No.

IN THE

Supreme Court of the United States

RODENBURG LLP, DOING BUSINESS AS
RODENBURG LAW FIRM, PETITIONER

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON,
SYNDICATE NO. 4020, SUBSCRIBING TO POLICY NUMBER
DCLPLA 00574-00
AND
THE CINCINNATI INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CLIFTON RODENBURG
Counsel of Record

Rodenburg Law Firm
300 NP Ave., Suite 105
P.O. Box 2427
Fargo, ND 58108-2427
rodenburgc@aol.com
(701) 235-6411

CURRY & TAYLOR ♦ (202) 350-9073

QUESTION(S) PRESENTED

1. Did the court of appeals' expansive reading of a boilerplate exclusion used nationwide by insurers in their commercial liability policies, a reading which makes the policy's coverage illusory and therefore worthless, overturn North Dakota substantive law, create a split of authority among the jurisdictions which have considered the identical question and deprive petitioner of the property rights to which it would otherwise be entitled in State court?

2. Can the Violation of Statutes exclusion used nationwide by insurance companies when writing commercial liability policies be enlarged despite its limiting language to incorporate the violation of *any* statute, ordinance or regulation "which prohibits or limits the...communicating...of material or information" in order to deny coverage for claims understood to be within the range of risks contemplated by the insured when it purchased the policy?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Eighth Circuit in *Rodenburg LLP v. Certain Underwriters at Lloyd's of London, Syndicate No. 4020 et al.*, C.A. No. 20-2521, decided August 25, 2021, and reported at 9 F.4th 1033 (8th Cir. 2021), affirming the District Court's grant of summary judgment to respondent Cincinnati Insurance Company, is set forth in the Appendix hereto (App. 1-13).

The published Order of the United States District Court for the District of North Dakota, Eastern Division, in *Rodenburg LLP v. Certain Underwriters at Lloyd's of London, Syndicate No. 4020 et al.*, Civil Action No. 3:19-cv-00027, filed June 24, 2020, and reported at 468 F. Supp.3d 1125 (D.N.D. 2020), granting respondent Lloyd's of London's motion for summary judgment motion and dismissing petitioner's complaint with prejudice, is set forth in the Appendix hereto (App. 14-31).

The published Order of the United States District Court for the District of North Dakota, Eastern Division, in *Rodenburg LLP v. Certain Underwriters at Lloyd's of London, Syndicate No. 4020 et al.*, Civil Action No. 3:19-cv-00027, filed January 9, 2020, and reported at 432 F. Supp.3d 979 (D.N.D. 2020), granting respondent Cincinnati Insurance Company's motion for summary judgment, denying petitioner's cross motion for summary judgment and dismissing petitioner's complaint with prejudice, is set forth in the Appendix hereto (App. 32-52).

The unpublished order of the United States Court of Appeals for the Eighth Circuit in *Rodenburg LLP v. Certain Underwriters at Lloyd's of London, Syndicate No. 4020 et al.*, C.A. No. 20-2521, filed on September 30, 2021, denying petitioner's timely filed petition for rehearing or, in the alternative, for rehearing *en banc*, is set forth in the Appendix hereto (App. 53).

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit affirming the District Court's grant of summary judgment to respondent Cincinnati Insurance Company and its dismissal of petitioner's complaint was entered on August 25, 2021; and its order denying petitioners' timely filed petition for rehearing or, in the alternative, for rehearing *en banc*, was filed on September 30, 2021 (App. 1-13;53).

This petition for writ of certiorari is filed within ninety (90) days of September 30, 2021, the date the court of appeals denied petitioners' timely filed petition for rehearing or, in the alternative, for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1332(a)(1) (diversity jurisdiction; amount in controversy; costs):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
(1) citizens of different States....

15 U.S.C. § 1692c (Fair Debt Collection Practices Act):

Communication in connection with debt collection

(a) Communication with the consumer generally.
Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—
(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer.
In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that

the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer;

or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties.

