UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF STERLING HEIGHTS, ET AL.,

Plaintiffs,

v.

UNITED NATIONAL INSURANCE COMPANY, ET AL.,

Defendants.
_____/

Case No. 03-72773

Honorable Nancy G. Edmunds

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANT GENERAL STAR INDEMNITY COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND GRANTING UNITED NATIONAL INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This insurance dispute comes before the Court on the following motions:

(1) Plaintiffs' motion for partial summary judgment regarding Defendant insurance companies' duty to defend and/or duty to indemnify for defense costs and/or damages arising from claims asserted against the City and Duchane in the underlying State and Federal Actions;

(2) Defendant General Star Indemnity Company's cross motion for summary judgment arguing that it owes no duty to indemnify for any of the underlying claims; and

(3) Defendant Specialty National Insurance Company's opposition to Plaintiffs' motion for partial summary judgment likewise arguing that it owes no duty to indemnify; and

(4) Defendant United National Insurance Company's cross motion for summary judgment arguing that while there is a duty to indemnify defense costs for covered claims, there is no duty to defend, and, with the possible exception of the libel/slander/defamation claims asserted in the underlying State Action, it has no duty to indemnify the claims asserted in the underlying actions.

For the reasons stated below, Plaintiffs motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART; Defendant General Star's motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART; and Defendant United National's motion for partial summary judgment is GRANTED.

I. Background

The underlying State Action asserts claims alleging substantive and due process violations, business libel and slander, detrimental reliance, breach of contract, breach of implied contract, and breach of implied covenant of good faith and fair dealing. The underlying Federal Action asserts claims alleging substantive and procedural due process violations, equal protection violations, and violations of the federal civil rights statute, 42 U.S.C. § 1983.

Plaintiffs filed this action against the Defendant insurance companies in July 2003 seeking a judgment declaring that Defendants owe it a duty to defend and to indemnify in the underlying State and Federal Actions and asserting breach of contract claims. This Court has diversity jurisdiction.

A. Relevant Facts

The following is a brief sketch of the facts relevant to the pending insurance issues.

. 1/01	City tells Hillside it will need SALU
. 2/28/01	SALU approved
. 06/01	Administrative Enforcement Hearing re: noise/nuisance; Duchane takes matter under advisement
. 8/06/01	Hillside files State Action seeking *inter alia* to have Duchane render decision
. 8/07/01	State Court orders Duchane to make decision within 7 days
. 8/15/01	Duchane decision - Freedom Hill is a nuisance because violating City noise ordinance
. 1/4/02	City Planner notifies Hillside of SALU violations
. 6/02	Preliminary Injunction hearing in Federal Court re: charity liquor licenses (case settled without prejudice)
. 6/21/02	State Judge decides City cannot enforce noise ordinance if Freedom Hill noise within noise level stated in SALU (currently on appeal and case stayed)
. 9/02	City Planner Birr recommends to Planning Commission to hold hearing on SALU revocation
. 9/10/02	Federal Action filed (new claims include constitutional claims alleging retaliation and related to revocation of SALU)
. 9/26/02	SALU revocation process begins
. 12/16/02	SALU revocation process ends

B. Insurance Contracts

1. General Star Indemnity Policies (Claims-Made Policies)

(a) **Policy # 1YA602491B** - Primary Insurance

Public Officials and Employment Practices Liability Policy
Policy Period: 9/1/00 to 9/1/01
Named Insured: City and officials (Duchane)

(b) **Policy #1YA602491C** - Primary Insurance

Public Officials and Employment Practices Liability Policy
Policy Period 9/1/01 to 9/1/02
Named Insured: City and officials (Duchane)

(c) **Policy #1XG 900294B** - Excess Insurance
Public Officials Liability
Policy Period: 9/1/00 to 9/1/01
Follows Form of Underlying Insurance

(d) **Policy #1XG 900294C** - Excess Insurance
Public Officials Liability
Policy Period: 9/1/01 to 9/1/02
Follows Form

2. Specialty National Insurance (Kemper) Policies (Claims-Made)

(a) **Policy No. 3 XZ 181159-00** - Primary Insurance
Public Entity Commercial General Liability
Public Officials Liability Coverage
Policy Period: 9/1/02 to 9/1/03
Policy Cancelled **May 14, 2003 (at City's request)**
Named Insured: City and Officials (Duchane)

(b) **Policy No. 3XZ18115900** - Umbrella Policy
Policy Period: 9/1/02 to 9/1/03
Named Insureds: City and Officials (Duchane)

3. United National Insurance Policies

(a) **Policy No. CP 65070** - Premier Public Entity Package
CGL (Section II) - Occurrence Policy
Public Officials Error & Omissions (Sec. IV) - Claims-Made Policy
Policy Period: 9/1/99 to 9/1/02

(b) **Policy No. XTP 58908** Excess 3d Pty Liability Insurance
Policy Period: 9/1/99 to 9/1/02
Policy Limits: $19 million in excess of $1 million (primary)

II. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In deciding a motion for summary judgment, the court must view the evidence and draw "all justifiable inferences" in favor of the non-moving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Once this burden is met, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 587. To demonstrate a

genuine issue, the non-moving party must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *See Liberty Lobby*, 477 U.S. at 252.

III. Analysis

A. Michigan Contract Construction Principles

The rules of construction for insurance contracts are the same as those for any other written contract. *Comerica Bank v. Lexington Ins. Co.*, 3 F.3d 939, 942 (6th Cir. 1993). First, the court must determine whether the contract language at issue is ambiguous or unambiguous. Second, the court must construe the contract. The question of whether a contract is ambiguous is a question of law for the court. *Mayer v. Auto-Owners Ins. Co.*, 338 N.W.2d 407, 409 (Mich. Ct. App. 1983). Construction of a contract, whether it is ambiguous or unambiguous, also is a question of law for the court. *Fragner v. American Community Mut. Ins. Co.*, 502 N.W.2d 350, 352 (Mich. Ct. App. 1993). The function of the court is to determine and give effect to the parties' intent as discerned from the policy's language, looking at the policy as a whole. *Auto-Owners Ins. Co. v. Churchman*, 489 N.W.2d 431, 434 (Mich. 1992).

