;
24. *Ruby Baucom, et al.*, Case No. 02-CV-59159, Walker County, Georgia, Superior Court;
25. *Sally Roberts*, Case No. 02-C-556, Hamilton County, Tennessee, Circuit Court,
26. *Terry L. Butler*, Case No. 02-C-556, Hamilton County, Tennessee, Circuit Court;
27. *Thomas Calderone*, Case No. 02-C-1121, Hamilton County, Tennessee, Circuit Court.

The allegations set forth in the complaints in the actions identified above are essentially three in nature:

- (1) Turner was negligent in submitting bodies to an unlicensed crematory without ascertaining that Tri-State was capable of and was, in fact, properly delivering cremation services and products; and, such negligence constituted a breach of the fiduciary duty/special duty imposed on the funeral home and/or crematory as the result of Tennessee and/or Georgia law;
- (2) Breach of contract, and breach of implied warranties in the aforesaid contract for failure of Turner to deliver appropriate cremation and/or cremation services and products.³

³In a number of actions, *Hixson*; *Bechtel, et al*; *Ballew, et al*; *Lee, et al*; *Burks*; *Oden*; *Hughes*; *Schenk*; *Dunn*; *Butler*; and *Calderon*, cases 4, 7, 8, 9, 11, 13, 14, 19, 23, 26 and 27 in the list set forth above, the plaintiffs have alleged, fraud, deceit and/or negligent misrepresentations by Turner in the promises in made to them in connection with the “professional” services Turner was to provide as part of their decedent’s funerals and/or cremations. The Court recognizes that under Tennessee law, fraud, deceit and/or negligent misrepresentations are torts, not an action for breach of contract. The Court will consider these claims along with the plaintiff’s breach of contract claims because the allegations underlying these claims are related to the quality of “professional” services which Turner promised to each of the plaintiffs in connection with their decedents’ funerals and/or cremations.

Further, in *Shivelle*, *Burks*, *Oden*, *Schenk*, *Dunn* and *Calderon*, cases 3, 5, 13, 19, 23 and 26 in the list set forth above, the plaintiffs have alleged that Turner engaged in deceptive trade practices in violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.*, because Turner accepted and retains monies for services it promised but did not actually render; namely, a proper cremation for each of the plaintiffs decedents.

Lastly, in *Bechtel, et al*; *Ballew; et al*; *Lee, et al*; *Workman, et al.* [Walker GA case]; and *Baucom*, cases 7, 8, 9, 16 and 24 in the list set forth above, the plaintiffs have alleged unjust enrichment because Turner accepted monies for services, i.e., a proper cremation of their decedents, which it promised but failed to deliver. *Bechtel*, *Ballew* and *Lee* specifically allege unjust enrichment. *Workman* and *Baucom* allege the unjust enrichment constitutes a RICO violation as it

- (3) Mental anguish stemming from the alleged mishandling of the plaintiff's decedents which interfered with each plaintiff's right of disposition/burial of his or her decedent.

(1) **The businessowners policies**

In its motion for a summary judgment, Trinity argues that the claims asserted against Turner in the underlying actions which arguably fall within the coverage of the businessowners policies occurred long after the coverage period in the Trinity policies expired. [Court File No. 5].

In *American Index. Co. v. Foy Trailer Rentals, Inc.*, 2000 WL 1839131 (Tenn Ct. App. Nov. 28, 2000) the court set out the manner in which a commercial general liability policy, such as the businessowners policies at issue here, should be construed. It stated:

Commercial general liability policies are designed to protect the insured from losses arising out of business operations. C.L. policies are not "all-risk policies; rather, these policies provide the insured with coverage up to the policy limits for damages for which the insured becomes liable as a result of tort liability to a third party. When facing coverage questions, the essential elements of a C.L. policy should be construed in the following order: the declarations, insuring agreement and definitions, exclusions, conditions, and endorsements. The insuring agreement reflects the limits of an insurer's liability. If coverage is not found in the insuring agreement, it will not be found elsewhere in the policy. Exclusions are read in terms of the insuring agreement to which they apply, and they can only decrease coverage.

Id. at *3.

Further, a general liability policy is not an "all-risk policy." *Standard Fire Ins. Co. v. Chester O'Donley & Associates, Inc.*, 972 S.W.2d 1, 6-7 (Tenn. Ct. App. 1998). Rather, general liability policies insure against the risk that the "insured's product or work will cause bodily injury or damage to property other than the work itself for which the insured may be found liable." *Id.* Thus, "general

stems from a RICO conspiracy between Turner and Tri-State. Again, for the sake of convenience the court will consider these claims along with plaintiff's breach of contract claims because they relate to "professional" services which Turner is alleged to have promised and failed to provide, and for which services it allegedly accepted and still retains monies paid by the plaintiffs.

liability policies are not intended to cover the insured's contractual liability for economic loss because its work was not that for which the damaged person bargained." *Id.* General liability policies "do[] not cover the accident of faulty workmanship but rather faulty workmanship which causes an accident." *Id.* at 7(quoting *Weedo v. Stone-E-Brick*, 81 N.J. 233, 405 A.2d 788, 796 (1979)).

Commercial general liability insurance covers "physical damages to others," not the "contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." *State Auto Ins. Companies v. Gordon Const., Inc.*, No. M1999-00785-COA-R3CV, 2001 WL 513884 at * 4 (Tenn. Ct. App. May 15, 2001)(unpub.). Accordingly, "the risk intended to be insured by a comprehensive general liability policy is faulty workmanship and materials which cause a tort liability to persons other than those to whom the contractual obligation of workmanlike performance is due." *Id.* (quoting *Vernon Williams & Son Const., Inc. v. Continental Ins. Co.*, 591 S.W.2d 760, 763 (1979); *Blaylock and Brown Constr. Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 152 (Tenn. Ct. App. 1990)). Thus, "a commercial general liability policy should not be construed in a manner that makes the insurer a guarantor of the insured's work product." *State Auto*, 2001 WL 513884 at *3 (quoting *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98, 103 (2nd Cir. 1993)).

In addition, Exclusion B.1.b in each of the four businessowners policies excludes "'bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." [Court File No. 5, Exhibits B(1), B(2), B(3) and B(4). Further, Exclusion B.1.n. applies to "property damage" to "impaired property" or property that has not been physically injured, arising out of either "a defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work' or 'a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms. . .'" *Id.*

Therefore, based upon the Tennessee law applicable to the interpretation of commercial general liability policies and the specific exclusions set forth in the four business owner's policies issued by Trinity to Turner, the Court finds that plaintiffs' claims of negligence and breach of contract are specifically excluded from coverage under the four businessowners policies.

More specifically, as is noted above, in the underlying actions, the plaintiffs seek damages against one, or more, of the defendants based upon the following causes of action: breach of contract concerning the handling of the remains, negligent hiring or supervision of the crematory, negligent entrustment of the bodies to the crematory, negligent failure to treat the remains with dignity and respect, negligent failure to comply with statutes pertaining to the handling of corpses, negligent misrepresentation, negligent infliction of emotional distress/mental anguish, intentional infliction of emotional distress fraud, deceit, unjust enrichment, breach of fiduciary/special duty, violation of the Tennessee Consumer Protection Act and violation of RICO.

In this instance, the claims for breach of contract concerning the handling of the remains, negligent hiring/supervision of Tri-State, negligent entrustment of the bodies to Tri-State, negligent failure to treat the remains with dignity and respect, negligent failure to comply with state statutes governing the handling of corpses; negligent misrepresentation, fraud, deceit, unjust enrichment, breach of fiduciary (special) duty arise out of the "professional" services provided by Turner and, thus, are barred by the exclusion for the rendering or failure to render any professional services. [Court File No. 5, Business Liability Coverage Form, section B.1.j]. Further, the claims for breach of contract concerning the handling of the remains, negligent hiring and/or supervision of Tri-State, negligent entrustment of the bodies to Tri-State and breach of fiduciary/special duty would also be barred by the exclusion which applies to the assumption of liability in a contract or agreement. *Id.*, section B.1.(a) & (b). In the underlying actions the plaintiffs contend that Turner, either orally or in writing, assumed

certain duties/responsibilities with respect to the handling of their decedents remains. These promises allegedly concerned the level of care Turner would use in handling the remains of the plaintiffs' decedents as well as the level of satisfaction the plaintiffs would derive from the "professional" services rendered by Turner.

Moreover, coverage for the underlying plaintiffs' claims for intentional infliction of emotional distress, fraud, deceit, violations of the Tennessee Consumer Protection Act and RICO are barred by the exclusion for intended "bodily injury" or "property damage." *Id.*, section B.1.(a). Furthermore, the coverage form also provides coverage for an occurrence during the coverage period; and, it defines an occurrence as an accident. *Id.*, section A.1.b(1) & (2); section F.12. Thus, the policy both expressly and by implication excludes intentional actions of the insured. *See also I. Appel Corp. v. St. Paul Fire & Marine Ins. Co., Inc.*, 930 S.W.2d 550, 552-53(Tenn. Ct. App. 1996)(a claim for intentional infliction of emotional distress is an intentional cause of action and it is not covered under a policy which excludes claims for bodily injury and property damage intended by the insured); *Miele v. Zurich U.S.*, 98 S.W.3d 670, 673-74 (Tenn. Ct. App. 2002)(claims for willful violations of the Tennessee Consumer Protection Act are not covered under a policy which excludes bodily injury or property damage intended from the standpoint of the insured.); *Pacific Employers Ins. Co. v. Cesnik*, 219 F.3d 1328, 1331 (11th Cir. 2000)(claims for violation of Georgia's RICO statute are not covered under a policy which covers claims for bodily injury or property damage caused by an "occurrence" in the coverage territory and during the policy period. The policy defines an "occurrence" as "an accident" and claims of RICO violations are intentional conduct and, therefore, not an "occurrence" as defined in the policy.)

With regard to the plaintiffs' claims in the underlying action of mental anguish, the Court also finds that these claims are not covered by the four businessowners policies because these claims did not occur during the policy period of any of the four businessowners policies issued by Trinity to Turner.

As the Court noted above, the four businessowners policies cover bodily injury and property damage which occurs during the policy period. [Court File No. 5, Exhibits B(1), B(2), B(3) and B(4), subsection A.1.b(1)(b)]. At common law, no right of property existed in the body of a deceased. *Tinsley v. Dudley*, 915 S.W.2d 806, 807 (Tenn. Ct. App. 1995). However, the Tennessee courts “have recognized that a quasi-property right in dead bodies vests in the nearest relatives, and arises from their duty to bury their dead.” *Id.* (citing *Barely v. Frank A. Hubbell Co.*, 67 N.M. 319, 355 P.2d 133 (1966); 22 Am. Jur.2d § 3, p. 10). *See also Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991)(“A majority of the courts confronted with the issue of whether a property interest can exist in a dead body have found that a property right of some kind does exist and often refer to it as a ‘quasi-property right.’”).

This “quasi-property right” is “the right to the possession of a dead body for the purposes of decent [disposition]” which vests in the decedent’s next-of-kin. *Hill v. Travelers’ Ins. Co.*, 154 Tenn. 295, 294 S.W. 1097, 1098 (1927). Interference with this “quasi-property right” of possession of a dead body for disposition is “an actionable wrong and a subject for compensation.” *Id.* Such an action is not “for the injury done to the dead body, but [is] for the wrong or trespass on the plaintiff’s right to the undisturbed possession and control of the body, measured by the mental anguish and suffering of the plaintiff occasioned thereby.” *Id.* Such an action is clearly not an action for bodily injury. *Id.*

In *Biro v. Harman Funeral Home*, 107 Ohio App. 3d 508, 669 N.E.2d 65 (Ohio App. 1995), the court held that plaintiff, as the decedent’s next-of-kin, could bring a tort action for the desecration of his decedent’s remains. *Id.*, 669 N.E.2d at 67. The court explained that this action was based not on any property right of the plaintiff in the dead body, but in the personal right of a family member to bury the body. *Id.* Further, the court explained that the action was not concerned with damages for

physical injury, if any, to the remains, but with the mental suffering of the decedent's next-of-kin stemming from the desecration of the remains. *Id.*

The plaintiff in *Biro* learned in 1992, that in 1986 his father's remains had been recklessly interred "in a mass unmarked grave." *Id.* at 68. Plaintiff, in 1995, brought an action for intentional infliction of emotional distress based upon the defendant's interference with his right as next-of-kin to bury his father's body. *Id.* The defendant challenged the action as time-barred based upon the applicable four-year statute of limitations. The *Biro* court found that the action was not time-barred, because, although plaintiff's father had been improperly interred in 1986, the cause of action "d[id] not accrue until the tort was complete," that is "until the injury was incurred and the emotional impact was felt." *Id.*

Likewise, in *Commercial Union Assur. Co., PLC v. Oak Park Marina, Inc.*, 198 F.3d 55 (2d. Cir. 1999), the defendants owned and operated a public marina on Lake Ontario in New York. The plaintiffs used the marina's restrooms and shower facilities. *Id.* at 56. Unknown to plaintiffs, the defendant had installed hidden video cameras in the marina's restrooms and changing areas; and, they played the videotapes from the restrooms and changing areas at a local bar, known as "Cutters." *Id.* Although the surreptitious videotaping began in 1993, the videotaping was not actually discovered until a marina employee reported the videotaping activity to the New York State Police in early 1995 or 1996. *Id.* In 1996, the plaintiffs brought an action against the defendants for negligent infliction of emotional distress and reckless and intentional infliction of emotional distress. *Id.* at 57. The district court found that the plaintiffs' action for reckless infliction of emotional distress was not time-barred by the applicable one-year statute of limitations because "all the elements of the cause of action for reckless infliction of emotional distress did not fall into place until the plaintiffs actually suffered severe emotional distress, *i.e.*,

when plaintiffs first learned that they had been videotaped.” *Id.* at 57. This finding by the district court was not challenged on appeal. *Id.*

However, on appeal, the defendant’s insurer challenged the district court’s finding that it had a duty to defend under the Bodily Injury Endorsement of the policies it had issued to the defendants. The Bodily Injury Endorsement provided coverage for “any and all claims for which [the Assured] may be held liable for damages arising out of *accidents* occurring during the term of the Policy.” *Id.* at 59. The term of the relevant policies was February 28, 1992 to February 28, 1993. *Id.* The Second Circuit found that district court had erred in finding a duty to defend. It found that the plaintiffs’ causes of action for “infliction of emotional distress did not ripen until plaintiffs actually suffered severe emotional distress,” which was after February 1995, when the plaintiffs first learned they had been videotaped. *Id.* Thus, the Second Circuit found that because the “accident,” *i.e.*, the videotaping occurred outside the term of the policy, there was no duty of the insurer to indemnify under the Bodily Injury Endorsement and, therefore, no duty to defend. *Id.*

Further, in *Swafford v. Memphis Individual Practice Ass’n*, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn. Ct. App. June 2, 1998), the court considered the issue of when plaintiff’s cause of action accrued under Tennessee law. It stated:

The statute of limitations commences when the plaintiff has a cause of action. *R.J. Reynolds Tobacco Co. v. Carson*, 187 Tenn, 157, 172, 213 S.W.2d 45, 51 (1948). The cause of action accrues when the plaintiff attains the right to sue. *Armistead v. Clarksville-Montgomery County School System*, 222 Tenn. 486, 490, 437 S.W.2d 527, 528-29 (1969). In *Shell v. State*, 893 S.W.2d 416, 422 (Tenn. 1995), the Tennessee Supreme Court held:

Under the law of Tennessee, a cause of action accrues when the plaintiff suffers in actuality a legally-cognizable wrong and thus acquires a right to bring suit for redress.

Id., 1998 WL 281935 at *8.

Thus, the plaintiffs' action for mental anguish asserted in the underlying lawsuits could not have accrued until they actually were aware of the mishandling of their decedent's remains by Tri-State and actually began experiencing emotion distress and/or mental anguish as a result of such knowledge. The parties do not dispute that the revelations about the discovery of uncremated human remains on the Tri-State property did not begin until early 2002. The coverage period of the businessowners policies Trinity issued to Tri-State ended in March 2001, when the fourth, and last, businessowners policy was terminated. As the plaintiffs' claims for mental anguish and/or emotional distress did not accrue until approximately eight or nine months after the "coverage period" of the Trinity policies, Trinity has no duty to indemnify and, hence, no duty to defend Turner pursuant to the businessowners policies.

(2) **The commercial umbrella policies as they follow form on the businessowners policies.**

Further, with regard to the four commercial umbrella policies issued by Trinity to Turner, since these policies are follow form policies, Trinity has no duty to indemnify or defend under the commercial umbrella policies based upon the businessowners policies it issued to Trinity.

(3) **The professional liability (malpractice) policies.**

With regard to plaintiffs' claims in the underlying actions for mental anguish and/or emotional distress, the four professional liability policies issued by Trinity to Turner provide that Trinity will pay sums for bodily injury, including, mental anguish. [Court File No. 5, Exhibits C(1), C(2), C(3) and C(4)]. However, the definitions sections of the policies, as set forth on the Declarations Page of the policies limits damages for bodily injury to claims which occur during the policy period.⁴ *Id.*

⁴The Professional Liability Policies also provide coverage "for injury to or destruction of the property of others . . ." [Court File No. 5, Exhibits C(1), C(2), C(3) and C(4)]. As is discussed above, the plaintiffs in the underlying actions do have a quasi-property right in the bodies of their decedents for purposes of burial and/or disposition. However, interference with this right gives rise to a tort action for mental anguish, not for an action for damages to the dead body. Thus, any action

In this case, the fourth, and final, professional liability policy was cancelled effective March 1, 2001. However, as is discussed above, the causes of action of the plaintiffs for mental anguish and/or emotional distress did not accrue until sometime in February 2002, when the discovery of uncremated human remains on the Tri-State property was first reported. This falls outside of the coverage period of the four professional liability policies Trinity issued to Turner. Accordingly, Trinity has no duty to indemnify Turner and, hence, no duty to defend pursuant to the four professional liability policies, with regard to the plaintiffs' claims of mental anguish and/or emotional distress and/or outrageous conduct in the underlying actions.

However, the four professional liability policies also obligate Trinity to

pay on behalf of [Turner]: . . . (3) such sums which the insured becomes legally obligated to pay as damages because of liability assumed under any contract made in the usual course of the **insured's** business as a funeral director for the embalming, burial, care, handling, or disposition of a **deceased human body** or the transportation thereof by another.

[Court File No. 5, Exhibits C(1),C(2), C(3) and C(4)](emphasis in original).

As is noted above, in all of the underlying actions, the plaintiffs have asserted essentially that Turner breached a contract to properly dispose of the bodies of their decedents, *i.e.*, to properly insure that the bodies of their decedents were properly cremated; and that Turner's breach of the contract to properly dispose of their decedents remains stemmed from its negligent selection of an unlicensed, as opposed to a licensed, crematorium. "The failure to perform a contract to properly handle a dead body is actionable in [Tennessee]." *Johnson v. Woman's Hospital*, 527 S.W.2d 133, 140 (Tenn. Ct. App. Feb. 12, 1975).

asserted by the plaintiffs in the underlying actions for mental anguish and/or emotional distress fall under the bodily injury provisions of the malpractice policies, not the injury to property provisions.

Interpreting the language in the third clause of the professional liability policies issued by Trinity to Turner based upon its plain and unambiguous meaning, the Court finds under the language of the professional liability policy, Trinity has a duty to indemnify⁵, and hence, a duty to defend plaintiff's claims of negligence/breach of contract in their underlying actions.

Further, under Tennessee law, an insurer's duty to defend is separate, distinct from and broader than the insurer's duty to indemnify. *Drexel Chemical v. Bituminous Ins.*, 933 S.W.2d 471, 480 (Tenn. App. 1996). "If even one of the allegations is covered by the policy, the insurer has a duty to defend, irrespective of the number of allegations that may be excluded by the policy." *Id.* (citing *U.S. Fidelity & Guar. Co. v. Murray Ohio Manuf. Co.*, 693 F. Supp. 617 (M.D. Tenn. 1988)).

Thus, in this instance Trinity has a duty to defend Turner in those underlying actions where at least one of the allegations of the plaintiffs are covered by the Professional Liability Policies it issued to Turner. As noted above, the Professional Liability Policies which Trinity issued to Turner were terminated/cancelled effective March 1, 2001. The Court has reviewed the complaints in the underlying actions. In *Hughes*, Case No. 02-C-698, the plaintiffs' decedent died on November 26, 2001, after the cancellation of the Professional Liability Policy. In both of the *Workman* class actions, 02-C-420 (Hamilton County, Tennessee) and 02-CV-4422 (Walker County, Georgia), the decedent of the named representative plaintiff died on February 2, 2002, outside of the policy period of the Professional Liability

⁵Of course, under the professional liability policies Trinity only has a duty to indemnify the plaintiffs' claims of breach of contract concerning the handling of the remains, negligent hiring or supervision of the crematory, negligent entrustment of the bodies to the crematory, negligent failure to treat the remains with dignity and respect, failure to comply with state statutes relating the handling of corpses, misrepresentation, fraud, deceit, unjust enrichment, breach of fiduciary/special duty, and violations of the Tennessee Consumer Protection Act and RICO. Trinity has no duty to indemnify the Turner defendants for the claims of mental anguish/emotional distress brought in the underlying lawsuits. Moreover, since in this declaratory judgment action, the Court has only reviewed the complaints in the underlying actions, the Court expresses no opinion as to the merits of any of the plaintiffs' claims in the underlying lawsuits..

Policy. Likewise, in *Cash*, Case No. 02-C-631, the plaintiff's decedent died on December 30, 2001; and in *Dunn*, Case No. 02-C-1391, the plaintiff's decedent died on July 21, 2001. [Court File No. 5, Attachment A]. All of the other complaints, except the complaint in *Kitchens*, Case No. 02-CV-59673, which sets forth no allegation about the decedent's date of death, allege a date of death prior to March 1, 2001.

Accordingly, except for the five cases identified above where the plaintiffs' decedents died subsequent to March 1, 2001, the Court **DECLARES** that Trinity has an obligation to defend Turner in the underlying actions based upon the Professional Liability Policy it issued to Turner.

(4) **The commercial umbrella policies as they follow form on the professional liability policies.**

As the commercial liability policies issued by Trinity to Turner are follow form policies, Trinity has a duty to defend and indemnify the Turner defendants based upon the Commercial Umbrella Policies to the same extent it has an obligation to defend the Turner defendants under the Professional Liability Policies.

III. NGMIC's motion for a partial summary judgment.

National Grange Mutual Insurance Company ("NGMIC") moves for a partial summary judgment against Turner [Case No. 1:02-cv-298, Court File No. 30]. NGMIC asserts that it issued businessowners policies, Policy BP 127606 to Turner. [Court File No. 31] The first policy was for the period from March 1, 2001 to March 1, 2002. The second policy period was for the period from March 1, 2002 through March 1, 2003.

NGMIC asserts that by, at least, February 2002, it was discovered that Tri-State had not been cremating the remains that Turner, and other funeral homes, had sent to Tri-State for cremation. NGMIC further asserts that by mid-February 2002, the discovery of uncremated human remains at Tri-State had

been widely publicized in the local and national media. Finally, NGMIC noted that the first of the underlying lawsuits, *Workman v. Turner Funeral Home, et al.*, No. 02-CV-4422, was filed in the Superior Court for Walker County, Georgia on February 21, 2002, and was served on Turner on February 28, 2002. [Court File No. 31, p. 3, Exhibit F, affidavit of service; complaint].

NGMIC states that it “is defending the Turner Defendants pursuant to a reservation of rights in the Underlying Lawsuits.” *Id.*, p. 2. It seeks a summary judgment “as respects its claim that it owes the Turner Defendants no defense or immunity obligation for the Underlying Lawsuits under the NGMIC policy which first became effective on March 1, 2002 based upon the known risk, loss or loss in progress doctrine.” *Id.* More specifically, NGMIC asserts that it is entitled to a summary judgment as a matter of law on the grounds that:

[t]he undisputed facts demonstrate that Turner Funeral had knowledge not only of the discovery that Tri-State had not been cremating remains that Turner had sent to it for cremation (“the Tri-State discovery”) prior to the effective date of the second policy period, but also knew of the claims arising from the failure to properly cremate remains.

Id. Thus, NGMIC asserts that the known risk of loss or loss in progress doctrines preclude coverage under the NGMIC policy which became effective on March 1, 2002.

The businessowners liability coverage form of the policies which NGMIC issued to Turner states in relevant part that the insurance applies to “claims for ‘bodily injury’ and ‘property damage’ only if the ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’ and “the ‘bodily injury’ or ‘property damage’ occurs during the policy period.” [Court File No. 31, Exhibit C, Businessowners Liability Coverage Form, subsection A.1.b, p. 1]. The policy also requires the insured to notify NGMIC “as soon as practicable of an ‘occurrence’ . . . which may result in a claim.” [Court File No. 31, Exhibit C, Businessowners Liability Coverage Form, subsection E.2.a, p. 9]. Finally, the policy defines an occurrence as:

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Id., subsection 12, p. 12.

Thus, the businessowners policy issued by NGMIC is an “occurrence” policy. Under an ‘occurrence’ policy the insured is indemnified for acts or occurrences which take place within the policy period while under a ‘claims made’ policy the insured is indemnified for claims made during the policy period regardless of when the acts giving rise to those claims occurred.” *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 59 (3rd Cir. 1982)(citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 n.3, 98 S. Ct. 2923, 2926 n.3 (1978)). Under an occurrence policy, the insurer has no obligation to indemnify the insured where the occurrence precedes the effective date of the insurance policy. *Id.* at 63. Any other interpretation “would contravene the rule that an insured cannot insure against something which has already begun.” *Id.* (citing *Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27, 29 (1st Cir. 1981)). The rule is derived from the reasoning that “the purpose of insurance is to protect the insured against *unknown* risks.” *Id.* (emphasis added).

Further, under the “loss in progress” rule, “where damage has begun to occur, no part of a loss may be insured against.” *Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co.*, 997 F.2d 172, 176 (6th Cir. 1993). The “loss of progress” doctrine applies only where “the insured is or should be aware of an ongoing loss in progress at the time the policy is purchased . . .” *Id.* (citing *Great Southwest Fire Ins. Co. v. Watt Indus. Inc.*, 280 Cal. Rptr. 253 n.5 (1991), *review denied and ordered not to be officially published* (July 22, 1991)). However, if a loss has already occurred, it still may be insured against provided it is unknown to the insured when the insurance policy became effective. *Id.* Thus, the court in *Inland Waters* found that for the “loss in progress” doctrine to defeat coverage “either

(1) an awareness of a loss on the part of the insured or (2) an immediate threat of loss tantamount to foreknowledge” is required. *Id.* at 176-78.

Finally, the *Inland Waters* court described the “loss in progress” doctrine as

a fundamental principle of insurance law, . . . and it has been applied by various courts across the country, . . . “by virtue of its recognition in standard insurance law . . .” *See also* Barry R. Ostrager and Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 8.02[d] (5th ed. 1992)(describing the “loss in progress” rule as “a commonly accepted premise of insurance law throughout the United States.”). We are unaware of any case in which a court has rejected the doctrine as internally fallacious or inconsistent with the general principles of insurance law.

Id. at 178-79.

Based upon the policy language of the businessowners policy and the exhibits accompanying NGMIC’s motion for a partial summary judgment, the Court finds that the “loss in progress” doctrine applies in this case. Under the “loss in progress” doctrine, because Turner knew that it was facing claim’s for Tri-State’s failure to cremate the human remains which had been delivered to it prior to March 1, 2002, the effective date of the second businessowners policy, NGMIC has no duty to indemnify Turner under that policy.

Prior to the effective date of the second businessowners policy issued by NGMIC to Turner, not only was the discovery of uncremated human remains at Tri-State widely reported in the national and local media, but Turner was also served with the complaint of the first of the many underlying actions involving allegations stemming from Tri-State’s failure to cremate the bodies delivered to it. As noted above, the affidavit of service in the *Workman* class action, which is pending in the Walker County, Georgia, Superior Court was served upon the Turner Funeral Home and J. Michael Turner on February 28, 2002. [Court File No. 31, Exhibit F].

Thus, at the time the second businessowners policy became effective on March 1, 2002, Turner was certainly aware of the loss, based upon both the media coverage and the service of at least one

underlying complaint. Further, although Turner may not have been aware of the exact number of claims that would be filed against it, as of March 1, 2002, Turner certainly had an awareness of an immediate threat of loss which was tantamount to foreknowledge. That is to say, Turner certainly knew the number of bodies it had sent to Tri-State for cremation and it knew, based upon the *Workman* class action that at least some of those bodies had not been cremated. Thus, even if Turner did not know the exact number of claims which ultimately would be asserted against it, it certainly had knowledge at least some claims had been brought against it and it certainly had foreknowledge of the potential number of claims it faced.

Accordingly, the Court **DECLARES** that pursuant to the “loss in progress” doctrine, NGMIC has no duty to indemnify, and, therefore, no duty to defend the Turner defendants, under the second of the two businessowners policies – which became effective on March 1, 2002 – it issued to Turner. However, because the discovery of uncremated human remains at Tri-State pre-dated the expiration of the coverage period of the first of the two businessowners policies NGMIC issued to Turner – March 1, 2002 – for the reasons stated above in the discussion of the Trinity businessowners policies, NGMIC does have a duty to defend and indemnify the Turner defendants under the first businessowners policy it issued to Trinity. Namely, the plaintiff’s claims for mental anguish/emotional distress did accrue during the coverage period of the first businessowners policy NGMIC issued to Turner.

