UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

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 Summary Judgment and/or Motion for Partial Summary Judgment[1] [Doc. No. 169] filed by Defendant Insurance Unlimited of Louisiana, LLC ("Insurance Unlimited"). An Opposition [Doc. No. 191] was filed by Plaintiff Landmark American Insurance Company ("Landmark") on April 18, 2022. A Reply [Doc. No. 204] was filed by IU on April 25, 2022.

For the reasons set forth herein, Insurance Unlimited' s Motion for Summary Judgment and/or Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

The issue in this Motion is whether the Landmark policy provides coverage and/or a duty to defends IU.

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 Baton Rouge, Louisiana. Insurance Unlimited obtains and maintains insurance coverage for

[1] Related to the issues in this motion are other motions filed by Landmark [Doc. No. 172, 173, and 174].

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 ("theft claims"), and that some of the losses of insurance coverages ("non-theft claims") 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 various exclusions in its policy, its policy does not provide coverage for the losses, and/or that

[2] Affidavit of Edwin Robinson [Doc. No. 168-2].
[3] Id.
[4] Id.
[5] Professional Liability Insurance Policy Number LHR780740, [Doc. No. 191-1].
[6] [Doc. No. 1-2].
[7] [Doc. No. 172, 173 and 174].

Landmark does not have a duty to defend Insurance Unlimited.

Landmark denied coverage and denied a defense to Insurance Unlimited by a September 3, 2020 letter, which was delivered to Insurance Unlimited owner Eddie Robinson by email on September 4, 2020, less than two days after the claim by Insurance Unlimited was reported.

This ruling addresses the coverage issues and duty to defend issue. The specifics of the policy language will be discussed in detail herein, but Landmark alleges the policy does not provide coverage because:

1. No "claim" was made under the policy;

2. Exclusion (A) applies (dishonest, fraudulent, criminal, intentionally wrongful or malicious act, error or omission committed by any Insured);

3. Exclusion (O) applies (commingling, conversion, misappropriation, or defalcation of funds);

4. Exclusion (G) applies (an obligation or liability assumed by the Insured);

5. Exclusion (I) applies (breach of an express or implied warranty or guaranty);

6. Exclusion (J) applies (an act, error or omission or circumstance likely to give rise to a claim that an Insured had knowledge of prior to the effective date of the policy);

7. Duty to Defend. (Landmark maintains since there is no coverage under the policy, there is also no duty to defend Insurance Unlimited).

The policy at issue[8] is a Professional Liability Insurance policy, Policy Number LHR780740 issued by Landmark to Insurance Unlimited from February 12, 2020, to February 12, 2021. The named insured is Insurance Unlimited of LA, LLC, with liability limits of $4,000,000.00 and with a $25,000.00 deductible. The policy is a claims-made and reported policy.

Under Part 1 of the Insuring Agreement, the covered services are described:

[8] [Doc. No. 191-1].

> The Company will pay on behalf of the Insured as shown in the Declarations, all sums that the Insured becomes legally obligated to pay as **Damages** and associated **Claim Expenses** arising out of a negligent act, error or omission, **Advertising Liability** or **Personal Injury**, even if the **Claim** asserted is groundless, false or fraudulent, in the rendering of or failure to render professional services for others in the **Insured's** capacity as an **Insurance Agent and Broker**.

II. LAW AND ANALYSIS

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." *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. Was a "Claim" Made?

The Declarations Page of the Landmark policy states "This is a Claims-made and reported policy." Part I. A. of the Insuring Agreement requires that the:

> 1. **Claim** is first made against the Insured during the **Policy Period** and reported to the Company no later than sixty (60) days after the end of the **Policy Period**.[9]

[9] [Doc. No. 191-1 p. 8].

A "claim" is defined under Part III of the Definitions portion of the policy as:

> **D. Claim** means a written demand for monetary or non-monetary relief received by the insured during the **Policy Period**, including the service of suit, or the institution of an arbitration proceeding. Additionally, **Claims** that arise from an incident, occurrence or offense first reported by the Insured during the **Policy Period** and accepted by the Company in accordance with **Part IV. A. Notice of Claim** will be considered a **Claim** first made during the **Policy Period.**[10]

This Court believes "claims" were made in accordance with the Landmark policy. Landmark argues the losses the customers reported to Insurance Unlimited were not claims. The Affidavit of Paul Lanier[11] ("Lanier") documents the large sums of money paid to and on behalf of Insurance Unlimited customers and actual settlements made with ten (10) different Insurance Unlimited customers.