A contract which admits of but one interpretation is unambiguous. *Fragner*, 502 N.W.2d at 352. In contrast, a contract provision is ambiguous if it is capable of two or more constructions, both of which are reasonable. *Petovello v. Murray*, 362 N.W.2d 857, 858 (Mich. Ct. App. 1984).

If a contract is clear and unambiguous, the court must enforce the contract as written, according to its plain meaning, *Clevenger v. Allstate Ins. Co.*, 505 N.W.2d 553, 557 (Mich. 1993), without looking to extrinsic evidence. *Upjohn Co. v. New Hampshire Ins. Co.*, 476

N.W.2d 392, 396 n. 6 (Mich. 1991). It is improper for the court to ignore the plain meaning of the policy's language in favor of a technical or strained construction. *Arco Indus. Corp. v. Travelers Ins. Co.*, 730 F. Supp. 59, 66 (W.D. Mich. 1989).

If the contract is ambiguous, the court must determine the intent of the parties. To do so, the court may look to extrinsic evidence such as custom and usage. *Michigan Millers Mut. Ins. Co v. Bronson Plating Co.*, 496 N.W.2d 373, 379 (Mich. Ct. App. 1992), *aff'd*, 519 N.W.2d 864 (Mich. 1994). "Perhaps the most common of extrinsic aids to the construction of an insurance policy or other contract is usage and custom." *Allstate Ins. Co v. Freeman*, 443 N.W.2d 734, 760 (Mich. 1989) (Boyle, J.).

In addition, certain rules of construction apply. Ambiguous terms in an insurance policy are construed in favor of the insured. *Arco Indus. Corp. v. Am. Motorists Ins.*, 531 N.W.2d 168, 172 (Mich. 1995). *Accord Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 786-87 (Mich. 2003) (holding that "[t]he rule of reasonable expectations clearly has no application to unambiguous contracts. That is, one's alleged 'reasonable expectations' cannot supersede the clear language of a contract. . . . [Moreover], if a contract is ambiguous and the parties' intent cannot be discerned from extrinsic evidence, the contract should be interpreted against the insurer. In other words, when its application is limited to ambiguous contracts, the rule of reasonable expectations is just a surrogate for the rule of construing against the drafter.").

It is the insurer's responsibility to clearly express limits on coverage. *Auto Club Ins. Ass'n v. DeLaGarza*, 444 N.W.2d 803, 806 (Mich. 1989). Thus, insurance exclusion clauses are construed strictly and narrowly. *Auto-Owners v. Churchman*, 489 N.W.2d at 435; *Farm Bureau Mut. Ins. Co. v. Stark*, 468 N.W.2d 498, 501 (Mich. 1991).

B. Cross Motions for Partial Summary Judgment

1. Duty to Defend - General Star and Specialty National

Plaintiffs argue that Defendants General Star and Specialty National have a duty to defend. Defendants are providing a defense, and thus argue that this issue is moot and does not present a justiciable controversy. Plaintiffs disagree. They respond that, although Defendants are providing a defense, they are doing so under a reservation of rights and under the threat of seeking reimbursement for defense costs at a later date. In light of Defendants' reservation of rights on the duty to defend and the threat to seek reimbursement for defense costs, Plaintiffs are correct. The issue is not moot and does present a justiciable controversy. *See Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 453-54 (6th Cir. 2003) (observing that while a declaratory judgment in an insurance dispute would not end the dispute, "it would settle the controversy regarding the scope of insurance coverage issued by the [insurer] to [insured] and whether [insurer] had a duty to defend the insureds."). The Court now addresses the duty to defend issue.

Under Michigan law, it is well-established that the insurance company's "duty to defend and [its] duty to provide coverage are not synonymous." *Illinois Employers Ins. of Wausau v. Dragovich*, 362 N.W.2d 767, 769 (Mich. Ct. App. 1984). "The duty to defend is broader than the duty to pay." *Pattison v. Employers Reinsurance Corp.*, 900 F.2d 986, 989 (6th Cir. 1990). It extends to allegations which are groundless, false, or fraudulent; it extends to allegations that even arguably come within the policy coverage. *Id.* at 989-90. *Accord Capitol Reproduction, Inc. v. Hartford Ins. Co.*, 800 F.2d 617, 620 (6th Cir. 1986). Michigan law further recognizes that when an insurer fails to fulfill its duty to defend, "it becomes liable for all foreseeable damages flowing from the breach," including amounts

paid in settlement. *Capitol Reproduction*, 800 F.2d at 624. An insurer's duty to defend is determined by examining the allegations of the underlying complaint against the insured. *Detroit Edison Co. v. Michigan Mut. Ins. Co.*, 301 N.W.2d 832 (Mich. Ct. App. 1980). The duty, however, is not limited by the precise language of the complaint; the insurer is required to look behind the allegations "to analyze whether coverage is possible. In a case of doubt . . . , the doubt must be resolved in the insured's favor." *Capitol Reproduction*, 800 F.2d at 620 (quoting *Western Cas. & Sur. Group v. Coloma Twp.*, 364 N.W.2d 367, 369 (Mich. Ct. App. 1985)). "An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *Detroit Edison*, 301 N.W.2d at 835 (emphasis added).

Applying the above principles here, this Court concludes that Defendants General Star and Specialty National owe Plaintiffs a duty to defend. Upon review of the underlying State and Federal Action complaints and the respective policies, this Court concludes that the allegations arguably come within the subject policies' coverage.

2. Duty to Indemnify

Plaintiffs also argue that each Defendant owes it a duty to indemnify. Defendant General Star has filed a cross-motion for partial summary judgment arguing that it owes no such duty. Defendant United National has also filed a cross-motion for partial summary judgment arguing that, with the possible exception of the slander/libel/defamation claims asserted in the underlying State Action, it owes no duty to indemnify. Defendant Specialty National opposes Plaintiffs' motion arguing that it too owes no duty to indemnify. The Court first addresses General Star's no-indemnity arguments.

a. General Star Policies

i. Coverage for Claims Asserted in the Underlying Federal Action

General Star first argues that it has no obligation to indemnify any damages that may be awarded in the Federal Action for procedural and substantive due process violations because General Star's policies do not apply to wrongful acts that occurred after Policy No. 1YA602491C's policy period, which expired on September 1, 2002. General Star relies on the following policy language:

> To the extent that any terms or conditions of this Endorsement conflict with the terms and conditions of this policy or any other endorsement, it is understood and agreed that the terms and conditions of this endorsement control. Except as changed by this endorsement, all other terms and conditions of this policy remain in force.
>
> I. SECTION 1 - COVERAGE - INSURING AGREEMENT is deleted and replaced by the following:
>
> (A) We will pay those sums in excess of the retained limit, that the Insured becomes legally obligated to pay as damages resulting from claims, to which this insurance applies, against the insured by reason of "wrongful act(s)" rendered in discharging duties on behalf of the public entity named in the Declarations. . . . <u>This insurance does not apply to "wrongful act(s)"</u> which occurred before the Retroactive Date, if any shown in the Declarations or <u>which occur after the policy period</u>. We will have the right and duty to defend any "suit" seeking those damages." But:
>
> * * *
>
> (D) This insurance applies only if a claim for damages because of the "wrongful act" is first made against any insured during the policy period.
>
> (1) A claim by a person or organization seeking damages will be deemed to have been made when notice of such claim is received and recorded by any insured or by us, whichever comes first.
>
> (2) <u>All claims for damages causing loss to the same person or organization as a result of "wrongful act(s)" will be deemed</u> to have

> been made at the time the first of those claims is made against any insured.

(Gen. Star Mot., Ex. 1, Self-Insured Retention Endorsement, Section 1.(D), GSI-PO-SIR at p. 1.) (emphasis added).

> PUBLIC OFFICIAL WRONGFUL ACT(S) are defined as:
>
> any alleged or actual breach of duty, or violation of any federal, state or local civil rights, by an insured while acting within the scope of his/her duties as a public official for the public entity named in the Declarations. PUBLIC OFFICIAL WRONGFUL ACT does not include any EMPLOYMENT WRONGFUL ACTS.

(General Star Policy, Section VI - Definitions, ¶ 5, p. 12 of 12.)

General Star further argues that, although the Basic Extended Reporting Period under its second policy extends coverage for claims made after that policy's expiration date if filed within 60 days, coverage is not available if coverage is provided under any subsequent insurance purchased by Plaintiffs. (Gen. Star Reply at 2.) General Star thus argues that there is no coverage under its second policy if coverage for claims asserted in the Federal Action are covered by Specialty National's policy. (*Id.*)

General Star's primary policies are "claims made" policies. This fact impacts on the Court's interpretation of policy language. Accordingly, before addressing General Star's no-coverage arguments, the Court discusses the difference between claims made and occurrence policies.

"Coverage under a 'claims made' policy is available for wrongful acts occurring prior to the policy period, as long as the potential claim was discovered and noticed during the period." *Sigma Fin. v. Am. Int'l Specialty Lines Ins. Co.*, 200 F. Supp.2d 710, 716 (E.D. Mich. 2002). Occurrence policies insure against the occurrence itself. Thus, coverage attaches when the occurrence happens "even though the claim may not be made for some

time thereafter. While in the 'claims made' policy, it is the making of the claim which is the event and peril being insured and, subject to policy language, regardless of when the occurrence took place." *Id*. (internal quotes and citations omitted). "Thus, a claims made policy, as it name suggests, covers claims (or occurrences which reasonably may give rise to a claim) discovered by the insured during the policy period, assuming sufficient notice is given to the insurer." *Id*. (footnote omitted.)

General Star reasons that, because Policy No. 1YA602491C expired on 9/1/02, it cannot provide coverage for wrongful acts that occurred after that date; i.e., everything alleged in the Federal Action complaint regarding the SALU revocation hearing and result. General Star's argument is rejected.

General Star erroneously asserts that "the Court's finding of liability against the City of Sterling Heights and Mr. Duchane was expressly predicated on conduct which indisputably arose after the expiration" of Policy No. 1YA602491C. (Gen. Star Br. at 13.) Even if all of the City's procedural due process violations in connection with the SALU revocation hearing flowed from wrongful acts that occurred after 9/1/02, General Star cannot avoid coverage for wrongful acts that occurred before 9/1/02. Many of the wrongful acts giving rise to the Court's determination that Hillside's substantive property and liberty interests were violated took place before expiration of the 9/1/02 policy period. For example:

(1) on June 12, 2001, just five days after the beginning of the concert season, Duchane informed Hillside that he would conduct an Administrative Enforcement Hearing to hear evidence as to whether Hillside constituted a nuisance, and that he would use the information obtained from the hearing to determine "the advisability of recommending

various formal actions, such as reconsideration of the Special Land Use" (Specialty National's Resp., Appendix, Ex. 5);

(2) during the June 20, 2001 administrative hearing, the City Attorney advised that the Planning Commission could review and determine whether the SALU should be revoked (*id.,* Ex. 6 at 6);

(3) on July 17, 2001, the City approved a motion directing the City's attorney to outline possible legal actions to close Hillside (*id*., Ex. 7);

(4) on August 7, 2001, the City's attorney issued a letter advising the City Council that one of its options was to terminate the SALU (*id*., Ex. 8);

(5) in early January 2002, Sterling Heights City Planner Norman Birr notified Hillside of the alleged SALU violations later addressed in the revocation hearing (evidence that the City was gearing up for revocation);

(6) following the State Court's order issued on June 21, 2002, requiring the City to cease enforcing noise ordinances when Hillside was operating within the SALU, the City Planner began to look for some violation of the SALU (Specialty National Req. for Judicial Notice, Ex. E at 184-185);

(7) in July or August 2002, Duchane informed City Councilman Rice that he wanted to revoke the SALU and had directed the City Planner to formalize the process for revocation (Specialty National Resp., Appendix, Ex. 10 at 56-57); and

(8) the City Planner also testified that prior to September 24, 2002, Duchane advised him that the City had collected sufficient information to consider revoking Hillside's SALU (*id*., Ex. 9 at 193-94).

That the culmination of these wrongful acts; i.e., the actual revocation of Hillside's SALU, took place after 9/1/02 does not serve to absolve General Star of the duty to indemnify for wrongful acts occurring before 9/1/02. General Star does not provide the Court with any policy language or legal authority that supports its all-or-nothing argument.

ii. Coverage Under General Star Policy No. 1YA602491C (9/1/01 to 9/1/02 Policy Period)

Construing the contract as a whole, General Star argues that coverage, if any, arises under General Star Policy No. 1YA602491B (policy period 9/1/00 to 9/1/01) and not Policy No. 1YA602491C (policy period 9/1/01 to 9/1/02). It reasons that, because all the claims in the State and Federal Actions are claims asserting losses to the same person or organization as a result of wrongful acts, they are all deemed under United's policy to have been made at the time the first of them was made. (SIR Endorsement §1.(D)(2).)[1] The first claim was made in August 2001 when the State Action was filed.

