IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

EVANSTON INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:15-CV-247 (MTT)**
	)	
SANDERSVILLE RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	

ORDER

In this declaratory judgment action, Plaintiff Evanston Insurance Company[1] seeks to determine its obligations to its insured—Defendant Sandersville Railroad Company—in relation to a FELA claim brought by its employee, John Flowers. Previously, the Court determined that the pollution exclusion in Evanston's policy barred coverage for Flowers's claim. Doc. 43. Evanston has again moved for summary judgment, this time seeking declarations that (a) based on the allegations of Flowers's complaint, it owed no duty to defend Sandersville Railroad and (b) based on an obligation created by its reservation of rights letters, it is entitled to recover expenses incurred in its defense of Flowers's lawsuit on behalf of Sandersville Railroad. Doc. 44 at 1. The Court concludes that Evanston has not shown as a matter of law that it did not owe Sandersville Railroad a duty to defend. The Court further concludes that Evanston has not shown as a matter of law that its reservation of rights letters obligated Sandersville Railroad to repay the defense costs. Accordingly, Evanston's motion is **DENIED**.

[1] The original plaintiff in this suit was Essex Insurance Company. Doc. 1. Evanston was substituted after Essex merged into Evanston on June 30, 2016. Docs. 36, 39, 40.

I. BACKGROUND

Sandersville Railroad purchased a comprehensive general liability (CGL) policy from Evanston that provides coverage for FELA.[2] Doc. 43 at 2-3. The policy has a standard pollution exclusion. *Id*. at 2.

On January 4, 2013, Flowers's attorney provided Sandersville Railroad with notice of a FELA claim, and on January 7, 2014, Flowers's attorney sent Sandersville Railroad a demand letter regarding the claim. Docs. 19-1 ¶ 16; 20-3 at 2; 23-2 ¶ 2. Sandersville Railroad notified Evanston of the claim, and Evanston sent a reservation of rights letter in April 2014. Doc. 20-3 at 2. In this letter, Evanston noted that Flowers was "making a claim for occupational illness from welding fume exposure during his employment at [Sandersville Railroad]"—namely that he had "contracted 'welder's lung' disease from occupational exposure to welding fumes while welding railroad cars owned by Sandersville Railroad." *Id*. at 2, 7. Evanston stated its position that the policy did not cover the claim because of the pollution exclusion and reserved its rights "as to whether the pollution exclusion applies to bar coverage for this claim," and "with respect to the investigation, settlement, and defense of the claim." *Id.* As to the latter, Evanston stated that "[u]pon exhaustion of [Sandersville Railroad's] self-insured retention, [Evanston] will pay the reasonable costs of defense for [Sandersville Railroad's] chosen defense counsel, subject to a reservation of rights to withdraw from providing the defense upon a determination that there is no coverage[,]" and subject to a reservation of "the right to reimbursement of costs paid if it establishes that it owes no coverage to [Sandersville Railroad]." *Id.* Evanston also reserved the right, should Flowers file suit, "to file a declaratory judgment action to obtain an adjudication that [Evanston] does not owe any defense or indemnity for the claims alleged." *Id.* The

[2] As a railroad, Sandersville Railroad is not subject to state workers' compensation laws. *See generally New York Cent. R. Co. v. Winfield*, 244 U.S. 147 (1917). Rather, its employees have the protection of the Federal Employees Liability Act (FELA), 45 U.S.C. § 51, *et seq*.

letter concluded by stating that neither Evanston nor Sandersville Railroad waived any rights under the policy or the law. *Id*. at 8. Sandersville Railroad did not object to this letter. *See* Doc. 46-1 ¶¶ 9-10. The parties agree that the policy itself does not give Evanston the right to recover defense costs. Doc. 19-1 ¶ 48.

On June 17, 2014, Flowers filed suit against Sandersville Railroad under FELA. Docs. 23-2 ¶ 9; 18-4; 20-4. In his complaint, Flowers alleged:

> In early 2012, [he] developed shortness of breath and was diagnosed with advanced lung disease. He was advised to avoid further exposure to workplace toxins, including welding fumes. As a result, [he] lost wages and benefits . . . suffered reduced earning capacity . . . sustained mental and physical pain and suffering and . . . [incurred] medical bills and other costs associated with his care and treatment.

Doc. 20-4 ¶ 5. Flowers alleged that Sandersville Railroad was negligent by failing to:

> provide a reasonably safe place to work . . . , by failing to provide him proper personal protective equipment in the form of adequate breathing protection; by failing to adequately ventilate the areas where Mr. Flowers was required to weld; by failing to promulgate and implement proper procedures and safeguards for Mr. Flowers [sic] proper breathing protection; by failing to properly warn and train Mr. Flowers of the dangers and signs of occupational lung disorders, and by failing to provide proper supervision.

Id. ¶ 6. Flowers further alleged that Sandersville Railroad's negligence "posed an unreasonable risk of illness and injury" and "caused or contributed, in whole or in part, to Mr. Flowers' injuries and damages as . . . alleged." *Id.* ¶ 7.

When Flowers filed his complaint, Evanston did not, by supplement to its reservation of rights letter or otherwise, address whether, based on the allegations of the complaint, it owed Sandersville Railroad a duty to defend. *See generally* Doc. 23-2 ¶¶ 4-15 (outlining history of Evanston's reservation of rights).

After Sandersville Railroad exhausted its self-insured retention in early 2015, it tendered the defense of the lawsuit to Evanston. Docs. 19-1 ¶¶ 44-45; 23-2 ¶ 13. Evanston did not, as Georgia law allows, seek a stay of Flowers's lawsuit so that it

could seek declaratory relief determining whether its policy covered the Flowers claim or whether it was obligated to defend Sandersville Railroad.[3] Rather, on May 18, 2015, Evanston issued a second reservation of rights letter. Docs. 20-5; 23-2 ¶ 14.

It is clear that Evanston's second letter was, subject to a very few changes, a "cut-and-paste" of the first. The letters each contained an introduction and four sections: Section I. *Factual Background*; Section II. *Policy Details*; Section III. *Reservation of Rights*; and Section IV. *Conclusion*. In its introduction and Section I. *Factual Background*, the second letter added to the first that it was "a supplemental bilateral reservation of rights with respect to coverage issues on this claim," noting the first letter was sent in April of 2014. Doc. 20-5 at 2. Otherwise, the second letter provided less factual background regarding Flowers's claim than the first. While the first letter provided a few sentences describing the claims made by Flowers's attorney in his initial demand letter on Flowers's behalf, this information was omitted, without replacement, in the second letter. *Compare* Doc. 20-3 at 2 *with* Doc. 20-5 at 2. Although the second letter stated that Evanston's adjuster had been "advised" that a lawsuit had been filed, the letter made no mention of Flowers's complaint or any particular allegation of the complaint. Doc. 20-5 at 2.

[3] Of course, this Court could not stay Flowers's state court action. 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."); *Pac. Indem. Co. v. Acel Delivery Serv., Inc.*, 432 F.2d 952, 955 (5th Cir. 1970) (rejecting, pursuant to 28 U.S.C. § 2283, insurer's request for stay of state court action against insured during pendency of insurer's declaratory judgment action to determine coverage); *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent decisions of former Fifth Circuit rendered prior to October 1, 1981). But an insurer's right to enjoin an action pending resolution of coverage issues is well-established under Georgia law. *See, e.g.*, *Yost v. Se. Fid. Ins. Co.*, 255 Ga. 179, 179, 336 S.E.2d 248, 249 (1985) (holding that superior court did not abuse its discretion in staying underlying action during pendency of declaratory judgment action); *see also Facility Invs., LP v. Homeland Ins. Co. of N.Y.*, 321 Ga. App. 103, 109-10, 741 S.E.2d 228, 233-34 (2013) (noting that once an insurer learns of grounds for noncoverage, it may either deny coverage or file a declaratory judgment action).

Section II. *Policy Details* was identical, word-for-word, in the two letters, though it should not have been. *Compare* Doc. 20-3 at 3-6 *with* Doc. 20-5 at 3-6. Due to Evanston's cut-and-paste drafting, the second letter replicated coverage provision A.1.a.(1)—addressing defense obligations prior to the exhaustion of Sandersville Railroad's self-insured retention—from the first letter, instead of substituting the then-applicable coverage provision A.1.a.(2)—addressing defense obligations after the exhaustion of Sandersville Railroad's self-insured retention. *Compare* Doc. 20-3 at 3-6 *with* Doc. 20-5 at 3-6. *See also generally* Doc. 18-3 at 18 (relevant policy provision). Accordingly, the policy provision stating Evanston's defense obligations following the exhaustion of the self-insured retention was never mentioned in the letter.

Section III. *Reservation of Rights*, as in the first letter, contained the following subsections: A. *Applicable Policy*; B. *Pollution Exclusion*; C. *Investigation*, *Settlement and Defense of the Claim*; D. *Reimbursement of Defense Costs*; E. *Declaratory Judgment Action*; and F. *Other Insurance*. Of these, A. *Applicable Policy*; C. *Investigation*, *Settlement and Defense of the Claim*; D. *Reimbursement of Defense Costs*; and F. *Other Insurance* were identical in the two letters. *Compare* Doc. 20-3 at 6-7 *with* Doc. 20-5 at 6-7. Evanston changed a few phrases of B. *Pollution Exclusion* in the second letter—"his attorney alleges" was replaced with "he alleges," "this claim is under investigation" was omitted, and "however" was omitted—otherwise it was identical to the first letter. *Compare* Doc. 20-3 at 6 *with* Doc. 20-5 at 6-7. Evanston omitted "if and when the claimant files a lawsuit against the insured" from E. *Declaratory Judgment Action* in the second letter, but otherwise it, too, was identical to the first letter. *Compare* Doc. 20-3 at 7 *with* Doc. 20-5 at 7. Evanston added to the second letter a subsection—G. *Cooperation and Consent*—describing the duties of Sandersville Railroad to inform and cooperate with Evanston in the defense of the suit, as well as reserving Evanston's rights "in respect to Sandersville Railroad's compliance with the conditions of the policy." *Compare* Doc. 20-3 at 7-8 *with* Doc. 20-5 at 7-8. Lastly,

Section IV. *Conclusion* was identical in the two letters. *Compare* Doc. 20-3 at 8 *with* Doc. 20-5 at 8.

In short, the second letter, sent after the filing of Flowers's complaint and accordingly representing Evanston's first opportunity to address whether it owed Sandersville Railroad a duty to defend based on the allegations of Flowers's complaint, did not recognize this in any fashion, either by describing allegations of the complaint or explaining why they did not implicate a duty to defend by Evanston. Rather, all of the operative reservation or rights language and facts in the second letter mirrored the first letter, which, being sent before Flowers filed his complaint, could not address any duty to defend. As with the first letter, Sandersville Railroad did not object to the second letter. *See* Doc. 46-1 ¶¶ 9-10.

On June 24, 2015, Evanston filed this declaratory judgment action seeking a determination that its policy did not provide coverage for Flowers's lawsuit and that it was entitled to recoup any defense costs paid in regard to the lawsuit. Doc. 1. Sandersville Railroad settled with Flowers with no contribution from Evanston on November 20, 2015. Doc. 19-1 ¶ 51. The parties thereafter filed cross motions for summary judgment in this action. Docs. 18; 20.

The Court, in its September 28, 2016 Order (Doc. 43), granted Evanston's motion in part, ruling that Evanston had no duty to indemnify Sandersville Railroad and no further duty to defend against the action. Doc. 43 at 20. By the time the parties filed their cross-motions for summary judgment in this action, it was undisputed that Flowers claimed that he suffered from siderosis, or "welders' lung," and that his occupational lung disease was caused by exposure to welding fumes containing iron. Doc. 23-2 ¶ 1. But these facts were not alleged in Flowers's complaint. Doc. 23-2 ¶ 11 (Sandersville Railroad's response to Evanston's statement of material facts, clarifying this point); *see generally* Doc. 20-4. The Court ruled that "based on the summary judgment record, the pollution exclusion" in the policy excluded coverage for Flowers's lawsuit. *Id*. As the

Court noted then: "The relevant facts . . . *significantly*, are not limited to the allegations of the Flowers complaint. Rather, the parties have put additional facts in the record to assist in the determination of whether Evanston's pollution exclusion excludes coverage for Flowers's claims." *Id*. at 2 (emphasis added). The Court denied summary judgment on the parties' cross motions regarding Evanston's attempt to recoup its defense costs, noting that the parties failed to address whether Evanston had a duty to defend based on the allegations of Flowers's complaint.[4] *Id*. at 20-23. The Court stated that "[t]he parties may renew their motions for summary judgment on these issues by way of motions filed with briefs addressing these remaining issues." *Id*. at 23.

Evanston has now moved for summary judgment "[a]s to Count 1," that "Evanston owed no duty to defend Defendant Sandersville Railroad Company for Mr. John Larry Flowers' Complaint against Sandersville Railroad Company," and "[a]s to Count 3," that "Evanston is entitled to reimbursement from Defendant Sandersville Railroad Company for all defense fees and costs paid in connection with" Flowers's lawsuit. Doc. 44 at 1.

II. STANDARD OF REVIEW

A court shall grant summary judgment "if the movant 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 factual dispute is genuine only if 'a reasonable jury could return a verdict for the nonmoving party.'" *Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002) (quoting *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991)). The burden rests with the moving party to prove that no genuine issue of material fact exists. *Id.* The party may support its assertion that a fact is undisputed by "citing to particular parts of materials in the

[4] At a hearing held to determine the parties' positions on the subject, Evanston conceded that it cannot recoup its defense costs if it had a duty to defend. *See* Doc. 43 at 22.

record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A).

"If the moving party bears the burden of proof at trial, the moving party must establish all essential elements of the claim or defense in order to obtain summary judgment." *Anthony v. Anthony*, 642 F. Supp. 2d 1366, 1371 (S.D. Fla. 2009) (citing *Four Parcels of Real Prop.*, 941 F.2d at 1438). The moving party must carry its burden by presenting "credible evidence" affirmatively showing that, "on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party." *Four Parcels of Real Prop.*, 941 F.2d at 1438. In other words, the moving party's evidence must be so credible that, if not controverted at trial, the party would be entitled to a directed verdict. *Id*.

"If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party, in response, 'come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.'" *Id.* (quoting *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991)) (alteration in original). However, "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, the Court "'can only grant summary judgment if everything in the record demonstrates that no genuine issue of material fact exists.'" *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) (quoting *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986)).

In contrast, "[w]hen the *nonmoving* party has the burden of proof at trial, the moving party is not required to 'support its motion with affidavits or other similar material *negating* the opponent's claim.'" *Four Parcels of Real Prop.*, 941 F.2d at 1437 (quoting

Celotex Corp. v. Cartrett, 477 U.S. 317, 323 (1986)). The moving party "simply may show . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 1438 (internal quotation marks and citation omitted). "Assuming the moving party has met its burden, the non-movant must then show a genuine dispute regarding any issue for which it will bear the burden of proof at trial." *Info. Sys. & Networks Corp.*, 281 F.3d at 1224-25 (citing *Celotex Corp.*, 477 U.S. at 324).

III. DISCUSSION

"The remaining issues are: (1) whether, based on the allegations of Flowers's complaint rather than on the broader summary judgment record, Evanston owed a duty to defend Sandersville Railroad after the exhaustion of its self-insured retention; and, if it is determined that Evanston had no such duty, (2) whether, pursuant to its reservation of rights letter, Evanston can recoup the defense costs tendered to Sandersville Railroad." Doc. 43 at 20-21. As Evanston concedes, it cannot recoup its defense costs under a reservation of rights if it had a duty to defend based on the allegations of Flowers's complaint. *See, e.g.*, Doc. 44-1 at 18 ("In the present case, Evanston does not contend it would have a right to reimbursement if there had been a duty to defend."). *Cf. Ga Interlocal Risk Mgmt. Agency v. City of Sandy Springs*, 337 Ga. App. 340, 346-47, 788 S.E.2d 74, 79 (2016) (recognizing that an "insurer's right to reimbursement of defense costs and fees" even under the "majority" view is limited to situations "where it is determined that the insurer had no duty to defend").

A. Whether, based on the allegations of Flowers's complaint, Evanston had a duty to defend

Under Georgia law, "an insurer's duty to pay and its duty to defend are separate and independent obligations." *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 268 Ga. 564, 565, 490 S.E.2d 374, 376 (1997) (citation and quotation marks omitted). "The insurer may be obligated to defend, even though it was not ultimately liable for any judgment . . . ." *Id.* at 565, 490 S.E.2d at 376-77 (citation, quotation marks, and

alteration omitted). "[T]he insurer is obligated to defend where . . . the allegations of the complaint against the insured are ambiguous or incomplete with respect to the issue of insurance coverage." *Id.* at 565, 490 S.E.2d at 376. And "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." *Id*. "Where the claim is one of potential coverage, doubt as to liability and [the] insurer's duty to defend should be resolved in favor of the insured." *Id*. (citation and quotation marks omitted).

Accordingly, the question is whether, as a matter of law, the allegations of Flowers's complaint unambiguously exclude coverage.[5] *Id*. ("To excuse the duty to defend the [complaint] must unambiguously exclude coverage . . . ." (citation and quotation marks omitted)). On a practical level, this question boils down to whether Flowers's complaint is unambiguous and complete in alleging that Flowers's injuries arose "out of the . . . discharge, dispersal, seepage, migration, release or escape of 'pollutants.'"[6] *See* Doc. 43 at 7, 14.

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[5] Evanston, rightly, does not argue that the allegations of the complaint coupled with other information available at the time the complaint was filed, say the demand letter, should be considered when determining whether the allegations of the complaint negated a duty to defend. If Evanston wanted these facts to be considered in relation to its defense obligations, it could have secured a stay of Flowers's lawsuit while seeking declaratory relief as to its obligations to Sandersville Railroad. *See* note 3 *supra.*

[6] Sandersville Railroad argues that the Court should not only consider ambiguity and incompleteness in the factual allegations, but should also consider the legal uncertainty as to the scope of the pollution exclusion. Doc. 46 at 17-18. First, the Court does not find any support in Georgia case law for the proposition that legal uncertainty is considered in determining the duty to defend. Second, the Court cannot say there was legal uncertainty regarding pollution exclusions when Flowers filed his lawsuit. Georgia law governing the breadth of pollution exclusions was not ambiguous following *Reed v. Auto-Owners Insurance Co.*, 284 Ga. 286, 667 S.E.2d 90 (2008). *See* Doc. 43 at 8-9. *Bituminous Casualty*, the older decision by the Eleventh Circuit relied on by Sandersville Railroad using contrary, outdated reasoning, does not change this. *See Id.* at 10-11 & n.5; *see also Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335 (11th Cir. 1996). The Georgia Supreme Court's subsequent decision in *Smith*, though helpful and solidifying, did not clarify any ambiguity left by *Reed*; it simply enforced *Reed*'s holding. *Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 298 Ga. 716, 720, 784 S.E.2d 422, 425 (2016) ("[O]ur decision in *Reed* controls the manner in which pollution exclusions in CGL policies are to be construed by the courts of this State, the Court of Appeals erred in failing to apply this Court's analysis in *Reed* to the facts of this case."). Still, pollution exclusions are somewhat arcane, and whether a complaint's allegations unambiguously implicate a pollution exclusion can be difficult to determine. *See, e.g.*, *Barrett v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 304 Ga. App. 314, 321, 696 S.E.2d 326, 332 (2010)

Flowers's three-page complaint is not a model of clarity. In relevant part, he alleges that as a welder he worked "in very close and poorly ventilated conditions." Doc. 20-4 ¶ 4. He then alleges he "developed shortness of breath[,] . . . was diagnosed with advanced lung disease[,] [and] was advised to avoid further exposure to workplace toxins, including welding fumes." *Id*. ¶ 5. Immediately following this allegation, he claims "[a]s a result," he lost wages, sustained pain and suffering, and incurred medical expenses. *Id*. Flowers then alleges that Sandersville Railroad was negligent because it failed to provide a safe place to work, failed to provide adequate breathing protection, failed to ventilate the areas where he welded, failed to adopt procedures and safeguards for breathing protection, failed to warn and train him regarding the dangers and signs of occupational lung disorders, and failed to provide proper supervision. *Id*. ¶ 6.

No doubt because of Flowers's spare allegations, Evanston massages and supplements these allegations. Evanston asserts that "Flowers alleged that he contracted 'welder's lung' disease from exposure to welding fumes during the course of his employment for Sandersville." Doc. 44-1 at 2-3. This is not true. Flowers' complaint does not mention "welder's lung disease," a phrase that suggests some causal connection to his work as a welder at Sandersville Railroad. Rather, the complaint simply alleges that Flowers "was diagnosed with advanced lung disease." Doc. 20-4 ¶ 5. Evanston doubles down on this incorrect assertion with its next—that "Flowers *specifically* alleged he was injured from 'exposure to workplace toxins, including welding fumes.'"[7] Doc. 44-1 at 7 (emphasis added). That specific allegation

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(reversing the trial court's dismissal based on pollution exclusion clause where "the allegations [of the complaint] do not show . . . a definitive 'but-for' causal link" between plaintiff's brain injury and the release of natural gas). So, while the legal scope of pollution exclusions is settled, that does not mean they are easy to apply factually, as this case has illustrated.

[7] Evanston made this characterization in its statement of material facts; Sandersville Railroad took issue with the characterization then and has since maintained its opposition. Docs. 23-2 ¶ 1 (clarifying that "the actual [Flowers complaint] alleges only that he developed 'advanced lung disease.'"); ¶ 11

is not in the complaint. To the contrary, the complaint does not allege, "specifically" or generally, that Flowers's advanced lung disease was caused by workplace toxins, such as welding fumes. As noted above, Flowers simply alleged that he was "advised to avoid further exposure to workplace toxins, including welding fumes." Doc. 20-4 ¶ 5.

Evanston does not argue what perhaps it could have argued. Perhaps it should have conceded that a literal reading of Flowers's complaint does not unambiguously lead to the conclusion that he is alleging that he contracted lung disease as a result of workplace exposure to toxins and then argued that, if considered in a more practical light, it can be inferred from Flowers's allegations that he is alleging an injury that falls within the pollution exclusion. While that argument is certainly preferable to reworking Flowers's complaint to make it allege something it does not, that argument too runs afoul of Georgia law. Again, the question is whether the allegations of the complaint "unambiguously exclude coverage." Even if Flowers's allegations are examined in such a practical light, an inference of a claim within the pollution exclusion is not the only inference that can be drawn. For example, it can be inferred that Flowers is complaining about Evanston's response to a lung disease that was not caused by workplace toxins. Again, he simply asserts that he has a lung disease and that "as a result of that lung disease," he was advised to avoid further exposure to workplace toxins. Evanston's interpretation of Flowers's complaint is accordingly not the only reasonable interpretation, and, it must be remembered, the Court must resolve the ambiguity in favor of the insured—Sandersville Railroad. *Cf. Hoover v. Maxum Indem. Co.*, 291 Ga. 402, 408, 730 S.E.2d 413, 418 (2012); *Penn-Am. Ins. Co.*, 268 Ga. at 565, 490 S.E.2d at 376. Accordingly, the Court cannot say, as a matter of law, that the

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(clarifying that Flowers's complaint "does not specifically allege that [Flowers's lung disease] was caused by welding fumes; rather, the Complaint alleges that he was 'advised' (by his doctor) to avoid welding fumes"); 46 at 18 ("[T]he *Flowers* complaint is open-ended as the potential causes of his injury. While the *Flowers* complaint does refer to welding fumes and lack of breathing protection, it also indicates these are not exclusive causes of his injury.").

allegations of Flowers's complaint establish that Evanston did not owe Sandersville Railroad a duty to defend.

B. Whether, even assuming Evanston had no duty to defend, it has a right to recoup defense costs

Even if Evanston had no duty to defend Sandersville Railroad, Evanston has not shown as a matter of law that it is entitled to reimbursement of defense costs.

Courts are divided on whether an insurer that has defended an insured under a reservation of rights is entitled to recoup its defense costs when it is thereafter adjudicated that the insurer was not obligated to defend. *See Ill. Union Ins. Co. v. NRI Constr., Inc.*, 846 F.Supp.2d 1366, 1374 (N.D. Ga. 2012). Courts following what is often referred to as the "majority rule" allowing recoupment[8] hold that an insured can defend the insured and create a right to recoup its defense costs, but only "where the insurer (1) timely and explicitly reserves its right to recoup the costs; and (2) provides specific and adequate notice of the possibility of reimbursement." *Id.* Courts following the minority rule do not allow recoupment even where the insurer timely provides such a reservation of rights. *Id.* at 1375. The Georgia Court of Appeals recently noted this split and stated that this question remains unresolved in Georgia. *Ga Interlocal Risk Mgmt. Agency*, 337 Ga. App. at 346, 788 S.E.2d at 79.

Evanston urges the Court to follow *Illinois Union*, a Northern District of Georgia case (cited above), in its prediction that Georgia will follow the majority rule. Doc. 44-1 at 9, 12. Evanston contends that Georgia will follow the majority rule because it is consonant with Georgia law—case law governing the effect of bilateral reservations of rights as to coverage defenses, Georgia unjust enrichment and implied contract law,

[8] *See Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 606 Pa. 584, 594, 601, 2 A.3d 526, 532, 536 (2010) (recognizing that this has been characterized as the majority rule). There is a recent trend of courts not allowing recoupment, which calls into question whether jurisdictions allowing recoupment actually remain in the majority. *See Gen. Star Indem. Co. v. Driven Sports, Inc.*, 80 F. Supp. 3d 442, 461 n.14 (E.D.N.Y. 2015). But for convenience, the Court will refer to the rule set out in *Illinois Union* as the majority rule. *See Ill. Union Ins. Co.*, 846 F. Supp. 2d at 1374.

and Georgia public policy.[9] Doc. 44-1 at 9-15. The Court need not predict whether Georgia will follow the majority rule or the minority rule because Evanston has not demonstrated that it has properly reserved its rights as required by the majority rule.

If Georgia follows the majority rule, the Court predicts, as it appears that Evanston itself concedes, a reservation of rights as to defense obligations must meet Georgia's requirements for a reservation of rights as to coverage obligations. *See* Doc. 49 at 4-7 (recognizing that the insurer must "fairly inform" an insured of the insurer's position regarding defense obligations). But Evanston's letter attempting to reserve a right to defense cost recoupment does not meet these requirements. Under Georgia law,

> In order to inform an insured of the insurer's position regarding its defenses, a reservation of rights must be unambiguous. If it is ambiguous, the purported reservation of rights must be construed strictly against the insurer and liberally in favor of the insured. A reservation of rights is not valid if it does not fairly inform the insured of the insurer's position.

Hoover, 291 Ga. at 406, 730 S.E.2d at 417 (citations, quotations, and alterations omitted). The reservation of rights should also "inform the insured of the specific basis for the insurer's reservations . . . ." *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 287 Ga. 149, 152, 695 S.E.2d 6, 10 (2010) (citations, quotations, and alterations omitted). "[A] mere allegation that the insurer contend[s] that the insured was not covered by the policy, without more, does not show any reservation on its part of a right to insist that the coverage of the policy was not extended to him." *Id*. (citations, quotations, and alterations omitted). A reservation of rights that does not meet these

[9] Evanston has not argued that the reservation of rights letter created an express contract allowing recoupment. *Cf*. O.C.G.A. § 13-3-1 ("To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.").

requirements is disregarded. *Hoover*, 291 Ga. at 406, 730 S.E.2d at 417; *World Harvest Church, Inc.,* 287 Ga. at 152, 695 S.E.2d at 9.

Sandersville Railroad notes: "Although Evanston now contends that it never had a duty to defend the underlying lawsuit . . . , it did not take that position at the time of the reservation of rights letter . . . ." Doc. 46 at 7. Sandersville Railroad contends that Evanston's reservation of rights letters are ambiguous because, "Evanston did not deny that a duty to defend existed under the insurance contract, and Evanston's letters did not fairly notify Sandersville [Railroad] that Evanston was acting outside of the parties[']contract to provide Sandersville [Railroad] defense funds that were subject to a recoupment obligation." *Id*. at 11. The Court agrees.

Throughout its dealings with Sandersville Railroad in this case, Evanston has overlooked, or at least muddled, the distinction between the duty to defend and the duty to indemnify as well as the importance of this distinction in relation to any recoupment of defense costs. This is best seen in the language Evanston used in its reservation of rights letters, by which it attempted to obligate Sandersville Railroad to reimburse the defense costs. In both letters, Evanston stated that it "reserves the right to reimbursement of defense costs paid if it establishes that it *owes no coverage* to the insured." Doc. 20-5 at 7 (emphasis added).[10] Georgia law clearly states that the duty to defend is broader than the duty to indemnify and there are accordingly many situations where the insurer has no coverage for the claim but nonetheless owes a duty to defend the insured against it.[11] The distinction between the two is clearly illustrated by what

[10] In the Court's view, Evanston's representation that it was "reserving" the right to recoup defense costs is confusing, perhaps even misleading or even plain wrong. There was no right to recover defense costs in the policy or otherwise then-existing under Georgia law. Rather, Evanston, in addition to reserving its right to assert a coverage defense based on the pollution exclusion, was seeking to lay the foundation for a new right.

[11] While it is perhaps conceivable to read "coverage" as encompassing the duty to defend and the duty to indemnify, that is not how the term is commonly used. *See, e.g.*, *Hoover*, 291 Ga. at 404, 730 S.E.2d at 416; *Richmond v. Ga. Farm Bureau Mut. Ins. Co.*, 140 Ga. App. 215, 217-18, 231 S.E.2d 245, 247-48 (1976). It should be remembered that a reservation of rights must be construed strictly against the

has happened here. Evanston, based on evidence well outside of the complaint, established that it had no coverage for this occurrence. But, as Evanston acknowledges, that in no way establishes that it is entitled to reimbursement of defense costs paid. Rather, it can recover its defense costs only if there was no duty to defend.

Evanston's confusion is also highlighted by the very fact that the two letters it sent were nearly identical, the second letter attaching no substantive significance to the intervening filing of Flowers's complaint. Evanston's second letter was its opportunity to explain that it did not believe that it had a duty to defend because the allegations of Flower's complaint, taken as true, unambiguously fell within the pollution exclusion and accordingly excluded coverage. But the second letter does not even mention the Flowers's complaint. *See generally* Doc. 20-5. For that matter, nothing in the letter definitively indicates that Evanston had ever seen the complaint.[12] *Id.* Evanston's second letter relied on the same facts relied on in the first letter—facts not pled in Flowers's complaint—to assert its position: that the pollution exclusion might negate coverage. *See id.* at 2, 6-7. Clearly, the first letter, because it was sent prior to the filing of Flowers's complaint, did not, and clearly could not, offer an informed position on Evanston's defense obligations. It did not attempt to. The first letter did not contest whether Evanston had a duty to defend or offer a basis for doing so. When Evanston resent that letter (despite the few, nonsubstantive changes noted above), the letter did not magically transform into a letter addressing these issues. To the contrary, the

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insurer and liberally in favor of the insured. Moreover, as discussed below, it is pertinent that this language was used in Evanston's first letter, which clearly could not be taken as addressing Evanston's duty to defend as Flowers's complaint was yet to be filed.

[12] The letter mentions allegations, stating: "He [Flowers's] *alleges* that he contracted 'welder's lung' disease from occupational exposure to welding fumes while welding railroad cars owned by Sandersville Railroad." *Id.* at 6 (emphasis added). But that identical characterization of Flowers's claims was present in the first letter (though "He" in the second letter replaces "His attorney" in the first). *See* Doc. 20-3 at 7. Because this was Evanston's summary of the claim before Flowers even filed his complaint and, as explained above, is not even found in Flowers's complaint, it does not indicate any interaction with the allegations of Flowers's complaint (distinct from Evanston's knowledge of the claim from other sources).

second letter demonstrates that Evanston was oblivious of its need to fairly inform Sandersville Railroad of its current position—that the allegations of the complaint, taken as true, unambiguously and completely exclude coverage because they fall within the pollution exclusion.

It seems that Evanston first realized these problems with its letters when it read Sandersville Railroad's response brief pointing them out.[13] But instead of addressing the problems head-on, Evanston calls Sandersville Railroad's argument—that "Evanston did not deny that a duty to defend existed under the insurance contract, and Evanston's letters [accordingly] did not fairly notify Sandersville that Evanston was acting outside the parties contract"—"astonishing" and "blatantly wrong." Doc. 49 at 4 (quoting Doc. 46 at 11). Instead of acknowledging the problems with its reservation of rights letters, Evanston, much in the way it rewrote Flowers's complaint, rewrites the record stating: "The letters could not be more clear . . . . they *conspicuously and unambiguously* stated that Evanston owed *no defense* or indemnity." *Id*. at 5 (emphasis added). It is this statement that the Court finds "astonishing" and "blatantly wrong." As noted above, Evanston's letters *never* state a position that Evanston did not owe Sandersville Railroad a defense, let alone why. To properly inform Sandersville Railroad in the reservation of rights letter what it was attempting to do, it was incumbent upon Evanston to advise Sandersville Railroad that it would have the right to reimbursement of defense costs paid if it established that the allegations of the complaint unambiguously exclude coverage because the allegations, taken as true, necessarily fall within the pollution exclusion. But, as explained, Evanston did not. Evanston cannot fix that problem now. *Cf. Hoover*, 291 Ga. at 407, 730 S.E.2d at 418

[13] Even in its initial brief in support of its latest motion for summary judgment, Evanston argues that "Sandersville consented in bilateral reservation of rights agreements to reimburse the money if it was determined there was *no coverage*." Doc. 44-1 at 9 (emphasis added).

(holding that any reason to deny coverage not asserted in the reservation of rights is waived).

Accordingly, Evanston's letters are defective and ineffective to support any right to recoup the defense costs and, regardless of whether Georgia follows the majority or minority rule, Evanston is not entitled to summary judgment.

III. CONCLUSION

In conclusion, Evanston has not shown as a matter of law that it did not owe a duty to defend. And even if it had, Evanston has not shown as a matter of law that its reservation of rights letters fairly informed Sandersville Railroad of Evanston's position, which is prerequisite to any recoupment of defense costs. Accordingly, Evanston's motion for summary judgment (Doc. 44) is **DENIED**.

The Court will convene a telephone conference for the purpose of determining if this Order disposes of this case or, otherwise, what further steps are appropriate.

SO ORDERED, this 25th day of July, 2017.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT