**UNITED STATES DISTRICT COURT**

**WESTERN DISTRICT OF LOUISIANA**

**LAKE CHARLES DIVISION**

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| **LANDMARK AMERICAN INSURANCE COMPANY** | **CIVIL ACTION NO.: 2:20-CV-1263** |
| **VERSUS** | **JUDGE: TERRY A. DOUGHTY** |
| **CHENEL ESTERS, ET AL.** | **MAGISTRATE: KATHLEEN KAY** |

**MEMORANDUM RULING**

Pending before the Court is a Motion for Partial Summary Judgment on the Issue of Waiver of Coverage Defenses [Doc. No. 168] filed by Defendant Insurance Unlimited of Louisiana, LLC ("Insurance Unlimited").

An Opposition [Doc. No. 192] was filed by Plaintiff Landmark American Insurance Company ("Landmark") on April 18, 2022. A Reply [Doc. No. 203] was filed by Insurance Unlimited on April 25, 2022.

For the reasons set forth herein, Insurance Unlimited' s Motion for Partial Summary Judgment is DENIED.

## A. BACKGROUND

The issue in this Motion for Partial Summary Judgment is whether Landmark has waived its coverage defenses under its policy of insurance[1] issued to Insurance Unlimited.

This case arises out of an unfortunate set of circumstances prior to Hurricane Laura making landfall in the southwest Louisiana area on August 27, 2020. Insurance Unlimited is a licensed independent insurance agency with offices in Lake Charles, Sulphur, Lafayette and

[1] Landmark Professional Liability Policy LHR 780740

Baton Rouge, Louisiana. Insurance Unlimited obtains and maintains insurance coverage for customers and employs licensed insurance brokers and ancillary staff.[2]

One of Insurance Unlimited's employees was Valerie Muse ("Muse"), an account manager who was employed with Insurance Unlimited from June 28, 2010, to September 2, 2020. After Hurricane Laura made landfall, various Insurance Unlimited customers began reporting losses to their respective properties to Insurance Unlimited, making claims to recoup losses in connection with their insurance coverage.[3]

On or about September 1, 2020, Insurance Unlimited first learned that Muse had stolen some of the customer insurance premiums, which were supposed to be used to pay premiums or renew policies. Insurance Unlimited also learned that some of their customers did not have insurance coverage as a result of Muse's actions. In addition, Insurance Unlimited alleged it also found that some customer policies were not bound, or renewed, as a result of actions or inactions, which did not involve Muse's theft of premiums.[4] In other words, Insurance Unlimited claims that some of the losses of insurance coverage were a result of theft of premiums by Muse, and that some of the losses of insurance coverages ("non-theft losses") were a result of Muse's negligence.

At the time of the losses of insurance coverages by Insurance Unlimited's customers, Insurance Unlimited had in effect a policy of insurance[5] issued by Landmark. The Landmark policy[6] has aggregate policy limits of $4,000,000 for all claims, along with a $25,000 deductible. In pending motions for summary judgment filed by Landmark[7], Landmark claims that due to

[2] Affidavit of Edwin Robinson [Doc. No. 168-2].
[3] Id.
[4] Id.
[5] Professional Liability Insurance policy LHR780740
[6] [Doc. No. 1-2].
[7] [Doc. No. 172, 173 and 174].

various exclusions in its policy, its policy does not provide coverage for the losses, and/or that Landmark does not have a duty to defend Insurance Unlimited.

In Insurance Unlimited's motion for partial summary judgment, Insurance Unlimited argues Landmark has waived its coverage defenses and/or exclusions, by Landmark's actions in contacting a Louisiana lawyer, Carl T. "Chip" Hellmers, III ("Hellmers"), to meet with Insurance Unlimited. The specific allegations will be detailed herein.

**Coverage Waiver Allegations**

Insurance Unlimited alleges on September 2, 2020, it notified its broker, Independent Insurance Agents & Brokers of Louisiana ("IIABL") of the potential claims.[8] Rhonda Martinez ("Martinez"), a representative of IIABL, then notified a representative of AmWINS, a wholesale insurance broker, about informing a claims representative of Landmark to make a claim under the RSUI Landmark policy.[9]

On September 3, 2020, David Bailey ("Bailey") with AmWINS, emailed Martinez to verify the claims being made. Matthew Lange ("Lange") was assigned the claim for Landmark.[10] Lange spoke to Edwin Robinson ("Robinson"), Insurance Unlimited's President, by telephone. Robinson told Lange all of the facts he was aware of at that time. Robinson also asked Lange about an attorney to help Insurance Unlimited with this situation.

Lange told Robinson he would contact a local lawyer to help Insurance Unlimited.

After talking with Robinson, Lange emailed Robert Orr ("Orr") at Landmark[11] and advised Orr that Insurance Unlimited was making both claims involving fraud by Muse, and separate E&O claims, which involved negligence by Muse.

[8] Affidavit of Edwin Robinson [Doc. No. 168-2].
[9] RSUI Landmark is simply referred to as "Landmark".
[10] Deposition of Landmark and Lange [Doc. No. 168-3].
[11] Deposition of Landmark and Lange, [Doc. No. 168-3, Exh. _].

Lange then emailed Hellmers, an attorney based in New Orleans, who had previously defended Insurance Unlimited. Lange wrote:

> We have received a new claim (possibly claims) for the above insured. At present, I have very little documentation. In short, insured has learned that an employee or agent was binding coverage but stealing the premiums. The policies were subsequently cancelled for non-payment. Now, particularly in light of the recent hurricane, claims are being filed and coverage denied.
>
> Insured is just learning of this. They need counsel to advise them and formulate a plan to handle incoming claims once denied by the carriers. We are currently reviewing coverage, but they need advice.
>
> I also learned in my conversation with the insured that they have other claims coming in for E&O by the same agent, but unrelated to the theft. I am not yet in receipt of those but they are forthcoming. Insured will need counsel on those as well. To the extent coverage is available, we may need to coordinate with local adjusters like Engle Martin to act as de facto property adjusters.
>
> Please advise if you can handle. If you can, to the extent you can, touch base with the insured (Eddie Robinson at 337-794-4009) **t**oday, would be appreciated. They are quite stressed at present.[12]

Later during the afternoon of September 3, 2020, Hellmers responded to Lange's email as follows:

> I spoke with Eddie [Robinson] briefly, and he and I will speak again this afternoon. I'll follow up with you as soon as I talk to him further.
>
> Thank you for the referral. We tried a case in Cameron Parish for this group several years ago.[13]

Then, Lange responded to Hellmers' email as follows:

> Thanks, Chip. Coverage is undetermined on the theft-related claims. However, in speaking with Eddy it sounds like there are more claims related to this employee that may not be theft-related forthcoming.[14]

[12] Id.
[13] Id.
[14] Id.

Later, in the afternoon of September 3, 2020, Robinson and Hellmers spoke by telephone. A personal meeting was set up between Robinson and Lange for the next day, September 4, 2020.[15]

On the afternoon of September 3, 2020, Lange sent Robinson a letter which contained the following language:

> Pending further investigation and its definite coverage position, Landmark is proceeding in this matter without waiving any of its rights, privileges and defenses available under the captioned policy or at law by or on behalf of Landmark, or not stating should be construed as a limitation or waiver of any such rights privileges or defenses. Our full coverage position will follow at the earliest opportunity. [Deposition of Landmark and Lange Doc. No. 168-3 p. 47].

After Hellmers telephone conversation with Robinson, and before their scheduled personal meeting, Hellmers sent the following email to Lange:

> I left you a telephone message a few minutes ago, but I wanted to briefly follow up on my conversation with Eddy Robinson. He was able to speak briefly about the matter, as they currently understand it. He and his office manager generally went through the detail associated with the incident. Apparently, one of their Customer Service Agents, Valerie Muse, has acknowledged that she failed to send premium payments to a carrier on one policy that resulted in a cancellation. She was either diverting the cash or using it to make other premium payments. (Mr. Robinson did not know what she did with the funds, and she has not given much of an explanation). She later called the office manager and recalled an additional four (4) policies that were either cancelled or never bound because of premium diversion. They expect that there will be more. They have filed a police report with the Calcasieu Parish Sheriff's Office, and they expect a warrant to be issued shortly. They are now identifying additional situations where certain policies were not properly handled and may have been cancelled because of Ms. Muse.
>
> I am going to be in Lafayette tomorrow on another matter and have agreed to meet with Mr. Robinson, his office administrator, and their billing manager later in the day. They are still trying to get an understanding of the scope of the potential loss, and they are in the process of marshalling information to further develop that issue. Unfortunately, Insurance Unlimited's offices are working off of

[15] Affidavit of Edwin Robinson, [Doc. No. 168-2].

> generator power, so there is some delay on that front. In addition, they are fielding calls on numerous property damage claims as well.
>
> It will probably be worthwhile to consider an adjuster on the front end, particularly for those properties that may have more dramatic losses. Mr. Robinson was under the impression that the agency had heard from each of the five (5) customers that believed they had coverage. He did not have any information on the nature or extent of the losses involved.
>
> If you have a few minutes to touch base tomorrow morning, it would be helpful for us to visit on a plan going forward.[16]

Insurance Unlimited and Robinson maintain Insurance Unlimited was unaware Hellmers was reporting to Landmark about their conversations. Insurance Unlimited stated it believed that Hellmers was acting as its counsel.

On the morning of September 4, 2020, Lange forwarded Hellmers' September 3 email to George Fagan ("Fagan"), Landmark's outside counsel and the attorney handling Landmark's coverage determination.[17] At 1:39 p.m. on September 4, 2020, just before Hellmers' in person meeting with Robinson, Fagan emailed Robinson a letter denying coverage for all claims involving Muse "stealing premium dollars intended for insurers" [18] In this letter, Landmark requested additional information about the claims and did appear to reserve rights to deny coverage. Later, Fagan made clear that the denial of coverage letter sent to Robinson on September 4, 2020, applied to both theft and non-theft claims.[19]

At approximately 2:00 p.m. on September 4, 2020, Hellmers and Robinson met at Robinson's house and discussed potential claims for Muse's failure to procure property and casualty coverage (the non-theft claims).[20] Hellmers told Robinson that he was not allowed to

[16] Deposition of Landmark and Lange, [Doc. No. 168-3, Exh. 11].
[17] [Id. at Exh. 11].
[18] [Id. at Exh. 11].
[19] [Id. at Exh. 11].
[20] Affidavit of Edwin Robinson, [Doc. No. 168-2, para. 25].

discuss the theft related claims because Landmark was denying coverage for those.[21] After their meeting, Robinson never heard from Hellmers again regarding the claims.[22]

Insurance Unlimited (through Robinson) believed Hellmers to be appointed by Landmark as Insurance Unlimited's attorney and did not know Hellmers was reporting their conversations to Landmark.[23] Robinson declared no one ever informed him that Hellmers was not representing Insurance Unlimited or that Hellmers was reporting to Landmark.[24]

On September 25, 2020, (three weeks after the in-person Hellmers-Robinson meeting), Landmark filed a Complaint against Insurance Unlimited and its customers, seeking a declaratory judgment that there was no coverage under the Landmark policy for both theft and non-theft claims.[25] The Complaint was amended and/or restated on March 10, 2021[26] and on December 28, 2021.[27] The Second Amended and Supplemental and Restated Complaint (which replaces and supersedes Landmark's previous complaints), asks for a declaratory judgment that there is no coverage under the Landmark policy, an interpleader regarding Insurance Unlimited's customers, and a declaration that Landmark did not have a duty to defend Insurance Unlimited. Additionally, Landmark has filed three pending motions for summary judgments,[28] which deny all claims.

On February 15, 2022, Insurance Unlimited took the deposition of Lange and the Rule 30(b)(6)[29] deposition of Landmark. At that deposition, Lange testified he did not appoint

[21] Id.
[22] Id. para. 30 and 31.
[23] Id.
[24] Id.
[25] [Doc. No. 1].
[26] [Doc. No. 65].
[27] [Doc. No. 149].
[28] [Doc. Nos. 172, 173 and 174].
[29] Lange was designated as Landmark's corporate representative.

Hellmers to represent Insurance Unlimited before Landmark denied coverage.[30] Lange also testified that he took additional facts developed and reported to him by Hellmers, and forwarded that to outside coverage counsel.[31] Additionally, Lange testified that Hellmers was not paid by Landmark for Hellmers' time, (regarding conversations and meeting with Robinson), that Hellmers did not open a file for either Insurance Unlimited or Landmark, and that Hellmers was doing "a favor" for Landmark in speaking to Robinson in September 2020.[32]

Landmark maintains the September 3, 2020 letter sent by Lange to Robinson was a reservation of rights letter and that therefore Landmark has not waived any coverage defenses by having Hellmers contact Insurance Unlimited.

## II. LAW AND ANALYSYS

### A. Standard of Review

Summary judgment is appropriate when the evidence before a court shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A fact is "material" if proof of its existence or nonexistence would affect the outcome of the lawsuit under applicable law in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable fact finder could render a verdict for the nonmoving party. *Id.*

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."

[30] Deposition of Landmark and Lange. [Doc. No. 168-3, p. 42].
[31] Deposition of Landmark and Lange, [Doc. No. 168-3, p. 44].
[32] Affidavit of Edwin Robinson, [Doc. No. 168-2, para. 33].

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting *Anderson*, 477 U.S. at 247). "The moving party may meet its burden to demonstrate the absence of a genuine issue of material fact by pointing out that the record contains no support for the non-moving party's claim." *Stahl v. Novartis Pharm. Corp.*, 283 F.3d 254, 263 (5th Cir. 2002). Thereafter, if the non-movant is unable to identify anything in the record to support its claim, summary judgment is appropriate. *Id.* "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

In evaluating a motion for summary judgment, courts "may not make credibility determinations or weigh the evidence" and "must resolve all ambiguities and draw all permissible inferences in favor of the non-moving party." *Total E & P USA Inc. v. Kerr–McGee Oil and Gas Corp.*, 719 F.3d 424, 434 (5th Cir. 2013) (citations omitted). While courts will "resolve factual controversies in favor of the nonmoving party," an actual controversy exists only "when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). To rebut a properly supported motion for summary judgment, the opposing party must show, with "significant probative evidence," that a genuine issue of material fact exists. *Hamilton v. Segue Software, Inc*., 232 F.3d 473, 477 (5th Cir. 2000) (emphasis added). "'If the evidence is merely colorable, or is not significantly probative,' summary judgment is appropriate." *Cutting Underwater Tech. USA, Inc. v. Eni U.S. Operating Co*., 671 F.3d 512, 517 (5th Cir. 2012) (quoting *Anderson*, 477 U.S. at 248).

Relatedly, there can be no genuine dispute as to a material fact when a party fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322-

23. This is true "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 323.

**B. Waiver of Coverage Defenses**

Landmark is maintaining various coverage defenses in this matter, which include Exclusion "O" (exclusion for comingling, conversion, misappropriation or defalcation of funds), Exclusion "A" (claims involving dishonest, fraudulent, criminal, intentionally wrongful or malicious acts, error or omission committed by any insured), Exclusion "G" (an obligation or liability assumed by the insured under any contract or oral or written agreement) and Section "B" (which requires that the insured not settle claims or admit liability). These exclusions are the basis for Landmark's denial of a duty to defend Insurance Unlimited and the basis of Landmark's defense of Insurance Unlimited's claims for penalties and attorney fees.[33]

In this motion, Insurance Unlimited seeks summary judgment that Landmark, through the above detailed actions, has waived its coverage defenses. In *Steptore v. Masco Const. Co., Inc.*, 643 So.2d 1213 (La. 1994),[34] the Supreme Court of Louisiana addressed the waiver of coverage issue. In *Steptore*, the issue was whether the insurance carrier could deny coverage based upon the insured's violation of a warranty as to the location of the insured's barge. The insured, with knowledge of facts indicating noncoverage, voluntarily assumed and continued the insured's defense without obtaining a nonwaiver agreement to reserve its rights. Both the insured and the insurer filed motions for summary judgment regarding the waiver of coverage issues.

In reversing the appellate court, the Supreme Court found the insurance carrier had waived its coverage defenses. The Court stated:

> [1] [2] Waiver is generally understood to be the intentional relinquishment of a known right, power, or privilege. *Tate v. Charles*

[33] [Doc. Nos. 172, 173, and 174].
[34] Opinion written by now United States Court of Appeals for the Fifth Circuit Judge James L. Dennis.

*Aguillard Ins. & Real Estate, Inc.*, 508 So.2d 1371 (La. 1987); *Ledoux v. Old Republic Life Ins. Co.*, 233 So.2d 731 (La. App. 3d Cir.), *cert denied* 256 La. 372, 236 So.2d 501 (1970); *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5th Cir 1992); Comment, *Waiver and Estoppel in Louisiana Insurance Law*, 22 La. L. Rev. 202 (1961); 16B Appleman, Insurance Law and Practice, § 9081 (1981); Couch on Insurance 2d, § 35:249 (Rev. ed. 1985). Waiver occurs when there is an existing right, a knowledge of its existence and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. *Tate*, supra; *Peavey*, supra; *Ledoux*, supra; 16B Appleman, supra, § 9085. A waiver may apply to any provision of an insurance contract, even though this may have the effect of bringing within coverage risks originally excluded or not covered. *Tate*, supra.

[3] It is well established that an insurer is charged with knowledge of the contents of its own policy. *Youngblood v. Allstate Fire Ins. Co.*, 349 So.2d 462 (La. App. 3d Cir. 1977); *Davis v. Aetna Casualty & Surety Co.*, 329 So.2d 868 (La. App. 2d Cir.), *writ denied*, 333 So.2d 233 (1976); *Pellets, Inc. v. Millers Mutual Fire Ins. Co.*, 241 So.2d 550 (La. App. 2d Cir. 1970), *writ denied*, 257 La. 607, 243 So.2d 274 (1971). In addition, notice of facts which would cause a reasonable person to inquire further imposes a duty of investigation upon the insurer, and failure to investigate constitutes a waiver of all powers or privileges which a reasonable search would have uncovered. *Swain for and on behalf* **5 *of Swain v. Life Ins. Co. of Louisiana*, 537 So.2d 1297 (La. App. 2d Cir. 1989), *writ denied*, 541 So.2d 895 (1989); *Foret v. Terrebonne Towing Co., Inc.*, 632 So.2d 344 (La. App. 1st Cir. 993) *writ denied*, 637 So.2d 1067 (La. 1994); *Peterson v. Pacific Fire Ins. Co.*, 148 So. 283 (La. App. Orl. Cir. 1933); *Franz v. United Casualty Co.*, 49 F. Supp. 267 (E.D. La. 1943); Comment, La. L. Rev. supra 206; 16B Appleman supra § 9084.

[4] [5] Waiver principles are applied stringently to uphold the prohibition against conflicts of interest between the insurer and the insured which could potentially affect legal representation in order to reinforce the role of the lawyer as the loyal advocate of the client's interest. *Employers Mutual Liability Ins. Co. of Wisconsin v. Sears, Roebuck & Co.* 621 F.2d 746, 747 (5th Cir. 1980); *Pacific Indemnity Co. v. Acel Delivery Serv.*, 485 F.2d 1169, 1173 (5th Cir. 1973), *cert denied*, 415 U.S. 921, 94 S.Ct. 1422, 39 L.Ed. 2d 476 (1974); *Parsons v. Continental National American Group*, 113 Ariz. 223, 550 P.2d 94 (1976); *Employers Casualty Co. v. Tilley*, 496 S.W. 2d 552 (Tx. 1973); *Transamerica Ins. Group v. Chubb and Son, Inc.*, 16 Wash. App. 247, 554 P.2d 1080 (1976). Cf. *Dugas Pest Cont. v. Mutual Fire, Marine and Inland Ins. Co.*, 504 So.2d 1051 (La. App. 1st Cir. 1987); *Brasseaux v. Girourd*, 214

> So.2d 401 (La. App. 3d Cir.), *writ denied*, 253 La. 60, 216 So.2d 307 (1968); *Storm Drilling Company v. Atlantic Richfield Corp.*, 386 F. Supp. 830 (E.D. La. 1974). See Rule 1.7, La. Rules of Professional Conduct; Restatement of the Law (3rd), The Law Governing Lawyers, Chapter 8, Introductory Note, §§ 201 and 202 (Tentative Draft 1990); Opinion 342, Opinions of the Committee on Professional Responsibility (La. State Bar Ass'n 1974); 15 McKenzie & Johnson, Insurance Law and Practice § 216 (1986). Accordingly, when an insurer, with knowledge of facts indicating noncoverage under the insurance policy, assumes or continues the insured's defense without obtaining a nonwaiver agreement to reserve its coverage defense, the insurer waives such policy defense. *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5th Cir. 1992); *Pitts By and Through Pitts v. American Sec. Life Ins. Co.* 931 F.2d 351 (5th Cir. 1991); *Ideal Mut. Ins. Co. v. Myers*, 780 **6 F.2d 1196 (5th Cir. 1986); *Employers Mutual Liability Ins. Co. of Wisconsin v. Sears, Roebuck & Co.*, 621 F.2d 746, 747 (5th Cir. 1980); 16C Appleman, Insurance Law and Practice § 9361.25 (1981). Cf. *Tate v. Charles Aguillard Ins. & Real Estate, Inc.*, 508 So.2d 1371 (La. 1987); *1217 *Ledoux v. Old Republic Life Ins. Co.*, 233 So.2d 731 (La. App. 3d Cir.), *cert denied* 256 La. 372, 236 So.2d 501 (1970).
>
> [6] There is no genuine dispute as to the material facts pertinent to the waiver issue. Applying the foregoing precepts to those facts, we conclude that Ocean Marine waived its right to assert a coverage defense by assuming and continuing the defense of its insured in the face of facts indicating that it had a right to deny coverage for the accident.

The insurance carrier in *Steptore* had named a law firm to represent both itself and the insured without reservation of the right to deny coverage under the policy. The attorneys met with the insured to discuss the accident. The attorneys continued to represent the insured and obtained information from the insured that was later used by the insured to deny coverage.

Because the insurer represented both the insured and the insurer without reserving its rights, when the insurer's interests were adverse to the insured, the Court found the insurer had waived any coverage defenses it had under its policy.

In *Steptore*, there was no reservation of rights by the liability insurer. The liability insurer, with knowledge of facts indicating noncoverage, voluntarily assumed and continued the insured's defense with the same attorney representing both the insurer and the insured. The

attorney representing both met with the insured to discuss the particulars of the accident and to review all pertinent company records. Over five (5) months after the attorney enrolled for both, the insurer denied coverage to the insured. In addition to addressing the failure of the insurer to obtain a nonwaiver agreement to reserve its coverage defenses, the Supreme Court also discussed waiver principles with respect to conflicts of interests between the insurer and the insured.[35]

The first question to address is whether Landmark reserved its rights to deny coverage. There is a substantial difference between a non-waiver agreement and a reservation of rights. In a non-waiver agreement, the insured agrees that the insurer may investigate an occurrence or defend the insured while preserving the right to contest coverage.[36] A nonwaiver agreement is bilateral, while a reservation of rights is unilateral.[37]

There has been no allegation or evidence presented that a non-waiver agreement was signed by Insurance Unlimited. Landmark has alleged that it reserved its rights to deny coverage on September 3, 2020, in an email by Matthew Lange to Robinson which stated:

> Pending further investigation in its definitive coverage division, Landmark is proceeding in the matter without waiving any of its rights, privileges and defenses available under the captioned policy or at law. Nothing stated by or on behalf of Landmark or not stated should be construed as a limitation or waiver on any such rights, privileges, or offenses. Our full coverage position will follow at the earliest opportunity.[38]

Additionally, on September 4, 2020, at 1:39 p.m., attorney George D. Fagan (representing Landmark on the coverage issue), mailed a letter to Edwin Robinson denying coverage and a defense with regard to acts, conduct or omissions on the part of Muse "in stealing premium dollars intended for insurers that has caused policy cancellations and potentially left

[35] 643 So.2d at 1216
[36] Shelby Steel Fabricators, Inc. v. United States Fidelity & Guaranty Ins. Comp. 569 So.2d 309 - 311 (Ala. 1990)
[37] I Allen D. Windt Insurance Claims and Disputes, Section 2:19, note 15 I t
[38] [Doc. No. 192-1, p. 15. Depo. Of Edwin Robinson].

insured's absent coverage."

On page 6 of said letter, Fagan stated:

> Landmark reserves all rights and defenses under the Landmark Policy and/or available at law, including without limitation the right to disclaim coverage or issue a reservation of rights in connection with this matter based on its receipts, discovery or procurement of additional information or documents. Landmark specifically reserves the right to amend or supplement this letter and its coverage position as set forth herein.[39]

In its Reply,[40] Insurance Unlimited argues there was not a reservation of rights letter, but simply a premature denial of coverage and duty to defend without conducting an investigation into the issues.

A reservation of rights letter serves two important purposes. First, a reservation of rights letter puts the insured on notice that its interests and the insurer's interests are not necessarily aligned and that the insured may potentially be exposed to personal liability. Second, it inoculates the insurer against allegations that it has waived coverage defenses or is estopped from asserting them by controlling the insured's defense.[41]

A reservation of rights letter must be timely made and must fairly or adequately inform the insured of the insurance company's coverage position.[42] Courts generally hold that "bare notice" of the insured's reservation of rights will not preserve the insurer's coverage defense.[43] It appears to this Court that Landmark sent both a "bare bones" and a detailed reservation of rights letter. However, that is not the end of the inquiry.

If a reservation of rights creates a conflict of interest, the insurer must specifically alert

[39] [Doc. No. 168-3, p. 40-47].
[40] [Doc. No. 203, p. 7].
[41] Reconnoitering Reservations of Rights in Liability Insurance, Douglas R. Richmond, Tort Trial & Insurance Practice+ Law Journal, Fall 2015.
[42] Id.
[43] Id; Standard Mutual Ins. Co. v. Lay, N.E. 2d 591, 596 (Ill. 2013).

the insured to the conflict.[44]

What Insurance Unlimited is claiming was improper here was assigning Hellmers to meet with Insurance Unlimited without Insurance Unlimited being aware that Hellmers was not actually assigned to represent them and/or that Hellmers was reporting what Eddie Robinson said directly back to Landmark. Insurance Unlimited representative Eddie Robinson states he believed Hellmers was appointed by Landmark as Insurance Unlimited's attorney and did not know Hellmers was reporting their conversation to Landmark.[45] Lange, who was the Landmark adjuster who contacted Hellmers about meeting with Robinson, testified that he did not appoint Hellmers to represent Insurance Unlimited before Landmark denied coverage.[46] Lange also testified he forwarded the information that was reported to him by Hellmers to counsel representing Landmark on the coverage issue.[47] Lange also testified that Hellmers was not paid by Landmark for Hellmers' time (regarding conversations and meeting with Robinson), and that Hellmers was "doing a favor" for Landmark in speaking to Robinson.[48]

At this point, the facts are clear about what Hellmers says about his meeting and discussions with Robinson/Insurance Unlimited.[49]

*Steptore* based its decision on waiver principles because the insurer did not reserve its rights. However, the court was clearly concerned about conflict of interest issues when it stated:

> Waiver principles are applied stringently to uphold the protection against conflicts of interest between the insurer and the insured which could potentially affect legal representation in order to rectify the role of the lawyer as the legal advocate of the client's interest.[50]

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[44] Id; Id
[45] Affidavit of Eddie Robinson [Doc. No. 161-2].
[46] Deposition of Landmark and Lange [Doc. No. 168-3].
[47] Id.
[48] Id.
[49] This statement is not to be construed that this Court believes discovery with regard to Edwin is permitted or not permitted. That issue will need to be decided through the normal discovery process.
[50] 643 So.2d at 1216

Therefore, this Court believes there is a material issue of fact whether the actions of Landmark with regard to its assignment of Hellmers to meet with Robinson has resulted in a waiver of its coverage defense.

**D. Estoppel**

This Court also believes there is a material issue of fact whether Landmark is estopped from raising its coverage defenses because of its actions with regard to its assignment of Hellmers to meet with Robinson. Estoppel requires an inducement or misrepresentation by the party against whom the destruction is asserted. The injured party must also be prejudiced by the actions.

Courts in many parts of the country have used the doctrine of estoppel to estop an insurer from denying coverage if the insured is prejudiced by the insured's conduct.[51] Normally, the cases involve the factors of the insured to reserve its rights, or to reserve its rights adequately or timely. The argument for prejudice is stronger when there is a conflict of interest that entitles the insured to independent counsel.[52]

In *Luther v. IOM Co., LLC*, 130 So.3d 817 (La. 2013), the court discussed the doctrine of equitable estoppel (detrimental reliance) under Louisiana Civil Code article 1967. To establish detrimental reliance, a party must prove three elements by a preponderance of the evidence: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance. The court noted that estoppels are not favored in the law and therefore, a party seeking to establish equitable estoppel must prove all of the essential elements.

[51] Founders Ins. Co. v. Oliving, 894 N.C. 2d 486, 592 (Ind. Ct. App. 2018); Brees v. St. Paul Mercury Ins. Co., 845 N.W. 2d 525, 535 (N.W. Co.) and Paradigm Ins. Co. v. IOC Prinnard Corp. 942 S.W. La. 645, cases (In. App. 1999).

[52] United States Fidelity & Guar. Co. v. N.Y. Susquehanna & W. Ry. Co., 713 N.Y.S. 2d 624 (N.Y. App. Div. 2000)

The court found equitable estoppel did not apply under the facts of this case.

As previously discussed, the Louisiana Supreme Court in *Steptore* used the doctrine of waiver, rather than equitable estoppel, in finding the insurer had waived its right to deny coverage. In contrast to equitable estoppel, waiver requires an existing right, a knowledge of its existence and an intent to relinquish it or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. Although similar, waiver and equitable estoppel are not the same. Equitable estoppel has been applied in Louisiana to bar the insurer from raising coverage defenses.[53]

Insurance Unlimited has set forth sufficient facts to create a material issue of fact about whether Landmark is barred by equitable estoppel and/or waiver from asserting its coverage defenses in this case. Lange contracted Hellmers to meet with Robinson of Insurance Unlimited. Robinson states Lange told him Landmark would contact a local lawyer to "help" Insurance Unlimited.[54] When Lange first emailed Hellmers,[55] Lange told Hellmers: "They need counsel to advise them and formulate a plan to handle insurance claims when denied by the carriers."

After talking with Robinson by phone, Hellmers continued to email Lange about the specifics of the conversations Hellmers had with Robinson.[56] In the email, Hellmers told Lange that Robinson did not know at that point what Muse had done with the money, and of four (4) additional policies that were either cancelled or never bound because of premium diversion.

After receiving this information from Hellmers, Lange forwarded this information to

[53] Cucini Ltd. v. Argument Equip. Cont. Ins. Co. 889 So.2d 1984 (La. 5th. Cir.).
[54] Affidavit of Edwin Robinson [Doc. No. 168-5, para. 22].
[55] [Depo. Of Landmark and Lange Doc. No. 168-3, Exh 7].
[56] Id. [Doc. No. 168-3. Exh. 11].

George Fagan, Landmark's counsel handling the coverage determination.[57] On the afternoon of September 4, 2020 (the same day that Hellmers email was received), Fagan sent an email letter to Robinson denying coverage for all claims involving Muse "stealing premium dollars intended for insured."[58] Later, it was determined that the September 4, 2020, letter applied to both theft and non-theft claims.[59] Robinson testified he was unaware Hellmers was reporting to Landmark about their conversations and believed Hellmers was acting as Insurance Unlimited's counsel.[60] Because Insurance Unlimited was claiming there was coverage on the non-theft claims due to Muse's negligence, (rather than theft), Hellmers' disclosure to Lange that Robinson had told Hellmers that Robinson did not know what Muse had done with the premiums could have prejudiced Insurance Unlimited due to Landmark's complete denial of coverage letter, which was sent the same day.

This Court believes there are material issues of fact which must be decided by the trier of fact whether Landmark has waived and/or is equitably estopped from raising its coverage defenses.

## III. CONCLUSION

For the reasons set forth herein, the Motion for Partial Summary Judgment on the Issue of Waiver of Coverage Defenses [Doc. No. 168] filed by Insurance Unlimited is **DENIED**.

**MONROE, LOUISIANA**, this 29th day of April 2022.

**TERRY A. DOUGHTY**
**UNITED STATES DISTRICT JUDGE**

[57] Remarks of Landmarks and Lange [Doc. No. 168-3, Exh 11].
[58] Deposition of Landmark and Lange [Doc. No. 168-3, Exh.11].
[59] Id, [Doc. No. 168-3, Exh. 16].
[60] Affidavit of Edwin Robinson [Doc. No. 168-5].