The claims of each of these customers was investigated by Insurance Unlimited Office Manager Shelley Young ("Young"). Young's Affidavit[12] stated she reviewed Insurance Unlimited's business records to determine the claims of customers that said they had relied on Valerie Muse ("Muse") to obtain coverage for them. Her investigation was to make a decision, whether the customers had a reasonable claim for coverage. Young relied upon customer statements and Insurance Unlimited's business records.

Young documented the claims of Clarence Thibodeaux, Sam's Residential, LLC, Gloria Robinson, Chanel Esters, Harold Iles, Christina Landry, Heidi and Casey LeBlanc, Dalbert Leday, Manick Investments, LLC, Karl Martin, Walter Somers, and Michael Willis. Young states that each of the Insurance Unlimited customers identified, i.e., "made claims", against

[10] [Doc. No. 191-1, pp. 12-13].
[11] [Doc. No. 169-9].
[12] [Doc. No. 169-2, pp. 1-14].

Insurance Unlimited for failing to procure property insurance for them that would have indemnified the customers for their property damage caused by Hurricanes Laura and Delta.

The claims of Clarence Thibodeaux, Dalbert Leday, Gloria Robinson, Casey and Heidi LeBlanc, Karl Martin, Michael Willis, Walter Somers, Harold Iles, and Chanel Esters were settled, and each signed Releases.[13] Paragraph 2 of each of the Releases states:

> 2 I have made a claim against Insurance Unlimited of Louisiana, LLC for failing to insure my property.

The written claims are verified in the Releases. Additionally, many of the customers retained attorneys who sent letters on behalf of the customers making claims.

All of the Insurance Unlimited customers were named as defendants in this lawsuit by Landmark. The "service of a suit" is a claim under the Landmark policy. The customers making claims did not have to file a suit. Landmark did it for them.

Notice of these claims by Landmark is certainly not an issue in this case. Insurance Unlimited found out about what Muse had done on September 1, 2020. Insurance Unlimited notified its broker, Independent Insurance Agents and Brokers of Louisiana ("IIABL") on September 2, 2020.[14] IIABL notified Landmark. By the afternoon of September 4, 2020, Landmark had denied both coverage and a defense to Insurance Unlimited.[15] Landmark filed its Complaint for Declaratory Judgment and Interpleader, naming Insurance Unlimited and reporting the customers making claims on September 25, 2020, less than one month after it had been notified of the claim.

[13] Copies of the Releases are attached as exhibits [Doc. No. 169-2, pp. 355-62, 364-65]; [Doc. No. 169-3, p. 76]; [Doc. No. 169-6, p.64]; [Doc. No. 169-6, p 96]; [Doc. No. 169-6, pp. 114, 184, 290-292]; and [Doc. No. 169-7, pp. 107-08].
[14] Affidavit of Edwin Robinson [Doc. No. 168-2].
[15] Deposition of Landmark and Lange. [Doc. No. 168-3]

If all of that were not enough, as detailed herein in II. G., Chanel Esters filed a Class Action on behalf of herself and the other claimants [Doc. No. 18], Insurance Unlimited filed a Counterclaim against Landmark for itself, and, for the amounts it paid to settle claims [Doc. No. 82], and other Counterclaims were filed against Landmark by Sandra LeBlanc and Sam's Residential [Doc. No. 29], Harold Iles [Doc. No. 35], Chanel Esters [Doc. No. 71], Manick Investments, LLC [Doc. No. 86] and Christina Landry [Doc. No. 97].

C. Exclusion A

Exclusion A in the Landmark Policy states:

> This policy does not apply to any **Claim** or **Claim Expenses** based upon or arising out of:
>
> A. Actual dishonest, fraudulent, criminal, intentionally wrongful or malicious act, error, or omission committed by any insured. However, this Exclusion shall not apply unless the dishonest, fraudulent, criminal, intentionally wrongful or malicious act, error, or omission is established or proven by:
>
> 1. an admission by any insured; or
>
> 2. a finding, determination, or ruling order or judgment in a judicial, administrative or arbitration proceeding.
>
> However, nothing in the foregoing shall exclude coverage for any other insured who has neither ratified, nor participated in committing, nor personally acquiesced in, nor remained passive after having personal knowledge of such act or omission. [Doc. No. 191, p.10]

Insurance Unlimited maintains that the "innocent insured" language in this exclusion provides coverage for Insurance Unlimited. Landmark argues that the "innocent insured" portion of the exclusion does not apply because Insurance Unlimited ratified, participated, acquiesced, or remained passive after having personal knowledge of Muse's actions.

The last paragraph (the "innocent insured" language) means that the exclusion for dishonest, fraudulent, criminal, intentionally wrongful or malicious act, error, or omission DOES

NOT APPLY to exclude coverage for any other insured who has neither ratified, nor participated in committing, nor personally acquiesced in, nor remained passive after having personal knowledge of such act or omission.

Landmark argues that Insurance Unlimited is not an "innocent insured" because of prior substance abuse issues by Muse, because Muse had been charged with issuing worthless checks at the time she was hired, because Muse repeatedly advanced Insurance Unlimited customer premium payments from Insurance Unlimited's bank account prior to the customer paying Insurance Unlimited, and because Muse had been accused in 2015 of stealing cash paid Insurance Unlimited for insurance premiums.

Despite the issues Muse had, the policy language in the "innocent insured" provision requires "personal knowledge" of the act or omission, ratification, actual participation or acquiescing in the act. No evidence has been presented that Insurance Unlimited did any of these things. The standard to meet the "innocent insured" exception is not negligence. Affidavits from Edwin Robinson[16], Paul Lanier[17], Craig Martel[18], and Shelby Young[19] show Insurance Unlimited had no knowledge that Muse had stolen the premiums until September 1, 2020. Muse was fired, and her actions were reported to the Calcasieu Parish Sheriff's Office for prosecution.

Exclusion A does not exclude coverage to Insurance Unlimited.

[16] Second Affidavit of Edwin Robinson [Doc. No. 169-10].
[17] Affidavit of Paul Lanier [Doc. No. 169-9].
[18] Affidavit of Craig Martel [Doc. No. 169-3].
[19] Affidavit of Shelby Young [Doc. No. 169-2].

D. Exclusion O

Exclusion O in the Landmark policy states:

> O. Commingling, conversion, misappropriation or defalcation of funds or other property, or the inability or failure to pay, collect, disburse, or safeguard any funds held by an Insured.[20]

Louisiana courts analyze insurance policies like any other contract, that is, according to the parties' intent as expressed in the words of the policy. If the words of the insurance policy are clear and explicit and do not lead to absurd consequences, no further interpretation may be made in search of the intent of the parties, and the insurance contract must be enforced as written.[21]

In ascertaining the common intent of the insured and insurer, courts begin their analysis with a review of the words in the insurance contract. Words in an insurance contract must be ascribed their generally prevailing meaning unless the words have acquired a technical meaning, in which case the words must be ascribed their technical meaning.[22] Unambiguous provisions limiting liability must be given effect.[23] An insurance contract is construed as a whole, and each provision in the contract must be interpreted in light of the other provisions.[24]

Insurance policies are liberally construed in favor of coverage, and exceptions to coverage are strictly construed against the insurer. The insurer has the burden of proving that a policy exclusion precludes recovery.[25]

Insurance Unlimited argues Exclusion O does not apply because, when compared with the "Covered Services" provided under the policy, (damages arising out of a negligent act, error,

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[20] [Doc. No. 191-1, p. 11].
[21] *Pioneer Expl., LLC v. Steadfast Ins. Co*., 767 F.3d 503, 512 (5th Cir. 2014).
[22] *Succession of Fannaly v. Lafayette Ins. Co.,* 805 So.2d 1134, 1137-8 (La. 2002).
[23] *Anton, Ltd. v. Colony Ins. Co.,* 77 So.3d 417, 421 (La. App. 5th Cir. 2011).
[24] *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 420 (La. 1988).
[25] *Reynolds v. Select Properties, Ltd.*, 634 So. 2d 1180, 1183 (La. 1994).

or omission), the exclusion cannot exclude negligent acts. Insurance Unlimited further argues there is inconsistency when Exclusions (A) and (O) are read together. Additionally, Insurance Unlimited argues Exclusion O does not apply because it must involve "funds held by an Insured" and that the funds were never "held" by Insurance Unlimited.