General Star further argues that, because all claims asserted in the Federal and State Actions are deemed to have been first made during the policy period of Policy No. 1YA602491B, which has a term that expired before the inception date of Policy No.

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[1]The deemer clause provides that:

> (2) All claims for damages causing loss to the same person or organization as a result of "wrongful act(s)" will be deemed to have been made at the time the first of those claims is made against any insured.

(General Star Mot. Ex. 1(B), Policy No. 1YA602491C, Self-Insured Retention Endorsement, § 1.(D)(2), GSI-PO-SIR at p. 1 of 5.) (emphasis added).

1YA602491C, Exclusion (h) applies and limits coverage to that available under Policy 1YA602491B.[2]

This Court agrees with General Star. Plaintiffs' contrary arguments ignore the plain language of the General Star policies. Their arguments that the State and Federal Actions state several claims against Duchane and the City miss the point. There is no dispute that Plaintiffs were aware of and gave notice of circumstances that might give rise to claims against Duchane and the City during the 9/1/00 to 9/1/01 policy period of General Star Policy No. 1YA602491B. In light of the deemer clause in General Star's later policy, covering the period 9/1/01 to 9/1/02, all claims asserted by the Hillside Plaintiffs are to be deemed first made during the earlier 9/1/00 to 9/1/01 policy period. Because Duchane and the City are entitled to indemnity under the earlier policy period, Exclusion (h) applies to preclude coverage under the latter policy period. *See Sigma Fin. Corp.*, 200 F. Supp.2d at 717-723; *Comerica Bank v. Lexington Ins. Co.*, 3 F.3d 939 (6th Cir. 1993); *Farmington Cas. Co. v. United Educators Ins. Risk Retention Group*, 117 F. Supp.2d 1022, 1025-26 (D. Colo. 1999) (reaching a similar conclusion when interpreting similar contract language despite the fact that a second lawsuit referenced "ongoing discriminatory acts" that ultimately led to the challenged employment termination). Moreover, because Exclusion (h) applies, this Court need not consider Plaintiffs' arguments concerning the correct

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[2]Exclusion (h) provides that the "insurance does not apply to any CLAIM made against the insured" "[f]or which the insured is entitled to indemnity or payment by reason of having given notice of any circumstances which might give rise to a CLAIM under any policy or policies the term of which has expired prior to the inception date of this policy." (Gen. Star Mot., Ex. 1(B), Policy No. 1YA602491C, § I, Coverage A Public Officials Liability, ¶ 2.h. at p. 2 of 12.) (emphasis added).

interpretation of § III - Limits of Liability, ¶ 3, providing that "CLAIMS based on and arising out of the same act or interrelated acts of one or more Insureds shall be considered to be a single CLAIM." Plaintiffs' reliance on cases discussing interpretation of "occurrence" policies is also misplaced. (Pls.' Reply at 12-14.) The policies at issue here are claims-made policies; not occurrence policies.

In sum, General Star is liable for indemnity coverage under its primary Policy No. 1YA602491B and under its excess Policy No. 1XG900294B, which General Star admits follows form with the primary policy in effect for the 9/1/00 to 9/1/01 policy period.

iii. Coverage for "Employment Wrongful Acts"

General Star argues that the libel, slander, and/or defamation claims asserted against the City and Duchane in the underlying State Action do not fall within their policy's definition of "employment wrongful acts." Plaintiffs argue otherwise.

"Employment Wrongful Act(s)" are defined under the policy as:

> actions involving refusal to employ, termination of employment, false arrest, false imprisonment, coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, libel, slander, invasion of privacy, wrongful eviction, malicious prosecution, abuse of process, discrimination or other employment-related practices, policies, acts or omissions. EMPLOYMENT WRONGFUL ACT(S) does not include any PUBLIC OFFICIAL WRONGFUL ACT(S).

(General Star Mot., Ex. A, Policy No. 1YA602491B, §VI.2, at p. 12 of 12.) (emphasis added).

General Star first argues that coverage for wrongful acts under the Public Officials Liability section of its policies (Coverage A) cannot, by definition, also provide coverage for wrongful acts under the Employment Practices Liability section (Coverage B). General Star correctly interprets policy language providing that "EMPLOYMENT PUBLIC ACT(S) does

not include any PUBLIC OFFICIAL WRONGFUL ACT(S)." (General Star Appendix, Ex. A, General Star Policy No. 1YA602491B, § VI.2, at p. 12 of 12.)[3] The fact that a public official's civil rights violations are excluded from the definition of "employment wrongful acts" does not support General Star's argument that the slander, libel and defamation claims asserted against Duchane in the underlying State Action cannot fall within this definition.

General Star next argues that the definition includes only employment-related conduct. This argument ignores the fact that, in the underlying State Action, it is alleged that Duchane committed the slander, libel and/or defamation while employed as the City's Manager. That fact distinguishes this case from the facts presented in *Claredon Nat'l Ins. Co. v. City of York*, 290 F. Supp.2d 500, 506 (M.D. Pa. 2003) (observing that "none of the defendants in the underlying action were ever employees of the City" and thus concluding that the insurer was correct in presuming that "the employment liability practices coverage was not applicable"). The Court is not persuaded that the underlying libel and slander claims fall outside this definition.

d. Coverage for Equal Protection Claims Alleged in the Federal Action

In the Federal Action, it is alleged that the City and Duchane engaged in conduct intended to punish the Hillside Plaintiffs for filing the State Action and for insisting on their rights under the SALU. (Fed. Ct. Am. Compl. at ¶ 54.) This Court denied the Hillside

[3]General Star's primary policies define Public Official Wrongful Acts as "any alleged or actual breach of duty, or violation of any federal, state or local civil rights, by an insured while acting within the scope of his/her duties as a public official for the public entity named in the Declarations." (General Star Appendix, Ex. A, General Star Policy No. 1YA602491B, § VI.4, at p. 12 of 12.) This definition likewise excludes acts defined as employment wrongful acts. (*Id.*)

Plaintiffs' motion for summary judgment on their equal protection retaliation claims finding questions of fact as to the City's and Mr. Duchane's motivation existed for trial. (10/30/03 Order Granting in part and Denying in part Pls.' mot. for summary judgment, at 24.) It also denied Duchane's motion for summary judgment on this same claim. (12/22/03 Order Granting in part and Denying in part Defs.' mot. for summary judgment, at 23.)

General Star argues here that there is no indemnity coverage for damages arising from the Hillside Plaintiffs' equal protection claims because its policy excludes coverage for damage claims "arising out of the willful violation of any federal, state, or local statute, ordinance, rule or regulation committed by or with the knowledge and consent of any insured. . . ." (General Star Policy No. 1YA602491B, § I, Coverage A (Public Officials Liability), ¶¶ 2.c, p. 2 of 12.) To succeed on the underlying equal protection claim, the Hillside Plaintiffs must prove that Duchane's and the City's challenged conduct was motivated, at least in part, as a response to the exercise of their constitutional rights. *Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998). Despite its contention that Policy Exclusion (c) "is not triggered on an 'intentional' act, but upon a 'willful violation' of a federal statute" (Reply at 6), General Star nonetheless argues that the Hillside Plaintiffs' proof of intentional retaliation will likewise prove a willful violation of the Hillside Plaintiffs' civil rights. General Star's reliance on *Claredon* to support this argument is misplaced. In *Claredon*, the United States District Court for the Middle District of Pennsylvania concluded that a policy exclusion for claims "[a]rising out of the deliberate violation" of any federal statute preclude claims alleging a "knowing and intentional deprivation" of civil rights. *Claredon*, 290 F. Supp.2d at 506-07. There is no similar allegation in the underlying Federal Action. General

Star has not presented the Court with authority supporting its position and thus is not entitled to summary judgment on this exclusion issue.

iv. Coverage for Damages Re: Diminution of Value or Loss of Use of Hillside's Property

General Star further argues that it owes no duty to indemnify the City and Duchane for any damages relating to the diminution in value or loss of use of Hillside's property. It supports this argument with policy language excluding claims made against the insured:

> 2. Exclusions.
>
> This insurance does not apply to any CLAIM made against the insured:
>
> * * *
>
> d. For . . . damage to or destruction of any property, including diminution of value or loss of use.

(General Star Policy No. No. 1YA602491B, § I, Coverage A (Public Officials Liability), ¶ 2.d, p. 2 of 12; Coverage B (Employment Practices Liability), ¶ 2.d, p. 4 of 12.)

General Star argues that the bulk of the Hillside Plaintiffs' damages relate to alleged economic lost profits arising from their inability to operate Freedom Hill in an "unfettered manner" and thus are damages relating to the "loss of use of the property" that is not covered under the policy.

Plaintiffs respond that the Hillside Plaintiffs are seeking economic damages resulting from constitutional harms; i.e., deprivation of and/or interference with constitutionally protected property and liberty rights, that do not fall within the policy exclusion for damage to or destruction of physical property. Plaintiffs' arguments find support in Michigan law, which governs interpretation of the subject insurance contracts. *See Krueger Seed Farms, Inc. v. Szlarczyk*, No. 200249, 200250, 1999 WL 33453867 (Mich. Ct. App. Mar. 9, 1999)

(construing a substantially similar property damage exclusion in a commercial liability policy and holding that, because the economic damages (lost profits) at issue did not flow from damage to physical property, the property damage exclusion in the insurance policy did not preclude coverage). *Cf Fitch v. State Farm Fire & Cas. Co.*, 536 N.W.2d 273 (Mich. Ct. App. 1995) (holding that coverage for property damage in a homeowner's policy was not available because the economic damages at issue did not involve damage to or destruction of tangible, physical property). General Star has not met its burden by showing that Exclusion (c) precludes the Hillside Plaintiffs' damage claims.

b. Specialty National Insurance Policies

Plaintiffs argue that Specialty National owes a duty to indemnify it for damages arising from claims asserted during its policy period. Specialty raises several arguments why coverage is not available. Because questions of fact exist regarding Specialty National's indemnity coverage, Plaintiffs' motion for partial summary judgment on this issue is denied.[4]

Specialty National issued Policy No. 3 XZ 181159-00 to the City of Sterling Heights, covering the period of September 1, 2002 to September 1, 2003. The policy contains commercial general liability, public officials errors and omissions liability, and umbrella coverage. The policy was cancelled at the request of the City of Sterling Heights, effective May 14, 2003. (Specialty National Resp., Cowan Aff. ¶¶ 3-4.) Specialty National raises several arguments why it owes no duty to indemnify Plaintiffs under this insurance contract.

i. Application of the Fortuity/Known Loss Doctrine

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[4]Because Plaintiffs' motion for partial summary judgment is being denied concerning primary coverage under Specialty National's policy, it is premature for this Court to address Specialty National's arguments concerning application of its umbrella policy.

Specialty National first argues that there is no duty to indemnify because, when the City purchased the subject policy, the conduct which ultimately became the subject of the Federal Action had been ongoing since 2000. Accordingly, Specialty National argues, Plaintiffs claims are precluded from coverage under the known loss doctrine.

As this Court has previously observed, "[t]he known loss doctrine is a common law concept that derives from the fundamental requirement of fortuity in insurance law. Its basic premise is that insurance policies are intended to protect insureds against risks of loss; not losses that have already taken place or are substantially certain to occur. Accordingly, the doctrine is properly invoked when the insured 'knows' about the claimed loss before the policy is purchased. The loss in progress doctrine, as a variant of the known loss doctrine, has its roots in the prevention of fraud. Because insurance policies . . . are designed to insure against fortuities, a fraud is worked when they are misused to insure a certainty." *Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 10 F. Supp.2d 771, 789 (E.D. Mich. 1998) (internal quotes and citations omitted). These fortuity-based doctrines "must be judged using a subjective standard because requiring this knowledge element best serves the overall principle of insurance law. A subjective standard also protects against the misuse of hindsight to avoid indemnification coverage." *Id.* (internal quotes and citations omitted). The crucial issue is whether the insured was aware of an immediate threat of the injury for which it was ultimately held responsible and for which it now seeks coverage, not the insured's awareness of its legal liability for that injury. *Id.* at 790. Despite Plaintiffs' arguments to the contrary, this Court continues to predict that the Michigan Supreme Court would adopt the known loss doctrine as described above. *See Aetna*, 10 F. Supp.2d at 788-790.

Specialty National argues that the City and Duchane were subjectively aware of the injury for which they were ultimately held responsible in the Federal Action. It argues that the City's and Duchane's continuing misconduct that occurred during the Specialty National policy period was simply part of the ongoing scheme that began before the policy's inception date (9/1/02). Specialty National contends that the notice of the Administrative Enforcement Hearing, and the hearing itself, demonstrate that Duchane and the City formulated a plan to revoke the SALU as early as June of 2001. It further argues that, in July 2001, the City's attorney advised the City Council of possible legal actions to close Hillside; and in August 2001, Duchane directed the City Planner to pull Hillside's previously approved site plan and other submissions and to look for problems and possible legal issues. Moreover, Specialty National asserts, in July or August of 2002, Duchane informed Councilman Rice of his desire and plan to revoke the SALU and further informed Councilman Rice that he had already directed the City Planner to move ahead to have the Planning Commission consider revoking the SALU. Specialty National argues that, because the entire scheme to put Hillside out of business, culminating in the revocation of the SALU, was already in progress, having begun long before the date the policy took effect, and because the City and Duchane knew of the risk of Hillside's claims prior to the policy period, there is no indemnity coverage.

Plaintiffs respond that Specialty National has not met its burden of establishing that no genuine issue of material fact exists concerning whether the known loss doctrine should apply to exclude coverage here. This Court agrees with Plaintiffs. There is a subjective component to the known loss doctrine that typically precludes summary judgment. Plaintiffs present evidence refuting Specialty National's argument that at the time the policy

was purchased Plaintiffs either knew or were aware of the threat of litigation over civil rights violations flowing from SALU revocation proceedings that did not take place until after that policy was purchased.

ii. Claims First Made During Specialty National's Policy Period

Specialty next argues that, although the Federal Action was filed during its policy period, the procedural and substantive SALU-related due process claims asserted in that Action are not claims first made during the policy period.[5] Rather, Specialty National argues, these claims were first made when the State Action was filed in August 2001 (more than a year before Specialty's policy was issued) because: (1) the SALU revocation in December 2002 (during its policy period) was merely the culmination of a pattern of harassing behavior that began with conduct described in the State Action; and (2) before Specialty National's policy took effect, Duchane and the City were aware of circumstances that could reasonably be expected to give rise to these claims. Plaintiffs argue otherwise.

The Court agrees with Plaintiffs. First, Specialty National does not point to policy language deeming all claims for damages causing loss to the same person or organization as being made when the first of those claims is made. Accordingly, arguments that worked for General Star do not work here. Claims-made policies like Specialty National's provide

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[5]The policy provides that CLAIM means:

> written demand from any party intending to hold an **INSURED** responsible for damages resulting from a **WRONGFUL ACT** covered by this **POLICY**. **CLAIM** also means an **INSURED**'s knowledge of circumstances that could reasonably be expected to give rise to such notice.

(Cowan Aff., Ex. A at Pub. Off. Liab., § I, "Definitions," at 1 of 11.) (emphasis added).

coverage for claims that are actually made during the policy period. Unlike occurrence policies, the date the claim is made matters more than the dates wrongful acts giving rise to that claim occurred. *Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P.*, 267 F. Supp.2d 601 (E.D. Tex. 2003).

Second, the argument that Plaintiffs could reasonably expect future litigation from the Hillside Plaintiffs for continued behavior of the type described in the State Action does not necessarily require the conclusion that Plaintiffs could reasonably expect the SALU revocation-related claims asserted in the Federal Action. The decisions Specialty National relies on to support its arguments are distinguishable for this very reason. *See Farmington,* 117 F. Supp. 2d at 1026 (holding that second lawsuit against insured for wrongful termination, filed during policy period of "claims made" policy, was part of ongoing discriminatory acts alleged in first lawsuit filed before inception of policy, and therefor, the second lawsuit should not be treated as a new and independent action giving rise to a new claim during the policy period); *Ameriwood Indus. Int'l Corp. v. Am. Cas. Co. of Reading*, 840 F. Supp. 1143, 1153 (W.D. Mich. 1993) (holding that insurer was not required to indemnify insured for claims made in second lawsuit filed during policy period of "claims made" insurance policy because the latter suit "[arose] out of the facts or circumstances underlying or alleged in" the prior suit). Despite Specialty National's argument to the contrary, the revocation of Hillside's SALU in December 2002, during its policy period, is not like the continued discrimination and termination of the employee in *Farmington*. Whether Plaintiffs had knowledge of circumstances that could reasonably be expected to give rise to the SALU revocation-related claims asserted in the Federal Action remains a disputed issue of material fact.

iii. Known Loss Policy Exclusion

Specialty National also argues that the following exclusion precludes coverage for Public Officials Liability Coverage:

> Exclusion - Knowledge of Wrongful Acts Prior to the Policy Period
>
> The following **EXCLUSION** is added to SECTION II - COVERAGES, EXCLUSIONS:
>
> This insurance does not apply to and **WE** shall not be obligated either to make any payment or to defend any **SUIT** in connection with any **CLAIM** or **SUIT** made against the **INSURED** arising out of:
>
> 1. Any **WRONGFUL ACT(S)** that takes place prior to the **POLICY PERIOD** if the **INSURED** had knowledge of circumstances which could reasonably be expected to give rise to a **CLAIM**;

(Specialty National Mot., Cowan Aff., Ex. A at Endorsement to Public Officials Liability Coverage, Exclusion - Knowledge of Wrongful Acts Prior to the Policy Period (POF 70a).) (emphasis added). Specialty National once again argues that Plaintiffs had knowledge of circumstances which could reasonably be expected to give rise to the SALU revocation-related claims asserted in the Federal Action. Plaintiffs once again respond that disputed questions of material fact remain on this issue. The Court agrees. Plaintiffs persuasively argue that, although the State and Federal Actions have some facts in common, the Federal Action alleges SALU related wrongful acts that occurred during Specialty National's policy period, and Plaintiffs asserted a claim for those wrongful acts during that policy period.

iv. The Bad Faith Exclusion

Specialty National also argues that its policy excludes public official liability coverage for claims or suits against the insured that are "[b]rought about or contributed to by fraud, dishonesty, or bad faith of an Insured." (Cowan Aff., Ex. A at Pub. Off. Liab., § II, "Exclusions," 2, at 4 of 11.) The Michigan Supreme Court has observed that "bad faith" defines "a state of mind." *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 393 N.W.2d 161, 164 (Mich. 1986). In *Commercial Union*, where an excess insurer sued the primary insurer for failing to settle a claim in good faith, the Court defined "bad faith" as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Id.* Specialty National wants to use that definition here to exclude public officials liability coverage. It argues that Duchane's conduct, allegedly assuring City Council members that "[w]e will put [Hillside] out of business," and instructing the City Planner to look for reasons allowing the City to revoke Hillside's SALU, constitutes bad faith.

Plaintiffs respond that disputed issues of material fact exist regarding Duchane's state of mind. This Court agrees.

v. General Liability Coverage for "Personal Injury"

Specialty National argues that there has been no "invasion of the right of private occupancy" and thus no "personal injury" as defined under the policy. The policy defines coverage for "personal injury" as including violations of federal civil rights statutes. (Cowan Aff., Ex. A., at CGL, § V, ¶¶ 10.i.) The underlying Federal Action alleges violations of the federal civil rights statute. Accordingly, Specialty National's argument is rejected.

c. United National Insurance Policies

i. Duty to Indemnify for Defense Costs

United National's Policy No. CP 65070 covers the period from September 1, 1999 to September 1, 2002 and provides for occurrence-based comprehensive general liability (CGL) coverage (with a $100,000 ultimate net loss Self-Insured Retention (SIR) and then $900,000 ultimate net loss of Specific Excess Coverage) and claims-made public officials errors and omissions coverage (with a $100,000 ultimate net loss Self-Insured Retention and no Specific Excess Coverage). (Pls.' Mot., Ex. E, United Policy at pp. 3, 5.) United's policy also provides Multiple Lines Loss Protection "when two (2) or more coverage sections apply to a covered loss" with limits of $900,000 ultimate net loss in excess of a $100,000 ultimate net loss SIR per covered loss. (*Id*. at 6.) United has informed the City that, because of the "Multiple Lines Loss" provisions of the policy, the City will be liable for a single $100,000 SIR instead of a $100,000 SIR under both the CGL and public officials errors and omissions coverage sections. (United Resp., Ex. E.)

Plaintiffs' motion for partial summary judgment argues that United National owes it a duty to indemnify or reimburse defense costs incurred in excess of the $100,000 SIR as provided in the policy because claims asserted in the State and Federal Actions are for covered occurrences and defense costs exceed the SIR. Both Plaintiffs and United agree that United does not owe a duty to defend. Rather, their dispute centers on United's duty to indemnify for defense costs.

As to that duty, United National admits that, if coverage applies, it owes such a duty. The policy's definition of "Ultimate Net Loss" includes "expenses of lawyers . . . for litigation, settlement, . . . of claims and suits which are paid as a consequence of any occurrence covered hereunder." (*Id.* at 17 (emphasis added).) United further argues that, pursuant to this policy language, its duty to indemnify for defense costs is triggered only if and when

its liability for excess coverage has been established. This Court agrees with United. Michigan courts have observed that a contractual duty to defend is broader than a contractual duty to indemnify for defense costs. *Busch v. Holmes*, 662 N.W.2d 64, 67 (Mich. Ct. App. 2003) (citing cases). The *Busch* court, construing language substantially similar to that at issue here, concluded that the insurer owed a more narrow duty-to-indemnify for defense costs. *Id.* Accordingly, the court concluded, "the doctrine that an insurer has a duty to defend arguable claims is not involved." *Id.* Likewise, because United's policy provides for indemnification of defense costs paid as a consequence of a covered occurrence, the duty to indemnify is triggered once coverage is established.[6]

ii. Covered Claims

United also argues that, with the possible exception of the slander/libel/defamation claims asserted in the underlying State Action, there is no coverage for the claims asserted in the State and Federal Actions and thus argues that these other coverage claims should be dismissed.[7] Specifically, United argues that, as to the CGL coverage, only the libel/slander/defamation claims asserted in the State Action fall within the definition of a covered "Personal Injury." United further argues that, as to the Public Officials coverage, although civil rights violations fall within the definition of covered "Wrongful Act(s)", there

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[6]Because the duty to indemnify defense costs applies only to "covered" losses and coverage questions remain unanswered, it is premature for this Court to decide issues raised concerning the apportionment of defense costs.

[7]In the State Action, the alleged defamatory statements were made on June 21, 2001, August 12, 2001, August 15, 2001, November 28, 2001, and December 27, 2001. (State Action 2nd Am. Compl. at ¶¶ 65a-f.) It is further alleged that the City and Duchane acted "negligently and knowingly. . . in the publication of these false and defamatory statements." (*Id.* at ¶ 68.)

is no excess coverage for such wrongful acts under the policy. Accordingly, United argues, its Public Officials coverage is equal to the City's $100,000 SIR.

Plaintiffs do not dispute United's interpretation of its Public Officials coverage. Plaintiffs do, however, argue that there is also coverage for the civil rights claims asserted in the State and Federal Actions under the CGL definitions of covered "Property Damage" and/or "Personal Injury." Plaintiffs have the burden of proving that a loss falls within the coverage provisions of an insurance policy. *See Harrow Products, Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1020 (6th Cir. 1995). As discussed below, this Court concludes that Plaintiffs have not met that burden with respect to CGL coverage for the underlying civil rights claims.

(a) The Underlying Claims Do Not Allege "Property Damage"

Plaintiffs first argue that the underlying civil rights claims fall within the policy's definition for covered "Property Damage" because they allege that, as a result of Plaintiffs' civil rights violations, the Hillside Plaintiffs lost the use of their property. This argument ignores the plain language of United's policy.

United's policy unambiguously defines "Property Damage" as "direct damage to or destruction or loss of property, including all resulting loss of use of property, excluding, however, damage to the **PROPERTY OF THE ASSURED.**" (United Mot., Ex. D, Policy at p. 16.) Given its plain meaning, Property Damage includes claims for: (1) direct damage to property, including all resulting loss of use of that property; (2) destruction of property, including all resulting loss of use of that property; and (3) loss of property, including all resulting loss of use of that property. It is clear from this definition that "loss of use" is

covered so long as it is the result of direct damage to, destruction of, or the loss of physical property. The underlying civil rights claims do not allege any such damage to, destruction of, or loss of physical property and thus do not fall within this definition.

(b) The Underlying Civil Rights Claims Do Not Allege "Personal Injuries"

Plaintiffs next argue that the underlying civil rights claims fall within the definition of a covered "Physical Injury" because they allege "Infringement of . . . Property," "Wrongful Entry," "Wrongful Eviction," and "Malicious Prosecution." Plaintiffs are mistaken.

United's policy defines "Personal Injury" as:

> **PERSONAL INJURY** means any injury other than **BODILY INJURY** or **PROPERTY DAMAGE** arising out of the following:
>
> Mental Anguish, Shock, Sickness, Disease, Disability or Death not arising from Physical Injury. It also means Wrongful Entry, Wrongful Eviction, Wrongful Detention, Malicious Prosecution, Humiliation, Misappropriation of Advertising Ideas, Invasion of Rights of Privacy, Libel, Slander or Defamation of Character, Piracy and any Infringement of Copyright or of Property, Erroneous Service of Civil Papers, Assault and Disparagement of Property. . . .

(United Mot., Ex. D, Policy at p. 16.)

Plaintiffs argument that the underlying civil rights claims constitute "infringement of . . . property" within the meaning of "personal injury" is not persuasive. The Colorado Court of Appeals recently interpreted the phrase "piracy and infringement of copyright or of property" within the context of the definition of "personal injury" and construed the "infringement of property" phrase to include claims alleging the infringement of intellectual property rights like a patent or trademark, not claims alleging the breach of a tenant's leasehold interest in real property. *City of Arvada v. Colorado Intergovernmental Risk Sharing Agency*, 988 P.2d 184, 187 (Colo. Ct. App. 1999), *aff'd*, 19 P.3d 10 (Colo. 2001).

This Court agrees with that interpretation. The underlying civil rights claims at issue here do not involve the infringement of intellectual property rights. Defining "infringement," as Plaintiffs urge; i.e., as "an encroachment or trespass on a right or privilege," *Webster's Ninth New Collegiate Dictionary* at 621 (1991), does nothing to advance Plaintiffs' argument. Furthermore, Plaintiffs' reliance on decisions construing different contract language; i.e., "invasion of the right of private occupancy," is misplaced.

Plaintiffs' arguments that these civil rights claims constitute claims of "wrongful entry" or "wrongful eviction" within the definition of Personal Injury similarly fail. There are no allegations in the underlying complaints that the City or Duchane wrongfully entered the Freedom Hill property or wrongfully evicted the Hillside Plaintiffs from that property. The underlying claims acknowledge that the Hillside Plaintiffs have a landlord/tenant relationship with Macomb County, not the City of Sterling Heights.

Finally, Plaintiffs argue that the underlying equal protection civil rights claim in the Federal Action "potentially" fits the elements of a "malicious prosecution" claim under Michigan law[8] and thus falls within the definition of "Personal Injury." Plaintiffs misconstrue the Hillside Plaintiffs' equal protection claims which allege that the City and Duchane selectively enforced the laws so as to punish or retaliate against the Hillside Plaintiffs for exercising their constitutional rights when they filed the State Action and insisted on their

[8]"To establish a prima facie case of malicious prosecution, [a Michigan] plaintiff must prove 1) that there was a civil or criminal proceeding instituted or continued against the plaintiff, 2) that the termination of the proceeding was in favor of the accused, 3) that there was an absence of probable cause for the proceeding, and 4) malice or a primary purpose other than that of bringing the offender to justice." *McGuffin v. Sturdevant*, No. 240661, 2003 WL 22301054, *2 (Mich. Ct. App. Oct. 7, 2003) (citing MCL 600.2907; *Rivers v. Ex-Cell-O Corp.*, 100 Mich. App. 824, 832, 300 N.W.2d 420 (Mich. Ct. App. 1980)).

rights under the SALU. (Federal Action Am. Compl. at ¶¶ 54, 101.) The underlying Federal Action does not allege a claim for malicious prosecution, and Plaintiffs are not entitled to coverage for claims that could have but were not asserted in the underlying action. To hold otherwise, would do violence to the plain language of United's policy. Furthermore, because the underlying Federal Action alleges a civil rights claim that falls within the definition of covered "wrongful acts" under United's Public Officials coverage section, (United Policy at 17), it is expressly excluded from coverage under CGL Exclusion (h). (United Policy at 27.)[9]

(c) Coverage for Remaining Contract-Related Claims

Finally, United argues that it has no duty to indemnify for the contract-related claims alleged in the underlying State Action because its policy does not provide for any such coverage. Under its comprehensive general liability coverage provisions, United's policy provides that it will indemnify for all sums the assured is "legally obligated to pay by reason of liability imposed" on the assured "for damage" as defined by the term "ULTIMATE NET LOSS, on account of PERSONAL INJURY, BODILY INJURY . . . and/or PROPERTY DAMAGE . . . arising out of any OCCURRENCE . . . happening during the PERIOD OF INSURANCE." (United Policy at 26.) Plaintiffs do not argue that the policy definitions of "personal injury," "bodily injury," "property damage," or "occurrence" include any of the contract-related claims asserted in the underlying State Action. As observed by the Sixth Circuit Court of Appeals in *Lenning v. Commercial Union Ins. Co.*, "courts have held that a breach of contract claim cannot constitute an 'occurrence' under liability policies triggered

[9]In light of this ruling, it is not necessary for the Court to address United's arguments that additional exclusions apply to preclude coverage of this civil rights claim.

by an accident or an occurrence." 260 F.3d 574, 582-83 (6th Cir. 2001) (citing cases). Contrary to Plaintiffs' arguments, United is not arguing that a policy exclusion applies to preclude coverage. Rather, United is arguing that coverage is not available under its policy. Plaintiffs have the burden of proving that a loss falls within the coverage provisions of an insurance policy. *See Harrow Products*, 64 F.3d at 1020. Plaintiffs have not met that burden here with respect to CGL coverage for the underlying contract-related claims asserted in the State Action. Accordingly, United is entitled to summary judgment on this issue, and Plaintiffs claims alleging indemnity coverage for the underlying contract-related claims asserted in the State Action are hereby dismissed.

IV. Conclusion

For the above stated reasons, Plaintiffs motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART; Defendant General Star's motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART; and Defendant United National's motion for partial summary judgment is GRANTED.

s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: February 11, 2004