IV. SAIC’s motion for a summary judgment.

SAIC seeks a summary judgment on the ground that there is no coverage for the Tri-State related claims currently pending in the underlying actions under the relevant businessowners policy and/or the commercial umbrella policy it issued to Turner. [Case No. 1:03-cv-038, Court File No. 12]. More specifically, SAIC asserts that as the last day of coverage under any of the policies it issued to Turner was

August 1, 1998 and as the misconduct by Tri-State was not revealed until February 15, 2002, the claims of the plaintiffs in the underlying actions for mental anguish and/or emotional distress could not have become known to the plaintiffs until well after the coverage period of the SAIC policies expired.

SAIC issued insurance policies to Turner for the policy periods: (1) August 1, 1995 to August 1, 1996; (2) August 1, 1996 to August 1, 1997; and (3) August 1, 1997 to August 1, 1998. [Court File No. 59, Callahan affidavit, ¶ 2]. The policies have the number PBP933480.⁶ *Id.* Further, each policy bears an endorsement which excludes liability coverage for professional services. *Id.* at ¶ 5, Bates stamp 000036.

The Commercial General Liability Form states that the SAIC policy applies to “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’” . . . [Court File No. 59, Section 1.A.1.a, bates stamp 000020, 00087, 000173]. Bodily injury and property damage are covered “only if . . . [t]he ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’; and . . . occurs during the policy period.” [Court File No. 59, Section 1.A.1.b(1) & (2), bates stamp 000020, 00087, 000173.]. The policy explicitly defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *Id.* , Section V.12, bates stamp 000030, 00097, 000182].

The exclusions section of the policy also states that the insurance does not apply to: (1) “[b]odily injury’ or ‘property damage’ expected or intended from the standpoint of the insured . . .” and (2) “‘bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. . .” *Id.*, Section 1.A.2.a & b, bates stamp 000020, 000087, 000173. Further, the policy also carries an endorsement which excludes professional services

⁶The record also contains a Commercial Fire Insurance Policy issued by SAIC to Turner. The terms of that policy are not implicated in this action.

of a funeral home. [Court File No. 59, bates stamp 000033 - 000034, 000099-000100, 000170-000171]. The exclusion specifically states that the “insurance does not apply to ‘bodily injury,’ ‘property damage,’ ‘personal injury,’ or ‘advertising injury’ due to the rendering or failure to render any professional service.” *Id.*, bates stamp 000036, 000102,000168.

The coverage provisions of the Commercial Umbrella Liability Policy issued by SAIC to Turner states in pertinent part that

We will pay those sums, in excess of the amount payable under the terms of any “underlying insurance”, that the insured becomes legally obligated to pay as damages to which this insurance applies, provided that the “underlying insurance” also applies, or would apply but for the exhaustion of its applicable limits of insurance.

[Court File No. 59, Section 1.A.1.a, bates stamp 000057, 000136, 000210]. The Commercial Umbrella Policy also states that “[t]his insurance is subject to the same terms, conditions, agreements, exclusions and definitions as the ‘underlying insurance,’ . . .” *Id.*, Section 1.A.1.d, bates stamp 000057, 000136, 000210] The policy further states that:

The exclusions applicable to the “underlying insurance” also apply to this insurance. Additionally this insurance does not apply to:

. . .

V. Injury arising out of the rendering of or failure to render any professional services.

Id., Section 1.A.2, bates stamp 000057, 000136, 000210.

Thus, the Commercial Umbrella Liability Policy issued by SAIC to Turner is a “follow form” policy and only provides coverage on the same terms as the businessowners, *i.e.*, Commercial General Liability, policy set forth above.

In this instance, the court concludes SAIC has no duty to indemnify and, therefore, no duty to defend under either the Commercial General Liability Policy – the businessowners policy – or the

Commercial Umbrella Policy. As is noted above, in the underlying actions, the plaintiffs seek damages against one or more of the defendants based upon one or more of the following causes of action: breach of contract concerning the handling of the remains, negligent hiring or supervision of the crematory, negligent entrustment of the bodies to the crematory, negligent failure to treat the remains with dignity and respect, negligent failure to comply with statutes pertaining to the handling of corpses, negligent misrepresentation, negligent infliction of emotional distress/mental anguish, intentional infliction of emotional distress, fraud, deceit, unjust enrichment, breach of fiduciary/special duty, violation of the Tennessee Consumer Protection Act and violation of RICO.

In this instance, the claims for breach of contract concerning the handling of the remains, negligent hiring or supervision of the crematory, negligent entrustment of the bodies to the crematory, negligent failure to treat the remains with dignity and respect, negligent failure to comply with statutes pertaining to the handling of corpses, negligent misrepresentation, fraud, deceit, unjust enrichment, breach of fiduciary/special duty all arise out of the provision of professional services by Turner. Thus, coverage for these claims is barred by the exclusion which provides that the coverage in the SAIC policies “does not apply to ‘bodily injury,’ ‘property damage,’ ‘personal injury,’ or ‘advertising injury’ due to the rendering or failure to render any professional service.” [Court File No. 59, bates stamp 000036, 000102, 000168]. Further, coverage for some of the of the underlying claims of the plaintiffs, particularly, the claims for breach of contract concerning the handling of the remains, negligent hiring, supervision of the crematory, negligent entrustment of the bodies to the crematory negligent failure to treat the remains with dignity and breach of fiduciary/special duty are also barred by the exclusions in the Commercial General Liability Policy which provides that the policy does not apply to “‘bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement . . .” [Court File No. 59, Section 1.A.2.b, bates stamp 000020, 000087, 000173]. All of these

claims arise out of what the plaintiffs in the underlying actions contend was Turner's oral and/or written agreement or promises concerning the handling of their decedents' remains.

Further, coverage for the plaintiffs claims for intentional infliction of emotional distress, fraud, deceit, violations of the Tennessee Consumer Protection Act and RICO are barred by the exclusion section of the Commercial General Liability Policy which excludes "'bodily injury' or 'property damage' expected or intended from the standpoint of the insured" [Court File No. 59, Section 1.A.2.a, bates stamp 000020, 000087, 000173. Moreover, the policy also provides coverage only for "bodily injury" or "property damage" which is caused by an occurrence that takes place in the coverage territory and during the coverage period. [Court File No. 59, Section 1.A.1.b(1) & (2), bates stamp 000020, 000087, 000173]; and, the policy expressly defines an occurrence as an "accident." [Court File No. 59, Section V.12, bates stamp 000030, 000097, 000182]. Thus, the policy both expressly and by implication excludes intentional actions of the insured. *See also I. Appel Corp. v. St. Paul Fire & Marine Ins. Co., Inc.*, 930 S.W.2d 550, 552-53(Tenn. Ct. App. 1996)(a claim for intentional infliction of emotional distress is an intentional cause of action and it is not covered under a policy which excludes claims for bodily injury and property damage intended by the insured); *Miele v. Zurich U.S.*, 98 S.W.3d 670, 673-74 (Tenn. Ct. App. 2002)(claims for willful violations of the Tennessee Consumer Protection Act are not covered under a policy which excludes bodily injury or property damage intended from the standpoint of the insured.); *Pacific Employers Ins. Co. v. Cesnik*, 219 F.3d 1328, 1331 (11th Cir. 2000)(claims for violation of Georgia's RICO statute are not covered under a policy which covers claims for bodily injury or property damage caused by an "occurrence" in the coverage territory and during the policy period. The policy defined an "occurrence" as "an accident" and claims of RICO violations are intentional conduct and, therefore, not an "occurrence" as defined in the policy.)

Finally, the claims of plaintiffs for mental anguish/negligent infliction of emotional distress are not covered by the policies issued by SAIC to Turner for exactly the same reasoning set forth in the discussion of the businessowners policies Trinity issued to Turner, *supra*. The SAIC policies cover claims for “bodily injury” or “property damage” which occurs during the coverage period. [Court File No. 59, Section, 1.A.1.b(1) & (2), bates stamp 000020, 000087, 000173]. The SAIC policies covered the period from August 1, 1993 to August 1, 1998. [Court File No. 59, Callahan affidavit, ¶ 2].

As is discussed fully above, the first media reports of the discovery of uncremated human remains on the property of Tri-State in Noble, Georgia surfaced in early to mid-February 2002, *i.e.*, the discovery of the remains was widely reported in the local and national news media beginning on or about February 15 or February 16, 2002. Thus, as is explained above in the detailed discussion concerning to the policies Trinity issued to Turner, the plaintiffs’ claims of mental anguish/emotional distress did not accrue until February 2002, the earliest possible time the plaintiffs could have begun experiencing mental anguish stemming from the failure of Tri-State to properly cremate their decedents’ remains. *See Biro v. Harman Funeral Home*, 669 N.E.2d 65, 67, 107 Ohio App. 3d 508 (Ohio App. 1995); *Commercial Union Assur. Co., PLC v. Oak Park Marina, Inc.*, 198 F.3d 55, 57-59 (2d Cir. 1999); *Swafford v. Memphis Individual Practice Ass’n*, No. 02A01-9612-CV-00311, 1998 WL 281935 at *8 (Tenn. Ct. App. June 2, 1998).

Accordingly, the Court finds that there is no coverage under the Commercial General Liability Policy (the businessowners policy) issued by SAIC to Turner for any of the claims asserted by the plaintiffs in the underlying actions. Moreover, because the Commercial Umbrella Liability Policy issued by SAIC to Turner is a follow form policy, there is no coverage for any of the claims asserted by the plaintiffs in the underlying actions under the Commercial Umbrella Liability Policy because there is no coverage for the aforesaid claims under the Commercial General Liability Policy. Hence, pursuant to 28

U.S.C. § 2201, this Court **DECLARES** that SAIC has no duty to indemnify nor to defend Turner against any of the claims asserted by the plaintiffs in the underlying actions which arise out of the discovery of uncremated human remains on the property of Tri-State in Noble, Georgia.

V. **NGMIC's attempt to obtain a declaratory judgment against Trinity and/or SAIC.** [Court File No. 43].

Also pending before the Court is the motion of NGMIC for partial summary judgment against Trinity and SAIC. [Court File No. 43]. In its motion, NGMIC notes that all of the policies issued by NGMIC, Trinity and SAIC contain "other insurance" clauses. [Court File No. 43]. These "other insurance" clauses/provisions are summarized in NGMIC's motion for a partial summary judgment, [Court File No. 43, ¶¶ 7 through 10], and, consequently, need not be repeated here.

Based upon the other insurance provisions, NGMIC seeks a declaration of the following:

12. To the extent NGMIC owes any defense or indemnity obligation to the Turner Defendants under the policies it issued to Turner Funeral, with respect to the Underlying Lawsuits, its obligations are excess to the Trinity Professional Liability Policies No. PLL4415153 and the State Automobile Preferred Business Policies No. PBP9333480 and any other primary valid and collectible insurance available to Turner Funeral. NGMIC owes no defense or indemnity obligation until the above Trinity and State Automobile have been exhausted through settlements or judgments.
13. If NGMIC owes a defense and/or indemnity obligation to the Turner Defendants under the policies it issued to Turner Funeral, after the exhaustion of the full limits of the Trinity Professional Liability Policies No. PLL4415153, the State Automobile Preferred Business Policies No. PBP9333480 and any other valid and collectible insurance available to Turner Funeral, it does so on a pro rata basis with the Trinity Businessowners Policy No. BOA4414616.
14. NGMIC has, pursuant to a reservation of rights, paid substantial sums to defend the Turner Defendants in the Underlying Lawsuits. The defense costs are properly payable by State Automobile and Trinity. Therefore, NGMIC should be reimbursed said amounts by those insurers.

[Court File No. 43].

Both Trinity and SAIC have responded to NGMIC's motion for a partial summary judgment. [Court File No. 52, 58]. In their responses, Trinity and SAIC argue that NGMIC's motion for a partial summary judgment should be denied and/or stricken on the grounds that, despite the consolidation of these three declaratory judgment actions, NGMIC may not seek declaratory relief against Trinity or SAIC, neither of which are parties to NGMIC's declaratory judgment action against Turner. *Id.*

A consolidation of separate actions for trial purposes does not merge the actions into a single suit. *Stacey v. Charles J. Rogers, Inc.*, 756 F.2d 440, 441 (6th Cir. 1985)(citing *Kraft, Inc. v. Local Union 327 Teamsters, Chauffeurs, Helpers and Taxicab Drivers*, 683 F.2d 131, 133 (6th Cir. 1982)). Not only does consolidation not merge the separate actions into a single one, it also does not "change the rights of the parties or make those who are parties in one suit parties in another." *Id.* (quoting *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97, 53 S. Ct. 721, 727-28 (1933)).

In *Provident Life & Acc. Ins. Co. v. Transamerica-Occidental Life Ins. Co.*, 850 F.2d 1489 (11th Cir. 1988), *cert. denied*, 489 U.S. 1081, 109 S. Ct. 1534 (1989), Provident brought a declaratory judgment action against Transamerica, seeking to have the district court determine which of the two insurers was liable for the medical expenses of David Wall. *Id.* In the declaratory judgment action, which was filed after Wall's death, the district court determined that Provident was liable for the payment of Wall's medical expenses. *Id.* 1490-91. However, neither Wall nor his estate had been made a party to the declaratory judgment action. *Id.*

The Eleventh Circuit vacated the district court's judgment on the ground that the district court lacked subject matter jurisdiction over the declaratory judgment action because there was no "case or controversy" arising between Provident and Transamerica. *Id.* at 1491. The Eleventh Circuit stated there was no "case or controversy" between Provident and Transamerica because:

[i]nstead of bringing an action to determine the rights and obligations between the insurance company and the insured, Provident brought a declaratory judgment action against Transamerica, the other insurance company. The controversy over whether Transamerica wrongly paid benefits to Wall is not between Transamerica and Provident, but between Transamerica and Wall. Consequently, Transamerica's failure to name Wall (or Wall's estate) in this action leaves no case or controversy on which to base jurisdiction.

Id.

The Eleventh Circuit contrasted the above situation with the situation presented by several other cases: *Industrial Underwriters Insurance Co. v. P & A Construction Co.*, 382 F.2d 313 (10th Cir. 1967) and *United Services Auto Association v. Royal-Globe Insurance Company*, 511 F.2d 1094 (10th Cir. 1975). In both *Industrial Underwriters* and *United Services*, although the insurers were not in privity with one another and the obligation of each insurer was to the named insured, instead of one another, the court found jurisdiction for the declaratory judgment to resolve the dispute between the two insurers because the insured had been joined in the action. *Id.*, 850 F.2d at 1492. As the Eleventh Circuit observed, "where the insurers joined the insured in their action, a definite and substantial controversy would exist, as the declaratory judgment action would be to establish the rights and obligations between the insurers and the insured as evidenced in the insurance contract." *Id.* at 1493.

That is precisely the situation here. The insured under all three policies, Turner, is a named party in all three of the consolidated actions. Moreover, NGMIC's motion actually seeks to establish the rights between the insurers and the insured. Further, as is set forth in detail above, the Court has had the opportunity to determine whether or not there is coverage under the policies issued by Trinity, NGMIC and SAIC to Turner for the claims of the plaintiffs in the underlying actions; and, Trinity and SAIC have had the opportunity to respond to NGMIC's motion for a partial summary judgment.

Accordingly, the Court finds that these three cases do present an actual "case or controversy" between the three insurers – Trinity, NGMIC and SAIC – and that this controversy is now ripe for review.

As noted above, Tennessee law governs the interpretations in the policies issued by Trinity, NGMIC and SAIC to Turner. In *Shelter Mut. Ins. Co. v. State Farm Fire and Cas. Co.*, 930 S.W.2d 570 (Tenn. Ct. App. 1996), the court examined the situation where multiple policies, each with “other insurance” clauses cover the same injury. The *Shelter Mutual* court noted that there were two lines of reasoning used by courts when analyzing such an issue. The rule used by the majority of the courts to consider the issue is that “where there are two applicable insurance policies, one containing a pro rata clause and the other an excess clause, the provisions of each will be interpreted to give intent to the contracting parties.” *Id.* at 527 (quoting *Jones v. Medox, Inc.*, 430 A.2d 488, 493 (D.C. App. 1981)). The other line of reasoning is that when two “other insurance” clauses “conflict they are repugnant, and thus, the court must void the clauses and prorate the damages.” *Id.* at 527 (quoting *Lamb-Weston v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P.2d 110, 119 (1959)).

The *Shelter Mutual* court stated that it thought the better approach to the issue was the majority rule as set forth in the *Jones* case. *Id.* at 574. However, the *Shelter Mutual* court qualified its approach by stating that the “other insurance” clauses in the policies before it were consistent and were not repugnant because “[n]o situation exist[ed] where the other insurance provisions of the respective policies w[ould] not harmonize [and] leav[e] a gap in coverage.” *Id.* Thus, although the *Shelter Mutual* court stated that the majority approach in the *Jones* case was the better approach, it did not rule out following the *Lamb-Weston* reasoning when the “other insurance” clauses would not harmonize and would leave a gap in coverage.

The Court, however, need not resolve this conflict in the instant situation, however, because as the Court has construed the policies issued by Trinity, NGMIC and SAIC to Turner, the policies under which there is coverage – a duty to defend and/or indemnify – are not multiple policies covering the same situation.

With regard to the SAIC policies, NGMIC seeks a declaration pursuant to 28 U.S.C. § 2201: (1) that its obligations to defend or indemnify Turner are excess to the SAIC policies; (2) that NGMIC owes a duty to defend and/or indemnify Turner only after the exhaustion of the full limits of the SAIC policies; and (3) that NGMIC should be reimbursed by SAIC for the amounts it has paid to defend Turner in the underlying lawsuits. [Court File No. 43, ¶¶ 12, 13 and 14]. However, as is stated in detail above, the Court will issue a declaration under 28 U.S.C. § 2201 that SAIC has no duty to defend and/or indemnify Turner under any of the policies it issued for Turner. Thus, since SAIC has no duty to defend and indemnify Turner: (1) NGMIC's duties to defend and/or indemnify Turner cannot be excess to the SAIC policies; (2) NGMIC's duty to defend and/or indemnify Turner cannot arise only after the exhaustion of the full limits of the SAIC policies; and (3) SAIC can have no duty to reimburse Turner for the amounts it paid to defend Turner in the underlying lawsuits when SAIC has no duty to defend and indemnify Turner with respect to the claims of the plaintiffs in the underlying lawsuits.

Accordingly, that aspect of NGMIC's motion for a partial summary judgment [Court File No. 43] which seeks a declaratory judgment against SAIC will be **DENIED**.

With regard to the businessowners policies issued by Trinity to Turner, since Trinity has no duty to defend or indemnify Turner pursuant to those policies, that aspect of NGMIC's motion for a partial summary judgment [Court File No. 43] which seeks a declaratory judgment against Trinity will be **DENIED**.

With regard to the professional liability policies issued by Trinity to Turner, NGMIC seeks a declaratory judgment: (1) that its obligations to defend or indemnify Turner are excess to Trinity's obligations under the professional liability policies; (2) that it owes no defense or indemnity to Turner until the full limits of the Trinity professional liability policies have been exhausted; and (3) that Trinity should

reimburse NGMIC on a pro rata basis for the amounts NGMIC has expended in defending Turner against the claims asserts in the underlying actions. [Court File No. 43].

However, as the Court’s discussion above makes clear, although the Court has held that Trinity has an obligation to defend Turner pursuant to the professional liability policies, and NGMIC has an obligation to defend Turner under the first of the two businessowners policies – which expired March 1, 2002 – the claims which each insurer are obligated to defend and indemnify are different and distinct from the claims the other insurer is obligated to defend and indemnify. With regard to the NGMIC businessowners policies, NGMIC has a duty to defend and indemnify the claims in the underlying actions for mental anguish/emotional distress. With regard to the Trinity professional liability policies, Trinity has an obligation to defend and indemnify Turner for claims relating professional services it was to render to the plaintiffs on behalf of their decedents; namely, breach of contract concerning the handling of the remains, negligent hiring/supervision of Tri-State, negligent entrustment of the bodies to Tri-State, negligent failure to treat the remains with dignity and respect, negligent failure to comply with state statutes governing the handling of corpses; negligent misrepresentation; fraud; deceit; unjust enrichment; breach of fiduciary (special) duty; violations of the Tennessee Consumer Protection Act and RICO violations.

As is noted by NGMIC in its motion for partial summary judgment, the “other insurance” clause of the NGMIC businessowners policy provides, in pertinent part:

- H. Other Insurance
 - 1. If there is other insurance covering the *same* loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance . . .
 - 2. Business Liability coverage is excess over any other insurance that insures for direct physical loss or damages.

3. When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or “suit” that any other insurer has a duty to defend . . .

[Court File No. 44](emphasis added).

The Trinity Professional Liability policies contain the following “other insurance” provisions:

6. Other Insurance

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated *to be applicable to the loss* on an excess or contingent basis, the amount of the company’s liability under this policy shall not be reduced by the existence of such other insurance.

[Court File No. 5, Exhibit C](emphasis added).

However, in this case the losses or claims covered by the Trinity and NGMIC policies are not the same loss. The NGMIC policies provide coverage for the claims of mental anguish/emotional distress in the underlying actions. The Trinity policies provide coverage for claims relating to the “professional” services Turner was to render on behalf of the plaintiffs’ decedents, including, breach of contract, negligent hiring/supervision of Tri-State, negligent entrustment of bodies to Tri-State, failure to comply with state statutes governing the handling of corpses, fraud, deceit, unjust enrichment and violations of the Tennessee Consumer Protection Act and RICO.

Thus, that aspect of NGMIC’s motion for a summary judgment declaring that its obligations to defend or indemnify Turner are excess to Trinity’s obligations under the professional liability policies; and, that it owes no defense or indemnity to Turner until the full limits of the Trinity professional liability policies have been exhausted [Court File No. 43] will be **DENIED**.

Lastly, in its motion for a partial summary judgment, NGMIC asserts that it has, pursuant to a reservation of rights, paid substantial sums to defend the Turner defendants in the underlying lawsuits. [Court File No. 43]. NGMIC seeks reimbursement from Trinity. As is noted above, both NGMIC and Trinity have a duty/obligation to defend the Turner defendants in the underlying lawsuits and, under Tennessee law, that duty to defend is broader than their duty to indemnify. *Drexel Chemical v. Bituminous Ins.*, 933 S.W.2d 471, 480 (Tenn. App. 1996). Where, as in this situation, at least one of the allegations in the underlying lawsuits is covered by the NGMIC businessowners policy and the Trinity professional liability policy, Trinity and NGMIC have a duty to defend the Turner defendants, “irrespective of the number of allegations that may be excluded” by their policies. *Id.* (citing *U.S. Fidelity & Guar. Co. v. Murray Ohio Manuf. Co.*, 693 F. Supp. 617 (M.D. Tenn. 1988)).

Thus, that aspect of NGMIC’s motion for a partial summary judgment [Court File No. 43] in which NGMIC seeks reimbursement from Trinity for some the sums it has expended in defending the Turner defendants against the claims in the underlying lawsuits will be **GRANTED**. However as the record currently before the Court reflects that the underlying lawsuits are still ongoing and as both Trinity and NGMIC have a duty to defend the Turner defendants in the aforementioned underlying lawsuit, any further action by the Court on this aspect of NGMIC’s motion for a partial summary judgment [Court File No. 43] against Trinity will be held in **ABEYANCE** until such time as the claims of the plaintiffs in the underlying lawsuits have been resolved and both Trinity and NGMIC have completely fulfilled their obligations to defend the Turner defendants. The Court believes that once the claims in the underlying lawsuit have been resolved and both NGMIC and Trinity have fully discharged their obligations to the Turner defendants, the Court will be in a better position to assess the nature and extent of the reimbursement, if any, due from Trinity to NGMIC, than it could presently do so.

VI. Conclusion.

For the reasons set forth in detail above:

- (1) That aspect of Trinity's motion for a summary judgement [Case No. 1:02-cv-231, Court File No. 5] which seeks a summary judgment as to the businessowners policies and commercial umbrella policies issued by Trinity to Turner will be **GRANTED** as follows:
 - (a) The Court **DECLARES** pursuant to 28 U.S.C. § 2201, that Trinity has no duty to defend and indemnify the Turner defendants with regard to the claims of the plaintiffs in the underlying actions under the four businessowners policies issued by Trinity to Turner; and
 - (b) The Court **DECLARES** pursuant to 28 U.S.C. § 2201, that Trinity has no duty to defend and indemnify the Turner defendants with regard to the claims of the plaintiffs in the underlying actions under the commercial umbrella policies issued by Trinity to Turner to the extent that the commercial umbrella policies follow form of the businessowners policies issued by Trinity to Turner.
- (2) That aspect of Trinity's motion for a summary judgement [Case No. 1:02-cv-231, Court File No. 5] which seeks a summary judgment as to the professional liability policies and commercial umbrella policies issued by Trinity to Turner will be **DENIED** as follows:
 - (a) The Court **DECLARES** pursuant to 28 U.S.C. § 2201, that Trinity has a duty to defend the Turner defendants with regard to the claims of the plaintiffs in the underlying actions under the professional liability policies issued by Trinity to Turner, except in *Hughes*, Case No. 02-C-698; *Workman*, Case No. 02-C-420 (Hamilton County Tennessee); *Workman*, Case No. 02-CV-4422 (Walker County, Georgia); *Cash*, Case No. 02-C-1391; and *Dunn*, Case No. 02-C-1391;
 - (b) The Court **DECLARES** pursuant to 28 U.S.C. § 2201, that Trinity has a duty to defend the Turner defendants with regard to the claims of the plaintiffs in the underlying actions under the commercial umbrella policies issued by Trinity to Turner to the identical extent it has a duty to defend the Turner defendants under the professional liability policies it issued to Turner; and,
 - (c) The Court **DECLARES** pursuant to 28 U.S.C. § 2201, that Trinity has a duty to indemnify the Turner defendants with regard to the claims of the plaintiffs in the underlying actions under the professional liability policies and commercial umbrella policies issued by Trinity to Turner. The nature and extent of Trinity's duty to indemnify, which is not as broad as Trinity's duty to defend the Turner defendants, is discussed in detail in subsection II, paragraph (3) of this Memorandum. As is discussed in that subsection, Trinity has no duty to

indemnify the Turner defendants with regard to the plaintiff's claims of mental anguish/emotional distress in the underlying actions. Further, the Court cannot determine Trinity's duty to indemnify with exact specificity at this point in time. However, as discussed above, Trinity may have a duty to indemnify the Turner defendants with regard to claims for breach of contract concerning the handling of the remains, negligent hiring/supervision of Tri-State, negligent entrustment of the bodies to Tri-State, negligent failure to treat the remains with dignity and respect, negligent failure to comply with state statutes governing the handling of corpses, negligent misrepresentation, fraud, deceit, unjust enrichment, breach of fiduciary (special) duty, and violations of the Tennessee Consumer Protection Act and RICO asserted in the underlying actions to the extent these claims are found to have merit.

- (2) NGMIC's motion for a partial summary judgment [Case No. 1:02-cv-298, Court File No. 30] will be **GRANTED** as follows:

The Court **DECLARES** pursuant to 28 U.S.C. § 2201, that NGMIC has no duty to defend and indemnify the Turner defendants with regard to the claims of the plaintiffs in the underlying actions based upon the second of the two businessowners policies, effective March 1, 2002, which it issued to Turner.

- (3) SAIC's motion for a summary judgment [Case No. 1:03-cv-038, Court File No. 12] will be **GRANTED** as follows:

The Court **DECLARES** pursuant to 28 U.S.C. § 2201, that SAIC has no duty to defend and indemnify the Turner defendants with regard to the claims of the plaintiffs in the underlying actions based upon any of the policies it issued to Turner.

- (4) The motion of Trinity [Court File No. 52] to strike NGMIC's motion for partial summary judgment [Court File No. 43] will be **DENIED**.
- (5) That aspect of the motion of NGMIC for a partial summary judgment [Court File No. 43] which seeks certain declaratory judgment against SAIC: (1) that its obligation to defend or indemnify the Turner defendants is excess to the SAIC policies; (2) that NGMIC owes a duty to defend and/or indemnify the Turner defendants only after the exhaustion of the full limits of the SAIC policies; and (3) that NGMIC should be reimbursed by SAIC for the amounts it has paid to defend Turner in the underlying lawsuits will be **DENIED**.
- (6) That aspect of the motion of NGMIC for a partial summary judgment [Court File No. 43] in which NGMIC seeks a declaratory judgment against Trinity with regard to the Trinity businessowners policies, particularly that any defense

and indemnity that NGMIC owes the Turner defendants would be pro rata to the defense and/indemnity obligation which Trinity owed to the Turner defendants under the Trinity businessowners policies, will be **DENIED**.

- (7) That aspect of the motion of NGMIC for a partial summary judgment [Court File No. 43] in which NGMIC seeks a declaration that its obligations to defend or indemnify the Turner defendants are excess to Trinity's obligations under the professional liability policies; and, that it owes no defense or indemnity to the Turner defendants until the full limits of the Trinity professional liability policies have been exhausted will be **DENIED**.
- (8) That aspect of NGMIC's motion for a partial summary judgment [Court File No. 43] in which NGMIC seeks a declaratory judgment with regard to the Trinity professional liability policies: (1) that its obligations to defend or indemnify the Turner are excess to Trinity's obligations under the professional liability policies and (2) that it owes no defense or indemnity to the Turner defendants until the full limits of the Trinity professional liability policies have been exhausted will be **DENIED**.
- (9) That aspect of NGMIC's motion for a partial summary judgment [Court File No. 43] in which NGMIC seeks reimbursement from Trinity for some of the sums it has already expended in defending the Turner defendants against the claims of the plaintiffs in the underlying actions will be **GRANTED**. However, further action to determine the nature and extent of the reimbursement, if any, from Trinity to NGMIC will be held in **ABEYANCE** until such time as the claims of the plaintiffs in the underlying lawsuits have been resolved and both Trinity and NGMIC have completely fulfilled their obligations to defend the Turner defendants in the underlying actions.

A separate order will enter.

R. ALLAN EDGAR
CHIEF UNITED STATES DISTRICT JUDGE