Landmark contends Exclusion (O) is clear and unambiguous, does not conflict with Exclusion (A), and excludes coverage in this case.

This Court believes Exclusion (O) applies to "theft claims," but not to the "non-theft claims." In other words, Exclusion (O) does NOT exclude the claims of Clarence Thibodeaux, Sam's Residential, LLC, Manick Investments, LLC, and Gloria Robinson. The provision is clear and unambiguous and DOES apply to the "theft claims" in which Muse actually misappropriated customer premiums. This would include the claims of Chanel Esters, Harold Iles, Christina Landry, Heidi and Casey LeBlanc, Dalbert Leday, Karl Martin, Walter Somers, and Michael Willis.[26]

As to Insurance Unlimited's argument that the funds are required to be "held by an Insured," Muse was an employee of Insurance Unlimited, and in accordance with the Landmark policy terms, was an "insured."[27] Exclusion (O) clearly excludes Muse's conversion, misappropriation, or defalcation of customer funds.

To clarify this Court's opinion as to the effect of this ruling in light of its ruling in [Doc. No. 208] (material issues of fact regarding waiver and/or estoppel of Landmark's coverage defenses), the Court intends that the trier of fact will determine whether Landmark has waived or is estopped from asserting coverage defenses. If the trier of fact determines that Landmark has waived, or is estopped from asserting policy defenses, Landmark will not be able to assert

[26] See Affidavit of Shelby Young [Doc. No. 169-2, p. 1-14].
[27] [Doc. No. 191-1, p. 9].

Exclusion (O). However, if the trier of fact determines that Landmark has not waived or is not estopped from asserting its policy defenses, Landmark will be able to assert Exclusion (O) to the "theft claims."

Another issue that needs to be discussed is whether there exist material issues of fact regarding "theft claims" and "non-theft claims." Normally, intent would be a material issue of fact. However, Muse confessed to stealing customer funds, and the evidence presented in the Affidavit of Shelley Young[28], Paul Lanier[29], Craig Martel[30], and Edwin Robinson[31] are sufficient to differentiate between "theft claims" and "non-theft claims."

Therefore, this Court believes there are no material issues of fact on this coverage issue, and it can be decided by summary judgment as to the "theft claims" vs. "non-theft claims."

E. Exclusion G; Part I.B.

Exclusion G in the Landmark policy reads:

> **G.** Any obligation or liability assumed by the insured under any contract or any oral or written agreement, unless liability would have attached in the absence of such a contract or agreement. This **Exclusion** does not apply to any liability the insured assumes under any formal written standard agency or brokerage agreement to indemnify any insurance carrier whom the insured represents for any **Claim** or **Claims Expenses** the insurance carrier incurs solely and exclusively due to the negligent acts, errors, omissions, **Personal Injury** or **Advertising Liability** committed by an insured, or by any other person or entity for whom the insured is legally liable.[32]

Part I. B. in the Landmark policy in pertinent part reads:

> The Company shall not settle any **Claim** without the Insured's written consent. The insured shall not admit any liability for or settle any **Claim** or incur any costs, charges, or expenses without the written consent of the Company.

[28] [Doc. No. 169-2].
[29] [Doc. No. 169-9].
[30] [Doc. No. 169-3].
[31] [Doc. No. 168-2].
[32] Landmark Policy [Doc. No. 191-1, p. 11].

Insurance Unlimited admittedly settled the claims of Clarence Thibodeaux, Dalbert Leday, Gloria Robinson, Casey and Heidi LeBlanc, Karl Martin, Michael Willis, Walter Somers, Harold Iles, and Chanel Esters.[33] Additionally, Insurance Unlimited paid additional amounts to its customers and/or their respective contractors and/or field adjusters for property damage caused by Hurricanes Laura and Delta.[34]

Insurance Unlimited attempted to obtain consent from Landmark prior to paying these claims.[35] However, Landmark responded as follows:

> Because the Landmark Policy provides no coverage for the IU-LA customers' claims, Landmark has no "authority" to give IU-LA. Whether to advance expenses to IU-LA Customers is IU-LA's decision, but Landmark will not reimburse any expenses advanced or paid by IU-LA to the IU-LA customers, because their claims are not covered by the Landmark Policy.[36]

Landmark refused to consent to payments by Insurance Unlimited to its customers. The policy exclusion is clear, but does it apply when the insurer has denied coverage and defense? It does not. In *Thomas W. Hooley & Sons v. Zurich General Acc. & Liability Ins. Co.*, 103 So.2d 449 (La. 1958), the Louisiana Supreme Court dealt with this situation. In *Hooley*, the insurer denied both coverage and defense to its insured. The insured repaired the property with the agreement of the Claimant, and then sought indemnity for the insurer. Like Landmark, the insurer sought to evade liability based upon grounds similar to the one used by Landmark, which prohibited the insured from voluntarily settling or paying claims prior to final judgment. The Louisiana Supreme Court stated:

> … by the mere denial of the insurer to its insured of any liability under the insurance policy for the damages claimed by a third person, the

[33] Affidavit of Paul Lanier [Doc. No. 169-9].
[34] Id.
[35] [Doc. No. 191, Exh. 6].
[36] Affidavit of Craig Martel [Doc. No. 169-3, p.8, para. 51, Exh. 92].

> insurer forfeits its right to claim the benefits of the "no action" clause, and the insured policyholder even in the absence of litigation may compromise the claim against him without prejudicing the right to recover from the insurer the amount of a reasonable and good faith settlement made by him. Especially when as here liability to the third person is unquestioned, and after a denial of coverage by the insurer the policy holder minimized the loss and avoids the expenses of litigation by a reasonable compromise, the insurer should be unable to claim that reimbursement to its insured of damages clearly covered by the insurance contract is barred by such compromise which was to the ultimate benefit of the insurer.[37]

Equity is certainly on Insurance Unlimited's side. Despite Landmark's denial of coverage and defense, Insurance Unlimited paid most of its customers' claims. Landmark refused to consent to Insurance Unlimited paying the claims. Had Insurance Unlimited not stepped up and personally paid its customers' claims, many customers may have been unable to fix their homes and property damaged by the hurricanes in 2020.

However, this issue is being determined based on the law, not equity. This Court believes Landmark has forfeited the right to pursue this exclusion due to denial of coverage and defense.

F. Exclusion (I) and (J)

Exclusions (I) and (J) of the Landmark policy read:

> **I. Breach of express or implied warranty or guarantee.**[38]
>
> **J.** An alleged act, error, omission, **Advertising Liability** or **Personal Injury**, or circumstance likely to give rise to a **Claim** that an insured had knowledge of prior to the effective date of this policy, or the effective date of any policy issued by the Company to which this policy is a continuous renewal or replacement. This exclusion includes, but is not limited to any prior **Claim** or possible **Claim** referenced in the insured's application.[39]

[37] 103 So.2d at 452-53.
[38] Landmark Policy [Doc. No. 191-1, p. 11].
[39] Id.

Landmark maintains that Muse made a breach of express or implied warranty or guarantee by assuring customers of Insurance Unlimited that they had insurance coverage for their properties when they did not, in violation of Exclusion (I). As to Exclusion (J), Landmark argues that Insurance Unlimited should have known when the policy was renewed on February 12, 2020, of what Muse was going to do.

There is no evidence to show that Muse was aware she was going to steal client funds when the policy was renewed in February 2020. There also is no evidence that Insurance Unlimited was aware of it. Therefore, Exclusion (J) is inapplicable.

Exclusion (I) requires there be a breach of an express or implied warranty or guarantee. This does not apply to Insurance Unlimited as there is no evidence of this. Muse certainly made it look as if the customers had insurance when they did not, but even if there were a potential claim for Muse guaranteeing coverage, there are plenty of facts supporting a claim against Muse stealing premiums and failing to get insurance, not a guarantee by her that they had it. None of the claims alleged that Muse guaranteed coverage, but instead the claims alleged she had taken premiums ("theft claims") and failed to renew or obtain insurance.

Therefore, neither Exclusion (I) or (J) provides relief for Landmark**.**

G. Duty to Defend

Part I. B. Defense and Settlement states, in pertinent part:

> The Company will have the right and duty to defend any **Claim** against an Insured seeking **Damages** to which this policy applies, even if any of the allegations of the **Claim** are groundless, false, or fraudulent.[40]

The duty to defend is generally broader than in insurer's liability for damage claims. An insurer's duty to defend brought against its insured is determined by the allegations of the injured

[40] Landmark Policy [Doc. No. 191-1, p.8].

plaintiff's petition, with the insured being obligated to furnish a defense unless the petition unambiguously excludes coverage.[41] If, assuming all the allegations of the petition to be true, there would be both (1) coverage under the policy and (2) liability to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit.[42]

While the duty to defend may exist in circumstances where it is apparent that there is no coverage, it is predicated on some possibility that the allegations, when supported by competent evidence, can be proven.[43]

The issue of whether a liability insurer has the duty to defend a civil action against the insured is determined by application of the "eight corners rule," under which the insurer must look at the "four corners" of the plaintiff's petition and the "four corners" of the insured's policy to determine whether it owes that duty.[44]

The Court has already extensively examined the "four corners" of the Landmark policy and will now examine the "four corners" of the claimant's petitions. Because Landmark initially filed this suit against the Insurance Unlimited customers and Insurance Unlimited, the counterclaims of Insurance Unlimited and its customers will be examined.

Chanel Esters filed a Counterclaim and Crossclaim for Class Action Relief [Doc. No. 18] on October 14, 2020. In this pleading, Esters made a Class Action claim in accordance with FED. R. CIV. P. 23 on behalf of herself, Harold Iles, Casey and Heidi LeBlanc Sandra Le Blanc, Dalbert Leday, Karl Martin, Gloria Robinson, Robby Robinson, Sam's Residential LLC Walter Somers, Jr. Clarence Thibodeaux Isaac Willis Michael Willis, and all other customers of Insurance Unlimited who required and/or obtained policies of insurance through Insurance

[41] American Home Assur. Co. v. *Czarniecki*; 230 So.2d 253, 259 (La. 1969).
[42] Id. 230 So.2d at 259
[43] *Allstate Ins. Co. v. Roy*, 653 So.2d 1327, 1333 writ denied, (La. App. 1st Cir. 1995).
[44] *Lamar Advert. Co. v. Cont'l Cas. Co.*, 396 F.3d 654, 660 (5th Cir. 2005).

Unlimited, and whose insurance premium payments were not applied to the payment of premiums on their policies.[45]

Made Defendants-in-Crossclaim were Insurance Unlimited and Muse. Made Defendants-in-Counterclaim was Landmark. Against Insurance Unlimited and Muse, Esters alleged both negligent and intentional acts of Muse and negligent acts on Insurance Unlimited. Esters also alleged wrongful and/or negligent acts of Muse, which gave rise to claims against Landmark.[46]

In Count I, the Class alleged negligence of Muse; in Count II, the Class alleged the misapplication of funds by Muse; Count III alleged the negligence of Insurance Unlimited in hiring, training, etc., regarding Muse; and Count IV alleged the liability of Landmark.

In Insurance Unlimited's Counterclaim[47] against Landmark, Insurance Unlimited alleged negligence and/or failure to procure insurance by Muse with regard to Thibodeaux, Sam's Residential, Gloria Robinson and Manick Investments. Insurance Unlimited alleged Muse converted premiums to her own use with regard to Esters, Iles, Landry, LeBlancs, Leday, Martin, Somers, and Willis, but alleged Insurance Unlimited was negligent with regard to Muse. Insurance Unlimited also alleged it had paid many of these claims.

In paragraph 27, Insurance Unlimited specifically alleged the claims of Thibodeaux, Sam's Residential, Robinson, and Manic Investments were based upon the negligence of Muse and not upon conversion by Muse of customer premiums. Additionally, Insurance Unlimited alleged it was negligent in allowing its agents to take cash payments and/or failing to properly supervise Muse. Insurance Unlimited further alleged Landmark failed to defend Insurance Unlimited and/or indemnify and provide coverage to Insurance Unlimited.

[45] This Class Action was dismissed without prejudice on November 30, 2020 [Doc. No. 28].
[46] [Doc. No. 18, pp. 5-6].
[47] [Doc. No. 82].

Other allegations by Insurance Unlimited against Landmark are violation of La. R. 22:1973, violation of La. R.S. 22:1892, and penalties, attorney fees and costs. Also, Insurance Unlimited alleged [Doc. No. 169, ¶ 59] that Insurance Unlimited sought to obtain permission from Landmark for Insurance Unlimited to pay the customer claims, but that Landmark refused to consent.

Additionally, S. LeBlanc and Sam's Residential filed a Counterclaim against Landmark[48] also making claims of negligence on the part of Insurance Unlimited and Muse. Other Counterclaims against Landmark were filed by Harold Iles[49], Chanel Esters[50], Manick Investments, LLC[51], and Christina Landry[52].

Applying the law in examining the four corners of the Landmark policy and the four corners of the Crossclaims against Landmark, this Court is of the opinion that Landmark has violated its duty to defend Insurance Unlimited with regard to the "non-theft claims." This Court is also of the opinion that Landmark did not violate the duty to defend in regard to the "theft claims." Allegations by both Insurance Unlimited and the claimants, Thibodeaux, Sam's Residential, Gloria Robinson and Manick Investments all specifically alleged that Muse was negligent and did not commit theft of any premiums with regard to these claimants.

Landmark was made aware almost immediately that several of the claims involved negligence, not theft, on the part of Muse. However, by way of a September 3, 2020 letter[53] (which was emailed to Eddie Robinson on September 4, 2020), less than two days after

[48] [Doc. No. 29].
[49] [Doc. No. 35].
[50] [Doc. No. 71].
[51] [Doc. No. 86].
[52] [Doc. No. 97].
[53] Depo. Of Landmark and Lange [Doc. No. 168-3].

Landmark was made aware of any of these claims, Landmark completely denied coverage and defense for all claims, both "theft claims" and "non-theft claims."

In summary, this Court is of the opinion that Landmark violated its duty to defend Insurance Unlimited with regard to the "non-theft claims."[54] However, there was and is no duty by Landmark to defend Insurance Unlimited on the "theft claims,"[55] which involved Muse's conversion of premium payments she received on behalf of Insurance Unlimited customers.

III. CONCLUSION

For the reasons set forth herein,

IT IS ORDERED that the Motion for Summary Judgment and/or Motion for Partial Summary Judgment [Doc. No. 169] is **GRANTED** with regard to Insurance Unlimited's claims that Exclusions (A), (G), (I), and (J) do not bar Insurance Unlimited's claims against Landmark.

IT IS FURTHER ORDERED that Insurance Unlimited's claim that Exclusion (O) does not bar coverage as to Insurance Unlimited's claims against Landmark is **GRANTED IN PART** and **DENIED IN PART**.

It is **GRANTED** with regard to the "non-theft claims," which include the claims of Clarence Thibodeaux, Sam's Residential, LLC, Gloria Robinson and Manick Investments, LLC.

It is **DENIED** with regard to the "theft claims," which include the claims of Chanel Esters, Harold Iles, Christina Landry, Heidi and Casey LeBlanc, Dalbert Leday, Karl Martin, Walter Somers, and Michael Willis.

IT IS FURTHER ORDERED that Insurance Unlimited's claims that Landmark violated the duty to defend Insurance Unlimited is **GRANTED IN PART** and **DENIED IN PART**.

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[54] The "non-theft claims" include Clarence Thibodeaux, Sam's Residential, LLC, Gloria Robinson and Manick Investments, LLC.

[55] The "theft claims" involve Chanel Esters, Harold Iles, Christina Landry, Heidi and Casey LeBlanc, Dalbert Leday, Karl Martin, Walter Somers, and Michael Willis.

The Motion is **GRANTED** with regard to the above listed "non-theft claims."

The Motion is **DENIED** with regard to the above listed "theft claims."

MONROE, LOUISIANA, this 3rd day of May 2022.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE