IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 15-CV-2435-MSK-KMT

THE PHOENIX INSURANCE COMPANY, a Connecticut corporation,

Plaintiff,

v.

HESKA CORPORATION, a Delaware corporation; and
SHAUN FAULEY, a natural person,

Defendants.

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Plaintiff Phoenix Insurance Company's Amended Motion for Affirmative Partial Summary Judgment (**# 57**) and Defendant Heska Corporation's Motion to Certify Questions to the Colorado Supreme Court (**# 63**). For the following reasons, the motion to certify is denied and the motion for partial summary judgment is granted.

I. BACKGROUND[1]

Shaun Fauley, named as a defendant in this case but never served, filed a lawsuit against Defendant Heska Corporation in the Northern District of Illinois (the Underlying Litigation). *See* Compl., *Frauley v. Heska Corp*., No. 15-CV-2171 (Mar. 12, 2015), *available at* Doc. 5-1. He seeks to recover under the Telephone Consumer Protection Act (the Act) on a class-action basis for an unsolicited fax he alleges he received in May 2013. *Id*. ¶ 2. Mr. Fauley seeks the

[1] The Court recounts the facts in the light most favorable to Heska, the nonmoving party. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002). In large part, the parties do not dispute the material facts.

greater of his "actual monetary loss" or $500 for each violation of the Act, *id*. at 13, and seeks treble recovery for a willful or knowing violation of the Act, *id*. ¶ 5. With regard to his monetary loss, Mr. Fauley alleges the fax caused a loss of paper, toner, and time, and used phone lines. *Id*. ¶ 36.

Plaintiff Phoenix Insurance Co. was Heska's provider for commercial liability insurance at all times relevant to the Underlying Litigation. To that end, from 2010 to 2014, Phoenix issued four successive policies (the Policies), each lasting one year.[2] The Policies each included a provision undertaking a "right and duty to defend the insured against any suit seeking" damages for "bodily injury" or "property damage," provided the damages were "caused by an occurrence that takes place in the coverage territory." 2010 Policy, Doc. 57-1 at 102.[3] Under the Policies, "Property Damage" means "[p]hysical damage to tangible property of others" or "[l]oss of use of tangible property of others that is not physically damaged." *Id*. at 151. And "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. at 115.

Each of the Policies contained exclusions, removing coverage from "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured." *Id*. at 103. The 2010 and 2011 Policies excluded any of the foregoing injuries or damage "arising out of unsolicited communications by or on behalf of any insured," defining "unsolicited communications" as "any form of communication, including but not limited to facsimile, . . . in which the recipient has not specifically requested the communication. Unsolicited

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[2] The policy provisions reproduced in this section are identical across each of the four Policies, except as noted. Accordingly, the Court will only cite to the first Policy to contain the quoted language, not all four.

[3] The Policies also extended the duty to defend to "personal and advertising injury," 2010 Policy, Doc. 57-1 at 106, but Heska does not argue in its response that coverage should be based on these provisions. The Court therefore does not address any personal or advertising injury.

communications also include [communications] made in violation of the [Act]." *Id*. at 139. The 2012 and 2013 Policies addressed unsolicited communications with substantially similar but slightly different language, excluding the foregoing injuries or damage "arising out of any actual or alleged violation of any law that restricts or prohibits the sending, transmitting or distributing of 'unsolicited communication,'" defined as "any communication, in any form, that the recipient of such communication did not specifically request to receive." 2012 Policy, Doc. 57-3 at 143.

Phoenix denied coverage for the Underlying Litigation in a letter to Heska. Letter of May 8, 2015, Doc. 58-3 at 8–9. After communication with Heska that is not in the record, Phoenix agreed to participate in the Underlying Litigation under an express reservation of "all of its rights, contractual, quasi-contractual and/or otherwise, to the extent permitted by Colorado law, . . . to seek reimbursement or recoupment of all defense fees and costs paid in connection with any and all non-covered claims." Letter of Oct. 16, 2015, Doc. 58-4 at 2. Phoenix also reserved the right "to decline coverage and withdraw from the defense." *Id.*

Phoenix filed this suit in November 2015, seeking declaratory judgment on the Policies. Phoenix contends that any number of the foregoing provisions operates to remove the Underlying Litigation from coverage. In August 2016, the Court bifurcated Phoenix's claim into two claims: "whether it has a contractual obligation to defend Heska in the underlying action and whether it[ ]has a contractual obligation to indemnify Heska for its liability, if any, determined in the underlying action." Doc. 48. The Court also stayed discovery as to the duty-to-indemnify claim pending determination of the duty-to-defend claim. Phoenix moved for summary judgment, as amended, on September 9, 2016, Doc. 57, and Heska moved to certify questions to the Colorado Supreme Court on October 30, 2016, Doc. 63.

II. MOTION TO CERTIFY

As an initial matter, Heska asks this Court to certify a number of questions to the Colorado Supreme Court:

> 1. Whether [Phoenix] has a duty to defend Heska in the Underlying Litigation.
>
> 2. Whether this action is an anticipatory declaratory judgment action . . . .
>
> 3. Whether, in an anticipatory declaratory judgment action, the insurer under a liability insurance policy owes a duty to defend a lawsuit against the insured unless the insurer can prove the allegations in the complaint against the insured fall solely and entirely within an exclusion to the insurance policy.
>
> 4. Whether, for purposes of determining the duty to defend . . . , the allegations in the complaint against the insured must be construed broadly in favor of coverage . . . .
>
> 5. Whether, for purposes of construing allegations in a complaint against the insured broadly in favor of coverage for purposes of determining a liability insurer's duty to defend, the court must consider whether the insured could be found liable on a cause of action not asserted in the complaint if facts alleged would support liability under that cause of action.
>
> 6. Whether a liability insurer can avoid its duty to defend a lawsuit against an insured based on a policy exclusion, if the complaint against the insured, construed broadly in favor of coverage, alleges facts that would support a cause of action not pled but, if proved, would potentially fall outside the operation of the policy exclusion.
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> 7. Whether a liability insurer is required to clearly and unambiguously state in writing to the insured all bases on which the insurer reserves its right to deny coverage for a claim against the insured within a reasonable time after the insurer receives notice of the claim from the insured.
>
> 8. Whether a liability insurer waives any coverage defense the basis for which is not clearly and unambiguously stated in writing to the insured within a reasonable time after the insurer receives notice of the claim from the insured.

Doc. 63 at 6–8.

Colorado Appellate Rule 21.1 permits the federal district court to certify any "questions of law of this state which may be determinative of the cause then pending in the certifying court

and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." But certification is discretionary and "is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Armijo v. Ex Cam Inc*., 843 F.2d 406, 407 (10th Cir. 1988).

The Court declines to certify any of the questions Heska urges, finding that the dispositive issue in this case can be resolved by applying Colorado law to the terms of the policy. Under Colorado law, an insurance policy constitutes a contract, which courts construe using general principles of contractual interpretation. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002). Clear and unambiguous contractual provisions "should be given their plain meaning." *Id*. "To ascertain whether a provision is ambiguous," the Court construes it "in harmony with the plain, popular, and generally accepted meaning of the words employed." *Wota v. Blue Cross & Blue Shield*, 831 P.2d 1307, 1309 (Colo. 1992).

There is no ambiguity here; the plain meaning of the Policies' terms is clear to the Court, as detailed below. Furthermore, many of Heska's proposed questions are either already determined by existing law or unnecessary to determine to resolve this case. For example, Questions 3 and 4 turn on settled law. *See Cotter Corp. v. Am. Empire Surplus Lines Ins. Co*., 90 P.3d 814, 829 (Colo. 2004) ("[T]he insurer bears the burden of establishing that the allegations in the complaint are solely and entirely within the exclusions in the insurance policy."); *Cyprus Amax Minerals Co. v. Lexington Ins. Co*., 74 P.3d 294, 301 (Colo. 2003) ("[T]he nature of the claims pled, the relief sought and the facts alleged must be construed broadly" in the duty-to-indemnify context). And an answer to Questions 5 and 6 is unnecessary for the Court to resolve the duty-to-defend claim. *See* discussion at p. 11, *infra*. Questions 7 and 8 are essentially an

invitation for the Colorado Supreme Court to revise and add to settled law. Under these circumstances, this matter can be resolved without certification to the Colorado Supreme Court.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment only if no trial is necessary. *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary adjudication is authorized when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Substantive law governs what facts are material and what issues must be determined. It also specifies the elements that must be proved for a given claim or defense, sets the standard of proof, and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *See Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See* Fed. R. Civ. P. 56(c)(1)(A). Once the moving party has met its burden, to avoid summary judgment the responding party must present sufficient, competent, contradictory evidence to establish a genuine factual dispute. *See Bacchus Indus. Inc. v. Arvin Indus. Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999). If there is a genuine dispute as to a material fact, a trial is required. If there is no genuine dispute as to any material

fact, no trial is required. The court then applies the law to the undisputed facts and enters judgment.

If the moving party does not have the burden of proof at trial, it must point to an absence of sufficient evidence to establish the claim or defense that the non-movant is obligated to prove. If the respondent comes forward with sufficient competent evidence to establish a *prima facie* claim or defense, a trial is required. If the respondent fails to produce sufficient competent evidence to establish its claim or defense, then the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

IV. DISCUSSION

As briefly noted above, under Colorado law, an insurance policy is construed according to principles of contract interpretation. *Thompson v. Md. Cas. Co*., 84 P.3d 496, 502 (Colo. 2004). The policy's language must be given the plain meaning of the words used, unless there is an indication by the parties of a mutual intent that an idiosyncratic meaning would apply. The policy is viewed as a whole, giving effect to all provisions. Because of the "unique nature of insurance contracts and the relationship between the insurer and insured," if mutual intent cannot be ascertained, ambiguous provisions are construed against the insurer and in favor of providing coverage to the insured. *Cyprus*, 74 P.3d at 299. For the same reasons, coverage exclusions are construed against the insurer. *Worsham Constr. Co. v. Reliance Ins. Co*., 687 P.2d 988, 990 (Colo. App. 1984). Exclusions must be drafted in clear and specific language. "To benefit from an exclusionary provision in a particular contract of insurance, the insurer must establish that the exemption claimed applies in the particular case and that the exclusions are not subject to any other reasonable interpretations." *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 953 (Colo. 1991).

A. Duty to Defend

The duty to defend is the "insurance company's duty to affirmatively defend its insured against pending claims." *Constitution Assoc. v. N.H. Ins. Co*., 930 P.2d 556, 563 (Colo. 1996). When an insurer refuses to defend in an underlying suit, and the insured brings an action for defense costs, the duty to defend is determined by application of the complaint rule. *Cotter*, 90 P.3d at 828. Under this rule, a duty to defend arises when the underlying complaint alleges any facts that might fall within the coverage of the policy. *Hecla Mining Co. v. N.H. Ins. Co*., 811 P.2d 1083, 1089 (Colo. 1991). The insured's actual liability is not considered. Instead, the "duty to defend arises from allegations in the complaint, which if sustained, would impose a liability covered by the policy." *Cotter*, 90 P.3d at 829. "Where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim." *Greystone Constr. Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1284 (10th Cir. 2011) (quoting *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 613–14 (Colo. 1999)). "An insurer has a heavy burden to overcome in avoiding the duty to defend, such that the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot." *Cyprus*, 74 F.3d at 301.

Phoenix argues a number of provisions in the Policies confirm it has no duty to defend in the Underlying Litigation. Though the Court doubts the terms "property damage," "occurrence," and "accident," contemplate a claim under the Act, the Court need not parse and resolve these terms because the Policies' exclusions clearly remove such claims from coverage. Specifically,

the unsolicited-communications exclusion, by the plain meaning of its text, indicates that Phoenix will not cover any claims for damages "arising out of unsolicited communications by or on behalf of the insured." *See* 2010 Policy, Doc. 57-1 at 139; 2012 Policy, Doc. 57-3 at 143 (making the exclusion even more specific, declining coverage for damages "arising out of any actual or alleged violation of any law that restricts or prohibits the sending, transmitting or distributing of 'unsolicited communication.'").[4] The plain meaning of "unsolicited communication" is no mystery — the Policies expressly state the definition is any communication not requested by the recipient. The 2010 and 2011 Policies go so far as to explicitly include the Act as a base upon which the exclusion rests. There can be no reasonable disagreement — and indeed, the disagreement here borders on frivolous — that the claim in the Underlying Litigation is not only excluded from coverage under the Policies, but clearly contemplated by Phoenix as a situation under which it will not provide coverage. *See Compass*, 984 P.2d at 618 (no duty to defend where allegations "are solely and entirely within the exclusions"). The Court thus finds that Phoenix has no duty to defend in the Underlying Litigation.

Heska urges four arguments that the ambit of the unsolicited-communications exclusion is not so clear, none of which have merit. First, Heska argues that the exclusion "applies only to intentional conduct" and because the Court must broadly construe the Underlying Litigation to account for the possibility that Heska "believed it had consent to send faxes, Heska's conduct was not intentional." Doc. 58 at 27. There is no basis, however, to read an intent element into the exclusion. In contrast, the exclusion vests the essence of being unsolicited in the recipient's

[4] Neither party draws much of a distinction between the unsolicited-communications exclusion in the 2010 and 2011 Policies and the same in the 2012 and 2013 Policies. Accordingly, the Court sees no need to analyze each separately.

conduct. *See* 2010 Policy, Doc. 57-1 at 139 (putting the onus on the recipient to request or not request a communication). It is therefore of no moment whether the sender intends to transmit the fax or whether he does so inadvertently — either way, the Policies are clear that the only relevant point is the recipient's request of the communication.

Second, Heska contends the exclusion improperly shifts the burden of proof to the insured because the insured "must prove that [it] can avoid the operation of the exclusion, rather than requiring [Phoenix] to prove the exclusion applies." Doc. 58 at 28. This line of reasoning is puzzling. Phoenix has the heavy burden to prove the Underlying Litigation *cannot* fall within the Policies' coverage, *see Cyprus*, 74 P.3d at 301, which it did by pointing to an exclusion that word-for-word removes claims under the Act from coverage. All Heska has to do is envision a way the Underlying Litigation may fall within the Policies' coverage. The fact that this task is a feat too great does not create a "Catch-22," *see* Doc. 58 at 28, it merely means the Policies are doing what they were clearly intended to do, *see Cotter*, 90 P.3d at 819 (interpreting policies to "carry out the parties' intent and reasonable expectations when they drafted the policies."). Any shift of burden in this situation would be a shift in burden for policy exclusions everywhere.

Finally, Heska maintains that the exclusion is ambiguous for four reasons: (1) the exclusion does not say that Phoenix will not defend a claim involving an unsolicited communication, (2) it does not distinguish between intentional and negligent conduct, (3) it attempts to shift the burden as previously described, and (4) by enumerating the Act, it swallows the Policies' coverage provisions because the Underlying Litigation could support a common-law negligence claim. These points are examples of clarity, not ambiguity. The Policies do not need to spell out the implication of an exclusion to be understood by a person of average intelligence as Heska suggests; rather, the headline of "**EXCLUSION**" is more than sufficient to

put an average person on notice that happenings touching on the provisions below such a headline will not be covered. *See Compass*, 984 P.2d at 617; Doc. 57-1 at 139. The Court has already addressed why intent is irrelevant and the exclusion does not actually shift any burdens. On the last point, even if the facts alleged by Mr. Fauley could support a negligence claim, such a claim would still be excluded by the plain terms of the exclusion. Though the second sentence of the exclusion enumerates the Act, the first sentence makes no distinction among different legal claims.

B. Remaining Claims

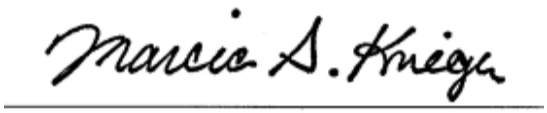
Finding that the Policy excludes coverage for the claims asserted in the Underlying Litigation, there is no need to address the duty-to-indemnify claim. Thus within 14 days, the parties shall show cause why such claim should not be dismissed. By such deadline, the parties shall address whether Phoenix's request for a recoupment order, *see* Am. Compl., Doc. 5 at 13, can be addressed in this litigation, and if so, by what mechanism.

V. CONCLUSION

For the foregoing reasons, the motion to certify (**# 63**) is **DENIED** and the motion for summary judgment (**# 57**) is **GRANTED**. Phoenix's previous motion for summary judgment (**# 54**) is **DENIED AS MOOT**.

DATED this 26th day of July, 2017.

BY THE COURT:



Marcia S. Krieger
United States District Court