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DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

84 LUMBER COMPANY, A LIMITED PARTNERSHIP,	)	
Plaintiff,	)	
v.	)	**Case No. 21-0700-BC**
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,	)	
Defendant.	)	

CORRECTED MEMORANDUM AND ORDER

This matter came before the Court on June 1, 2022 upon the parties' competing motions for summary judgment. Plaintiff has sued Defendant for declining to provide a defense to a suit brought by Defendant's insured's employee for a July 2, 2019 incident on Plaintiff's property after it tendered the claim to Defendant. Plaintiff asserted that its status as an additional insured required coverage. Defendant denied that it had a duty to defend. Plaintiff brought this action to obtain declaratory relief on the coverage issue, as well as associated damages for its cost of defense, bad faith failure to defend, and attorneys' fees.

With its motion, Plaintiff, 84 Lumber Company, A Limited Partnership ("84 Lumber"), moves for partial summary judgment on all issues, including declaratory relief and liability for costs associated with its defense in the underlying action and bad faith penalties and attorneys' fees, leaving only the amounts for resolution. Defendant National Union Fire Insurance Company of Pittsburgh, PA. ("National Union") moves for summary judgment on all issues of liability, both declaratory and monetary in nature, based on a finding that it acted within its rights in denying coverage to 84 Lumber. National Union also asserts that any damages 84 Lumber could recover for bad faith refusal to pay are exclusively available pursuant to Ga. Code Ann. § 33-4-6, and not

recover under Ga. Code Ann. § 13-6-11[1] as pled. 84 Lumber agrees and thus its request for damages under the latter statute is dismissed.

The Court reviewed the parties' submissions regarding this matter, the exhibits thereto, and heard argument from counsel. Based on the foregoing, the Court finds as follows.

UNDISPUTED FACTS

The Policy at Issue

National Union issued a commercial general liability insurance policy, number GL 522-24-09, to US Lumber Group, LLC ("US Lumber") effective April 1, 2019 to April 1, 2020 (the "Policy"). The Policy contains several provisions relevant to this dispute:

> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we," "us," and "our" refer to the company providing the insurance.
>
> The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.
> …
>
> **SECTION I – COVERAGES**
>
> **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

[1] *McCall v. Allstate Ins. Co.*, 310 S.E.2d 513, 515-16 (Ga. 1984).

The Policy includes two endorsements relevant to this action, one entitled "Additional Insured – Owners, Lessees Or Contractors – Scheduled Person or Organization" (the "OLC Endorsement"), and one entitled "Additional Insured – Vendors" (the "Vendor Endorsement"). Both the schedules for the OLC and Vendor Endorsements list as covered "any person or organization whom you become obligated to include as an additional insured as a result of any contract or agreement you have entered into."

The OLC Endorsement provides in relevant part:

> **A. Section II- Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1.Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

The Vendor Endorsement provides in relevant part:

> **A. Section II - Who Is An Insured** is amended to include as an additional insured any person(s) or organization(s) (referred to throughout this endorsement as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business.
>
> However:
>
> **1.** The insurance afforded to such vendor only applies to the extent permitted by law; and
>
> **2.** If coverage provided to the vendor is required by a contract or agreement, the insurance afforded to such vendor will not be broader than that which you are required by the contract or agreement to provide for such vendor.

The 84 Lumber/US Lumber Purchasing Agreement

US Lumber provided wood materials to 84 Lumber pursuant to a Purchasing Agreement which ran from November 1, 2018 to October 31, 2019 (the "Purchasing Agreement"). The

Purchasing Agreement incorporated, at paragraph XI(A), the Terms and Conditions of Purchase executed by the parties on October 9, 2018 ("Terms and Conditions"). The Terms and Conditions provide in relevant part:

> III. INDEMNIFICATION / ADDITIONAL INSURED
>
> [US Lumber] agrees to indemnify, defend and hold 84 Lumber, its affiliates, agents and customers harmless from and against any and all claims and liability including costs, attorney's fees and expenses including, but not limited to personal injury, death or property damage and any alleged violation of third party intellectual property rights, including but not limited to trademarks, copyrights, trade secrets and/or patents which may be obtained against, imposed upon or suffered by 84 Lumber, its affiliates, agents or customers and/or [US Lumber] arising out of or in connection with the sale or use of products manufactured, installed, and/or distributed by [US Lumber]. [US Lumber's] indemnification and duty to defend 84 Lumber shall survive termination of these Terms and Conditions of Purchase and the Purchasing Agreement, and apply to all claims and liability regarding [US Lumber's] products purchased by 84 Lumber at anytime. [US Lumber] is required, on an annual basis, to provide a Certificate of Insurance and name 84 Lumber as an Additional Insured on its General Liability Policy and on a Broad Form Vendors Endorsement to its Product Liability Policy with limits of no less than $1 million bodily injury and $500,000 property damage. Certificate of Insurance and Additional Insured Endorsement must be attached to this Agreement. Failure of [US Lumber] to provide 84 Lumber with Certificate of Insurance and Additional Insured Endorsement makes [US Lumber] insurer. It shall be [US Lumber's] sole obligation to provide an updated Certificate of Insurance as required hereby on an annual basis. The failure of 84 Lumber to request such Certificate of Insurance shall not excuse [US Lumber] from such duty. [US Lumber] shall affix adequate warning labels and safety instructions to each product, and shall indemnify, defend and hold 84 Lumber harmless from any Claims for failure to warn or inadequate safety instructions.

US Lumber provided 84 Lumber with a Certificate of Liability Insurance dated October 1, 2019 which shows US Lumber as the insured, National Union as the insurer, references the Policy as the subject coverage, and identifies 84 Lumber as an additional insured as required by written contract (the "Certificate of Insurance"). The Certificate of Insurance has a disclaimer at the top as follows:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE**

AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

It certifies that the Policy, among others listed therein, had been issued to US Lumber for the period listed and notwithstanding any contract terms requiring the provision of the Certificate of Insurance, any coverage would be subject to the terms, exclusions and conditions of the Policy.

The Duncan Lawsuit and 84 Lumber's Tender to National Union

Hubert Duncan filed suit against 84 Lumber in the Circuit Court for Bledsoe County, Tennessee, on June 5, 2020 ("Duncan Lawsuit"). In the Duncan Lawsuit, Duncan alleged that, as a business invitee, while performing his duties as a truck operator at an 84 Lumber facility, he was injured due to the negligence of an 84 Lumber employee who was driving a forklift and the negligence of 84 Lumber. Duncan further asserts therein that he was acting in a careful and prudent manner and was not negligent. Duncan asserts 84 Lumber was at fault for injuries he incurred by creating a dangerous condition by failing to properly train employees to safely operate forklifts of which it had actual and/or constructive knowledge.

The Duncan Lawsuit makes no allegations respecting any act or omission of US Lumber or its employee Duncan, or that Duncan's injuries were caused in any way by the acts or omissions of US Lumber or Duncan himself. It also does not include any claims that Duncan was a customer of 84 Lumber who purchased US Lumber's wood products or that there were any defects in its products that proximately caused his injuries.

Four days after service of the Duncan Lawsuit, on June 26, 2020, counsel for 84 Lumber contacted US Lumber tendering the Duncan Lawsuit pursuant to the Purchasing Agreement, including the Terms and Conditions, and as a purported additional insured under the Policy as evidenced by the Certificate of Insurance. This correspondence sought contractual indemnification

from US Lumber, asserting that "Plaintiff's allegations against the 84 Lumber Defendants fall within US Lumber's indemnity obligations outlined in the Terms and Conditions." 84 Lumber did not identify any facts suggesting or contending the affirmative defense of comparative fault might apply, or that Duncan himself may have been negligent in any way while on 84 Lumber's premises.

On July 22, 2020, US Lumber responded that the claims set forth in the Duncan Lawsuit were not covered by the indemnification clause in the Terms and Conditions and it declined to provide defense and indemnity. 84 Lumber's counsel therefore directed the same request to National Union's agent, NFP Corporate Services (SE), Inc., via correspondence dated July 24, 2020.

In both letters, 84 Lumber's counsel expressed concern that 84 Lumber needed to exercise its option to remove the Duncan Lawsuit to federal court within the subject timeframe and that it would proceed to do so pending a coverage determination. 84 Lumber did, in fact, remove the Duncan Lawsuit to the United States District Court for the Eastern District of Tennessee in Chattanooga and filed its Answer on July 29, 2020, asserting the affirmative defense of comparative fault.

National Union used third-party claims administrator AIG Claims, Inc. ("AIG") to investigate and advise it regarding 84 Lumber's tender. National Union contracted with Sedgwick Claims Management Services, Inc. ("Sedgwick") to act as third-party claims manager and investigate the 84 Lumber coverage claim as well as Duncan's workers' compensation claim. Duncan provided Sedgwick a handwritten incident report which is contained in its workers' compensation claim file. Tori Padillo was the Sedgwick representative responsible for investigating the incident and gathering information for AIG so that it could evaluate the 84 Lumber tender to National Union. She was also instructed by her supervisor to do several things, including the following:

> 1. Confirm coverage, location and coding. Update event and loss descriptions. CAUSE/NATURE/PART ACCURATELY REFLECT LOSS; IF NOT, UPDATE AS NEEDED
> 2. Contact member and obtain their version of the loss. What was the scope of member's involvement? Are there any contracts or CERTS to be reviewed? Are there other 3rd parties involved or have contributed towards the loss? Speak with any involved employees. Is there surveillance video? Are there any independent witnesses? Secure incident reports.
> 3. Was the condition open and obvious? Were there warning signs in place? Was any verbal warning given? Are there maintenance records that are applicable?
> 4. Contact the clmt and obtain their recorded statement.
> 5. What injuries are being claimed and treatment for same. Send med-auth
> 6. Obtain medical records and review
> 7. Complete investigation and evaluate member's exposure.
> 8. Make settlement recommendation to member if warranted.
> 9. Fill in all screens, specifically detail screen and claimant detail screen, continue to update coding and set initial reserve accordingly...

Padillo limited her investigation into the cause of Duncan's injuries to reviewing the Sedgwick intake report. Padillo did not speak with Duncan or anyone at 84 Lumber because of the pending litigation.[2] She did contact the workers' compensation adjuster for additional information, although she did not obtain a copy of the file, which identified 84 Lumber employees present when Duncan was injured, including the forklift driver. Padillo's role was to collect information so that a coverage decision could be made. She did not attempt to obtain information regarding whether Duncan was at fault for the accident.

Based upon the information Padillo gathered, and its interpretation of the Policy, including the OLC and Vendor Endorsements, AIG determined there was no coverage and National Union denied 84 Lumber's tender.

On November 3, 2020, AIG notified 84 Lumber with its conclusion that 84 Lumber lacked additional insured status under the Policy pursuant to the OLC Endorsement and declined to defend

[2] 84 Lumber included an April 4, 2022 affidavit of John Raffanti, who was the Co-Manager of the subject 84 Lumber facility at the time of the Duncan incident with its summary judgment materials. Raffanti saw Duncan the day of the accident, and states that Duncan "was driving a dark colored truck and was wearing a dark shirt" and no "high visibility safety apparel." This is not from Sedgwick's file and is presumably submitted for the inference that a more thorough investigation may have revealed this information and changed National Union's position on coverage.

it against the Duncan Lawsuit. In the letter, AIG outlined the allegations in the Duncan Lawsuit, the indemnification language in the Terms and Conditions, and the Policy terms. Its coverage position was "[b]ased upon the allegations of the Litigation, 84 Lumber's alleged liability is not with respect to liability for 'bodily injury' caused in whole or in part by US Lumber's acts or omissions, or the acts or omissions of US Lumber's employee, Duncan, in the performance of US Lumber's ongoing operations for 84 Lumber." Further, that "based on the absence of any allegation that Duncan was negligent," it was denying coverage.

In a letter dated December 23, 2020, 84 Lumber renewed its demand that National Union provide a defense, this time in reliance on the Vendor Endorsement, as an "additional insured" and arguing that "Mr. Duncan's purported injuries arose out of the sale and distribution of USL's products, which are sold in the regular course of 84 Lumber's business as a vendor of USL." It further stated that the OLC Endorsement was inapplicable to the Duncan Lawsuit, and thus, National Union erred when it relied upon it to deny coverage.

National Union reasserted its denial in correspondence from counsel dated February 23, 2021, denying coverage pursuant to either the OLC or Vendor Endorsements. National Union interpreted the Vendor Endorsement to only apply to products liability claims, as compared to premises liability claims. Specifically, the letter indicated that "the Duncan Lawsuit does not allege that Mr. Duncan's injuries arose out of US Lumber's products, or that his injuries were caused by a US Lumber product," but instead "that Mr. Duncan's injuries arose out of 84 Lumber's own alleged negligence in creating a dangerous condition on premises that 84 Lumber owns, operates and/or maintains."

On June 14, 2021, 84 Lumber filed the instant lawsuit against National Union.

LEGAL ANALYSIS

Summary Judgment Standard

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, requiring that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the non-moving party's evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 261-62 (Tenn. 2015). In response, the non-moving party "'may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Tolliver v. Tellico Village Property Owners Ass'n, Inc.*, 579 S.W.3d 8, 21 (Tenn. Ct. App. 2019) (citing Tenn. R. Civ. P. 56.06).

Georgia Law Regarding Contract Interpretation

The parties agree that Georgia law applies to the substantive issues herein as the Policy was issued and delivered to US Lumber at its place of business in Georgia. Georgia courts have long held that insurance policies are, at their core, contracts. *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 35 F.4th 1318, 1320 (11th Cir. 2022) (citing *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90, 92 (Ga. 2008)). As such, courts interpret insurance policies using the same tenets that guide the construction of any other contract. *BBL-McCarthy, LLC v. Baldwin Paving Co.*, 646 S.E.2d 682, 685 (Ga. Ct. App. 2007) (citing *Scottsdale Ins. Co. v. Great American Assurance Co.*, 610 S.E.2d 558, 560 (Ga. Ct. App. 2005)).

As set out in *Brotherhood Mut. Ins. Co. v. Richardson*, 871 S.E.2d 1 (Ga. Ct. App. 2022):

> In Georgia, insurance is a matter of contract, and the parties to an insurance policy are bound by its plain and unambiguous terms. Thus, when faced with a conflict

> over coverage, a trial court must first determine, as a matter of law, whether the relevant policy language is ambiguous. A policy which is susceptible to two reasonable meanings is not ambiguous if the trial court can resolve the conflicting interpretations by applying the rules of contract construction.

Brotherhood Mut. Ins. Co. v. Richardson, 871 S.E.2d 1, 3 (Ga. Ct. App. 2022) (citing *Old Republic Union Ins. Co. v. Floyd Beasley & Sons*, 551 S.E.2d 388, 390 (Ga. Ct. App. 2001)). Whether a contract is ambiguous is a question of law and not a question of fact. *Id.* (citing *State Farm Fire & Cas. Co. v. Bauman*, 723 S.E.2d 1, 3 (Ga. Ct. App. 2012)).

As set out in *Mehic v. Allstate Prop. and Cas. Ins. Co.*, No. 1:20-CV-03949-JPB, 2022 WL 444473 (N.D. Ga. Feb. 14, 2022), Georgia law requires application of a three-step analysis for contract interpretation:

> First, the trial court must decide whether the language is clear and unambiguous. If it is, no construction is required, and the court simply enforces the contract according to its clear terms. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.

Mehic v. Allstate Prop. & Cas. Ins. Co., No. 1:20-CV-03949-JPB, 2022 WL 444473, at *3 (N.D. Ga. Feb. 14, 2022) (citing *Envision Printing, LLC v. Evans*, 786 S.E.2d 250, 252 (Ga. Ct. App. 2016)).

Courts must interpret contracts to ascertain and give effect to the intent of the contracting parties consistent with legal principles. *Blue Ridge Auto Auction v. Acceptance Indem. Ins. Co.*, 807 S.E.2d 51, 53 (Ga. Ct. App. 2017). In doing so, courts must "consider the insurance policy as a whole" and "attempt to harmonize the provisions with each other." *Henry's Louisiana Grill, Inc.,* 35 F.4th at 1320 (quoting *Nat'l Cas. Co. v. Georgia Sch. Bds. Ass'n-Risk Mgmt. Fund*, 818 S.E.2d 250, 253 (Ga. 2018)). "The 'natural, obvious meaning' of a term 'is to be preferred over any curious, hidden meaning which nothing but the exigency of a hard case' would suggest." *Id.*

(quoting *Payne v. Middlesex Ins. Co.*, 578 S.E.2d 470, 472 (Ga. Ct. App. 2003)). Unambiguous terms must be applied as they are written. *Id.* (citing *Reed*, 667 S.E.2d at 92).

"Ambiguity exists where the words used in the contract leave the intent of the parties in question—i.e., that intent is uncertain, unclear, or is open to various interpretations." *Gen. Steel, Inc. v. Delta Bldg. Sys., Inc.*, 676 S.E.2d 451, 453 (Ga. Ct. App. 2009) (quoting *Cap. Color Printing, Inc. v. Ahern*, 661 S.E.2d 578, 583 (Ga. Ct. App. 2008)). If the contract language is found to be ambiguous, the court must apply established rules of construction to determine the intent of the parties. *Mehic*, 2022 WL 444473, at *3 (citing *Envision Printing*, 786 S.E.2d at 252). "In the context of an insurance policy, an ambiguity is 'strictly construed against the insurer as drafter of the document' as is any exclusion from coverage invoked by the insurer." *Id.* at *4 (citing *Richards v. Hanover Ins. Co.*, 299 S.E.2d 561, 563 (Ga. 1983)); *see also Hoover v. Maxum Indemnity Co.*, 730 S.E.2d 413, 418 (Ga. 2012). The policy must also be interpreted "in accordance with the reasonable expectations of the insured where possible." *Mehic*, 2022 WL 444473, at *4 (citing *Richards*, 299 S.E.2d at 563). "But an equally valid rule is that an unambiguous policy requires no construction, and its plain terms must be given full effect even though they are beneficial to the insurer and detrimental to the insured." *Id.* (quoting *Woodmen of World Life Ins. Soc. v. Etheridge*, 154 S.E.2d 369, 372 (Ga. 1967)). Thus, the Court cannot use "strained construction" to find coverage where there is none.

Analysis of Policy Coverage Claims

In 84 Lumber's Motion for Partial Summary Judgment, it argues that it was entitled to coverage as an additional insured under the Policy and that National Union breached two duties through its course of dealings with 84 Lumber following the accident and the Duncan Lawsuit: 1) the duty to adequately investigate the event; and 2) the duty to defend 84 Lumber under the Policy. In response, National Union contends that it had no duty to investigate because 84 Lumber failed

to notify National Union of any facts that would bring the Duncan Lawsuit within potential coverage under the Policy. In National Union's Motion for Summary Judgment, it contends that, as a matter of law, 84 Lumber is not an additional insured under the Policy, and this action should be dismissed. Further, that it appropriately compared the Policy with the allegations in the Duncan Lawsuit complaint and properly concluded that the allegations did not implicate potential coverage for 84 Lumber, and, therefore, it had no duty to defend 84 Lumber and did not breach same.

The duty to investigate and the duty to defend are somewhat intertwined, because Georgia law creates a duty to investigate in certain circumstances to determine whether there is a duty to defend. In Georgia, the duty to defend is a separate and broader obligation from the duty to pay. *Penn-America Ins. Co. v. Disabled American Veterans, Inc.*, 490 S.E.2d 374, 376 (Ga. 1997) (citing *Capital Ford Truck Sales, Inc. v. U.S. Fire Ins. Co.*, 349 S.E.2d 201 (Ga. Ct. App. 1986)); *Shafe v. American States Ins. Co.*, 653 S.E.2d 870, 873 (Ga. Ct. App. 2007). "An insurer's duty to defend is determined by comparing the allegations of the complaint with the provisions of the policy." *BBL-McCarthy, LLC*, 646 S.E.2d at 685. However, "it is only where the complaint sets forth true factual allegations showing no coverage that the suit is one for which liability insurance coverage is not afforded and for which the insurer need not provide a defense." *Penn-America Ins. Co.*, 490 S.E.2d at 376. If the complaint falsely indicates non-coverage, and "[i]f the true facts are known or ascertainable to the insurer at the outset, then the insurer is obligated to defend the suit, just as if the complaint against the insured falsely alleged coverage." *Id.* The same is true if the allegations are ambiguous or incomplete regarding coverage. *Id.*

In *Colonial Oil Indus. v. Underwriters Subscribing to Policy Nos. TO31504670 and TO31504671*, 491 S.E.2d 337 (Ga. 1997), the Georgia Supreme Court decided this relevant issue certified to it by the Eleventh Circuit Court of Appeals: "whether an insurer has a duty to conduct a reasonable investigation of facts outside those presented in the complaint, or otherwise presented

to the insurer by its insured, prior to determining whether to defend a claim brought against the insured." *Colonial Oil Indus. Inc. v. Underwriters Subscribing to Pol'y Nos. TO31504670 and TO31504671*, 491 S.E.2d 337, 338 (Ga. 1997). The Georgia Supreme Court said that it does in certain situations, relying on *Loftin v. U.S. Fire Ins. Co.*, 127 S.E.2d 53 (Ga. 1952):

> The generally accepted view is that in making a determination of whether to provide a defense, an insurer is entitled to base its decision on the complaint and the facts presented by its insured. The insurer is under no obligation to independently investigate the claims against its insured. This rule is sound policy because the insured is in the best position to investigate and develop facts that will bear on the coverage issue.
>
> 2. A different rule, however, applies when the complaint on its face shows no coverage, but the insured notifies the insurer of factual contentions that would place the claim within the policy coverage. The Georgia Court of Appeals held in *Loftin v. U.S. Fire Ins. Co*., that in this situation the insurer has an obligation to give due consideration to its insured's factual contentions and to base its decision on "true facts." The requirement that an insurer base its decision on true facts will necessitate that the insurer conduct a reasonable investigation into its insured's contentions. To relieve an insurer of any duty to investigate its insured's contentions would allow the allegations of a third-party to determine the insured's rights under its contract. Placing a duty of investigation on insurers in these limited circumstances is not an unreasonable burden, especially in light of the availability of the "procedurally safe course" of providing a defense under a reservation of rights and filing a declaratory judgment action to determine its obligations.

Id. at 338-39 (citations omitted).

National Union interprets this caselaw to unqualifiedly justify reliance solely on the allegations in a complaint against the policy language to make a coverage determination. The Court does not believe Georgia law is that definitive. Rather, Georgia courts appear to look at the facts and circumstances, including what information was reasonably available to the insurer in evaluating if there was potential coverage, to determine the existence and extent of a duty to investigate. In *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 490 S.E.2d 374 (Ga. 1997), the Georgia Supreme Court explained:

> Indeed, the insurer may have an obligation to defend even when the complaint against the insured falsely indicates non-coverage. *Loftin v. U.S. Fire Ins. Co.*, supra at 294, 297, 127 S.E.2d 53. In that rare class of cases, **courts should look to**

> **whether the true facts showing coverage are known or ascertainable to the insurer**. If the true facts are known or ascertainable to the insurer at the outset, then the insurer is obligated to defend the suit, just as if the complaint against the insured falsely alleged coverage. *Loftin v. U.S. Fire Ins. Co.*, supra at 296, 127 S.E.2d 53. *See also Colonial Oil Industries Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 and TO31504671*, 268 Ga. 561 (2), 491 S.E.2d 337 (1997); *Associated Petro. Carriers, Inc. v. Pan Amer. Fire & Cas. Co.*, 117 Ga. App. 714, 716, 161 S.E.2d 411 (1968); 7C Appleman, Insurance Law and Practice § 4683, p. 56.
>
> Similarly, the insurer is obligated to defend where, as here, the allegations of the complaint against the insured are ambiguous or incomplete with respect to the issue of insurance coverage.

Penn-Am. Ins. Co., 490 S.E.2d at 376 (emphasis added). Thus, Georgia courts appear to hold that "if the insurer is aware of 'factual contentions that would place the claim within the policy coverage,' courts may consider such 'true facts' outside of the four corners of the complaint in determining whether an insurer has a duty to defend." *Capitol Specialty Ins. Corp. v. PTAV, Inc.*, 331 F. Supp. 3d 1329, 1334 (N.D. Ga. 2018) (citing *Colonial Oil Indus. Inc.*, 491 S.E.2d 337, 338-39 (Ga. 1997)). Therefore, if "the complaint on its face shows no coverage, but the insured notifies the insurer of factual contentions that would place the claim within the policy coverage," the insurer will have a duty to defend. *Colonial Oil Indus. Inc.*, 491 S.E.2d at 338-39. Likewise, "'[i]f the complaint,' including facts outside of the complaint that are known to the insurer, 'does not assert a claim that is covered, the insurer is justified in refusing to provide the insured a defense.'" *Capitol Specialty Ins. Corp.*, 331 F. Supp. 3d at 1334.

Here, National Union did undertake an investigation regarding its duty to defend, albeit one 84 Lumber asserts was incomplete and not appropriately thorough. 84 Lumber contends that the "true facts" of the accident were ascertainable to National Union; namely, that a "reasonable investigation" would have revealed that Duncan was not wearing safety equipment to make him more visible on the work site, that National Union ignored coverage issues raised by the July 24, 2020 letter from 84 Lumber's counsel, that National Union failed to consider 84 Lumber's

affirmative defense in the Duncan Lawsuit alleging comparative fault, and that National Union, through Padillo, failed to adequately investigate and follow through with the tasks assigned by her supervisor, which led to its improper failure to defend 84 Lumber. 84 Lumber asks the Court to second guess and critique every action or inaction of Sedgwick based upon the information it now has, or that could have been obtained, at the time. The Court disagrees that this is the standard to be applied. 84 Lumber did not give National Union notice of any facts to support its theory that Duncan was comparatively at fault for his injuries which would have potentially triggered coverage under the Policy. In the July 24, 2020 correspondence, there is no mention of actions or inactions Duncan took to bring about his own injuries. The complaint in the Duncan Lawsuit does not implicate comparative fault, and even though 84 Lumber vigorously and continually asserted that National Union should provide coverage, it never provided any facts that would lead to that conclusion. Rather, 84 Lumber focused on the indemnity provision in the Terms and Conditions, language of the Policy, and the Endorsements as the basis for coverage.

The duty to defend is determined based on whether the type of claim brought is arguably covered by the Policy, not what another person would have done in the shoes of the Sedgwick investigator to get to the truth or cause of the incident if it knew then what it knows now – especially since 84 Lumber did not share that information with National Union. The inquiry is whether the circumstances trigger coverage because the claim "arose out of" a covered event. In this case 84 Lumber's position is that Duncan was comparatively at fault, and thus US Lumber's duty to defend arose as a matter of law. A claim "arising out of" a party's actions "does not mean proximate cause or require a finding that the injury was directly and proximately caused by the insured's actions." *JNJ Found. Specialists v. D.R. Horton, Inc.*, 717 S.E.2d 219, 223 (Ga. Ct. App. 2011). The question is, based on the information in Duncan's complaint and information provided

by 84 Lumber, whether National Union should have accepted 84 Lumber's tender. The Court finds it should not have been expected to accept the tender.

In its Motion, 84 Lumber contends that National Union should have extended a defense to 84 Lumber as an additional insured under a plain reading of either the Vendor or OLC Endorsements. However, 84 Lumber has taken inconsistent positions regarding the applicability of this claim to the OLC Endorsement. In its June 26, 2020 and July 24, 2020 letters, 84 Lumber simply requested coverage because of the indemnity provision in the Terms and Conditions, which requires US Lumber to "provide a Certificate of Insurance and name 84 Lumber as an Additional Insured on its General Liability Policy and on a Broad Form Vendors Endorsement to its Product Liability Policy." After AIG reasserted the denial based upon the OLC Endorsement,[3] and having reviewed the Endorsements, on December 23, 2020, 84 Lumber reasserted its claim specifically based upon the Vendor Endorsement, denying that the OLC Endorsement was applicable to it. 84 Lumber's analysis under the Vendor Endorsement was that "Mr. Duncan's purported injuries arose out of the sale and distribution of USL's products, which are sold in the regular course of 84 Lumber's business as a vendor of USL."

The OLC Endorsement covers injuries "caused, in whole or in part, by" US Lumber's acts or omissions. At no time did 84 Lumber notify National Union that it asserted Duncan's injuries were caused by his own acts or omissions. None of 84 Lumber's letters asserted comparative fault, and the assertion of an affirmative defense to that effect did not put National Union on notice that it should provide a duty to defend. Moreover, 84 Lumber specifically disclaimed coverage under this endorsement, and National Union had a right to rely on that position.

The Vendor Endorsement covers injuries "arising out of" US Lumber's products and references any contract with the vendor. The indemnification provision in the Terms and

[3] AIG does not identify that particular endorsement by name, but the language quoted in the letter tracks that in the OLC Endorsement.

Conditions provides that US Lumber agreed to indemnify 84 Lumber for any claims or liability "arising out of or in connection with the sale or use of products manufactured, installed, and/or distributed by [US Lumber]." Although Duncan was delivering products to 84 Lumber when he was injured, the Court does not interpret that circumstance to "arise out of" US Lumber's products. It finds the case cited by National Union, *Dominick's Finer Foods, Inc. v. American Manufacturers Mut. Ins. Co.*, 516 N.E.2d 544 (Ill. Ct. App. 1987), to provide helpful analysis to this issue. The injured party there was delivering cases of Coca-Cola and fell on a slippery floor. The premises owner sought a tender of defense based upon a vendor endorsement similar to the one in this case. The Illinois Court found it only applicable to injuries caused by the insured's products themselves. *Dominick's Finer Foods, Inc. v. American Manufacturers Mut. Ins. Co.*, 516 N.E.2d 544, 546 (Ill. Ct. App. 1987). The Court does not necessarily find that the Vendor Endorsement could only be applicable to a products liability claim – although the indemnity language in the Terms and Conditions refers to a "Vendor Endorsement to [US Lumber's] Products Liability Policy" – but it certainly is not applicable to this claim. There is no reasonable reading of this endorsement that could lead to the conclusion that it would cover the Duncan Lawsuit. To find otherwise would be a strained interpretation of the Vendor Endorsement, prohibited by Georgia's rules of contract construction. *See Mehic*, 2022 WL 444473, at *3; *see also Woodmen of World Life Ins. Soc.*, 154 S.E.2d at 372.

Based on the foregoing, the Court finds that National Union appropriately concluded that it had no duty to defend based on its review of the allegations in the complaint, its investigation through Sedgwick, and its conclusion that the Endorsements did not apply to provide coverage. The Court therefore dismisses 84 Lumber's claim for breach of contract, as well as its declaratory judgment action.

Duty of Good Faith and Fair Dealing

The Court relies on its findings regarding the duties to defend and investigate to deny 84 Lumber's claim for breach of the duty of good faith and fair dealing.

Bad Faith Failure to Defend

The Court relies on its findings regarding the duties to defend and investigate to deny 84 Lumber's claim for bad faith for failure to defend.

CONCLUSION

Nothing in the Duncan Lawsuit complaint reasonably indicated to National Union that it had a duty to defend in response to 84 Lumber's tender for defense. 84 Lumber also did not provide any facts to National Union that would have reasonably led it to believe it needed to investigate Duncan's accident to determine coverage. National Union's reading of the Policy, including the OLC and Vendor Endorsements, was that there was no coverage. Based upon the information that it had, or that it should have been aware of based upon the information provided by 84 Lumber, National Union properly denied 84 Lumber's tender. National Union's interpretation of the OLC and Vendor Endorsements was accurate and appropriate, and they did not trigger a duty to defend.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that 84 Lumber's motion for partial summary judgment is DENIED and National Union's motion for summary judgment is GRANTED. 84 Lumber's claims are hereby DISMISSED.

Costs are to be taxed to 84 Lumber.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR, PART II
TENNESSEE BUSINESS COURT
PILOT PROJECT

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RULE 58 CERTIFICATION

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named above.

s/Megan Broadnax
Deputy Clerk & Master

7-14-22
Date