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease

further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C. § 1692d:

(d) Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) [1] of this title.
(4) The advertisement for sale of any debt to coerce payment of the debt.
(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 USC § 1692e (purposes of the FDCPA):

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692f (Unfair Practices):

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general

application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.
(7) Communicating with a consumer regarding a debt by post card.
(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

North Dakota Century Code 9-07-14 & 9-07-19 (Interpretation of Contract):

9-07-14. Interpreted as promisor believed promisee understood it.
If the terms of a promise in any respect are ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it.

9-07-19. Uncertainty interpreted against party causing it -
Presumption as to cause.
In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, and in such case it is presumed that all uncertainty was caused by the private party.

North Dakota Century Code 9-08-01 (Provisions that are unlawful):

Any provision of a contract is unlawful if it is:
1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited; or
3. Otherwise contrary to good morals.

North Dakota Century Code 31-11-05(25):

Maxims of jurisprudence - How to be used and applied - List.

The maxims of jurisprudence set forth in this section are not intended to qualify any of the provisions of the laws of this state, but to aid in their just application:
....
25. Particular expressions qualify those which are general.

North Dakota Century Code 14-02-02; 03; 04 (Defamation):

14-02-02. Defamation classified.
Defamation is effected by: 1. Libel; or 2. Slander.

14-02-03. Civil libel defined.
Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes the person to be shunned or

avoided, or which has a tendency to injure the person in the person's occupation.

14-02-04. Civil slander defined.

Slander is a false and unprivileged publication other than libel, which:
1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes to the person the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure the person in respect to the person's office, profession, trade, or business, either by imputing to the person general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to the person's office, profession, trade, or business that has a natural tendency to lessen its profits....

STATEMENT

Petitioner Rodenburg LLP ("petitioner") is a North Dakota law firm primarily engaged in debt collection. In early 2015, petitioner purchased from respondent Cincinnati Insurance Company ("respondent" or "Cincinnati") two insurance policies which covered its law practice for the period from May 1, 2015, through May 1, 2018. The policies were governed by North Dakota law and included two kinds of coverage, i.e., a commercial general liability coverage ("the CGL Policy") which excluded professional liability coverage and a commercial umbrella liability coverage

("the Umbrella Policy") which did not exclude professional liability coverage.

Both Cincinnati policies provided petitioner with insurance for damages arising from its law practice which resulted in certain kinds of injuries: "bodily injury," "personal and advertising injury," and "property damage" (App. 39-40). For coverage to apply, the injuries must have resulted from an "occurrence" which the policies defined for practical purposes as an accident although the Umbrella Policy's definition of "occurrence" included coverage for intentional torts which cause "personal and advertising" injuries (App. 39-40;52).

Both policies also contain various exclusions from coverage, including one for any claim for "bodily injury" or "property damage" which may reasonably be expected to result from the intentional or criminal acts of [petitioner] or which is in fact expected or intended" by petitioner (App. 44-45;48).

Cincinnati also wrote another exclusion into its policies, the so-called "Violation of Statute" exclusion (App. 9;48-49). It provides:

> This insurance doe not apply to:
> ....
> **8. Distribution of Material in Violation of Statutes**
> Any liability arising directly or indirectly out of any action or omission that violates or is alleged to violate:

> a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
> b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
> c. *Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.*

(App. 9;48-49) (emphasis supplied).

Besides this coverage from Cincinnati, petitioner also purchased from respondent Certain Underwriters at Lloyd's of London, Syndicate No. 4020, subscribing to Policy Number DCLPLA 00574-00 ("Lloyd's") a claims-made policy of insurance covering its law practice, effective May 10, 2017, through May 10, 2018, with a retroactive date of May 10, 2009 (App. 15-17). Its coverage indemnified petitioner for any damages it may become legally obligated to pay as the result of any "negligent act, error or omission in Professional Services" petitioner provided for which it was legally responsible (App. 15-16). It required that the claim be made within the policy period and based on an incident occurring after the retroactive date with petitioner being obligated to provide Lloyd's with written notice "of the Claim while this Insurance Policy is in effect" (App. 16).

With this liability insurance in place, petitioner in January of 2011 received a defaulted credit card account for collection belonging to one Charlene Williams ("Williams"). Petitioner's client, Portfolio

Recovery Associates ("PRA"), provided petitioner with Williams' street address in Coon Rapids, Minnesota. Unknown to petitioner, the Coon Rapids address belonged not to Williams but rather to an individual named Charlene Williams-Mumbo ("Williams-Mumbo") (App. 17;34). Based on the information provided it, petitioner commenced a civil action against Williams in Minnesota state court, serving her with the summons and complaint at the address given it by the assignor (*Id.*). When Williams failed to answer, petitioner obtained a default judgment on December 6, 2011 (*Id.*). Williams-Mumbo, who lived at the Coon Rapids address, retained an attorney (Daniel York) to vacate the default judgment but he did nothing further to respond to petitioner's follow-up inquiries (App. 17-18;34).

On November 8, 2016, PRA advised petitioner that Williams was now employed and it then attempted to collect on the judgment debt, serving Williams at the same Coon Rapids address with notice of its intent to garnish her earnings and then, after receiving no response, serving her employer with the garnishment papers (App. 18;34). Williams, who had never lived at the Coon Rapids address, learned from her employer in December of 2016 of petitioner's garnishment of her wages (App. 18;34-35). Beginning late that month, Williams contacted petitioner by phone, asserting that she did not owe the debt, did not live at the Coon Rapids address, and never received notice of the lawsuit or the judgment before garnishment commenced (App. 18-19;34-35). In January of 2017, she filed complaints against petitioner with Minnesota's Attorney General and the Consumer Financial Protection Bureau (App. 19;35).

Yet petitioner could not discuss the matter with Williams personally because Attorney York represented her and it so advised Williams (App. 19). Williams, on her own initiative, contacted York who eventually confirmed with petitioner on February 16, 2017, that the Charlene Williams whose wages were garnished was *not* the judgment debtor and that he represented a different person named Charlene Williams in 2011 regarding the default judgment (*Id.*). Soon thereafter, petitioner ceased garnishment, vacated the default judgment and dismissed the underlying lawsuit, directing the third-party servicer who held the garnished funds to return them to Williams (App. 19-20).

On October 31, 2017, Williams filed suit against petitioner and PRA in the federal district court for the District of Minnesota alleging nine claims and seeking damages for petitioner's alleged violations of the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692p) ("the FDCPA"), conversion, trespass to chattels, civil theft, wrongful garnishment and invasion of privacy (App. 21;35). She claimed injuries of extreme emotional distress, anxiety, humiliation, embarrassment and annoyance (*Id.*).

In response to the lawsuit, petitioner sought coverage from Lloyd's on its claims-made policy (App. 35). On January 18, 2018, Lloyd's denied coverage (App. 21). Petitioner also sought coverage from Cincinnati under the CGL and Umbrella policies it purchased in 2015 (App. 35). Cincinnati denied coverage under each policy (*Id.*). As it wrote petitioner on March 7, 2018, there was no coverage under the CGL policy because Williams' claims did not allege any "bodily injury" or

"property damage" and because of other exclusions of professional liability coverage . As for the Umbrella policy, there was no coverage for the reason that, among others, Williams' claims which alleged a "personal or advertising injury" are "excluded from coverage by the Violations of Statute exclusion."

Petitioner undertook its own defense of Williams' lawsuit and ultimately entered into a settlement in November of 2018 (App. 36). On January 19, 2019, petitioner brought a civil action against Cincinnati and Lloyd's in North Dakota state district seeking a declaratory judgment and damages stemming from their refusal to honor their contractual duty to defend and indemnify it in the Williams lawsuit (App. 36). On January 30, 2019, respondents timely removed this civil action to the federal district court for the District of North Dakota pursuant to 28 U.S.C. § 1446(a) & (c) (*Id.*).

By September 19, 2019, petitioner and Cincinnati had filed cross motions for summary judgment; and on January 8, 2020, Lloyd's filed its own motion for summary judgment against petitioner (App. 32-33). On January 9, 2020, the district court, Welte, J., issued an order granting Cincinnati's summary judgment motion, denying petitioner's cross motion for the same relief and dismissing petitioner's complaint against Cincinnati with prejudice (App. 32-52).

The parties agreed that the issue of Cincinnati's duty under its Umbrella Policy to defend and indemnify petitioner is governed by North Dakota law and the district judge ostensibly applied this substantive State law in order to predict how the North Dakota Supreme

Court would decide the question (App. 37). He determined that Williams' claims against petitioner did not meet the policy's definition of "property damage" so as to trigger Cincinnati's duty to defend and indemnify petitioner (App. 43). However, her allegations did allege "bodily injury" within the policy's language but those injuries resulted from petitioner's intentional conduct in wrongfully garnishing her wages, thereby failing to meet the policy's definition of an "occurrence," an event founded on an "accident," and therefore her allegations did not invoke Cincinnati's duty to defend and indemnify petitioner for her "bodily injury" (App. 44-48).

Yet the district court did conclude that Cincinnati's Umbrella Policy was invoked by the allegations of Williams' complaint that petitioner committed certain common law intentional torts in the course of its wrongful garnishment of her wages, among them conversion, invasion of privacy and even malicious prosecution and defamation although these latter two claims were not overtly alleged but impliedly found in her allegations (App. 42-43). These were claims of "personal and advertising injury" within the policy's definition and thereby triggered Cincinnati's affirmative duty to defend and indemnify petitioner unless these claims came within any of the Umbrella Policy's various exclusions from coverage (App. 43;44;48).

Judge Welte ruled that one of the policy's exclusions entitled "Distribution of Material in Violation of Statutes" applied here (App. 48-49). As he read the exclusion together with Williams' allegations, he determined that her claims that petitioner violated

the FDCPA, a federal statutory regime aimed at prohibiting unfair practices *by debt collectors*, comes within ¶ 8.c. of the exclusion, i.e., "[a]ny statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information" (App. 49). He did so "because [the FDCPA] prohibits or limits the communicating of information" even though this statute was not expressly identified in any part of this exclusion (App. 49-50).

The district judge rejected petitioner's argument that to be considered a part of ¶ 8.c.'s catch-all provision, a statute must be of a type similar to the two enumerated statutes identified in ¶¶ 8.a. & b., i.e., The Telephone Consumer Protection Act ("TCPA") or The CAN-SPAM Act of 2003 ("CAN-SPAM"), which together make it unlawful *for soliciting marketeers*---not debt collectors---to make unwanted, unsolicited electronic, fax, telephone or even e-mail communications with random consumers (App. 49-50). As he saw it, the exclusion encompasses *any* statute which prohibits or limits the communicating of information and the FDCPA is such a statute (*Id.*). Nor was it required to be expressly identified by the exclusion itself since such a requirement would render the catch-all provisions of ¶ 8.c. "perpetually useless" (App. 50).

Because the motion judge ruled that the FDCPA prohibits or limits the communicating of information within the contemplation of ¶ 8.c., he ruled that the Violation of Statutes exclusion precludes coverage for any liability arising directly or indirectly out of any

action that is alleged to have violated the FDCPA and that includes liability for all Williams' statutory and common law tort claims "because that liability...arises from [petitioner's] alleged violations of the FDCPA" (App. 50-51). Thus all of Williams' claims against petitioner alleging statutory and common law torts came within this exclusion (App. 51). With no possibility of coverage for any of Williams' claims under its Umbrella Policy, Cincinnati had no duty to defend and indemnify petitioner (App. 51-52).

On June 24, 2020, Judge Welte granted Lloyd's summary judgment because petitioner was aware of sufficient facts *before* May 10, 2017, when Lloyd's claims-made policy became effective, for it to reasonably expect Williams' lawsuit, a fact which disqualified petitioner from now seeking coverage for that lawsuit under Lloyd's claims-made policy (App. 14-31).

Petitioner appealed the lower court's ruling that there was no coverage under Cincinnati's Umbrella Policy and on August 25, 2021, the court of appeals unanimously affirmed the judgment (App. 1-13). It first determined that Williams' claimed injury of emotional distress did not invoke Cincinnati's duty to defend and indemnify because this injury was not the result of an "occurrence" as defined by the policy, i.e., "[a]n accident...that results in 'bodily injury'" (App. 6-7). Instead of the result of a mistake by petitioner, Williams alleged that her emotional distress was caused by petitioner's intentional conduct in wrongly garnishing her wages, an allegation which does not invoke Cincinnati's obligations under its Umbrella Policy (App. 7).

Like the district court, the Panel concluded that Williams' statutory and common law claims of invasion of privacy, defamation and malicious prosecution arising from this wrongful garnishment came within the policy's definition of "personal and advertising injury" which was caused by an "occurrence" under the policy, i.e., an "offense that results in 'personal and advertising injury,'" thereby invoking Cincinnati's duty to defend against the Williams lawsuit, unless these claims came within the Umbrella Policy's exclusion entitled "Distribution of Material in Violation of Statutes" (App. 7-8).

Applying just some of North Dakota substantive law, the Panel ruled that ¶ 8.c. of this Violation of Statutes exclusion was unambiguous, that its clear language "on its face" encompasses alleged violations of the FDCPA and therefore it must be enforced as written (App. 10). Cincinnati's policy therefore "excludes coverage for [petitioner's] potential FDCPA liability because the statute falls within the plain language of Subsection 8(c)" (*Id.*, citing 15 U.S.C. § 1692d).

In so ruling, the Panel refused to recognize that applying such a broad interpretation to ¶ 8.c. would render illusory the insurance coverage for a major source of potential liability under the FDCPA that petitioner, a law firm primarily engaged in debt collection, understood it was purchasing when it paid premiums to Cincinnati for its Umbrella Policy (App. 10). Moreover, it rejected authority from another jurisdiction reaching the opposite conclusion about identical language in the exclusion before it, apparently relying on North Dakota law in doing so (App. 9-10).

Finally, the Panel ruled that FDCPA's inclusion in ¶ 8.c. has the effect of excluding coverage for all the intentional torts alleged in Williams' complaint (App. 11). Because the alleged conduct underlying the FDCPA claims was the same conduct underlying the invasion of privacy claim as well as the unpled but implied defamation and malicious prosecution claims, Cincinnati's policy "does not cover [petitioner's] potential liability to Williams for any of the covered injury alleged in the complaint" (App. 11-12, citing 15 U.S.C. § 1692c(b) & 1692f)).

On September 30, 2021, the Panel denied petitioner's timely petition for rehearing or, in the alternative, for rehearing *en banc* (App. 53).

REASONS FOR GRANTING THE PETITION

The Panel's Expansive Reading of a Boilerplate Exclusion Used Nationwide by Insurers in Their Commercial Liability Policies—A Reading Which Makes the Policy's Coverage Illusory and Therefore Worthless—Overturns North Dakota Substantive Law, Creates a Split of Authority Among the Jurisdictions Which Have Considered The Identical Question, Presents A Public Policy Problem of National Proportions and Deprives Petitioner of the Property Rights to Which it Would Otherwise Be Entitled in State Court.

Cherrypicking just some of North Dakota substantive law in order to bolster its ruling, the Panel concluded that Cincinnati could sell a professional liability policy to petitioner, a law firm engaged primarily in debt collection, and incorporate within it an

exclusion covering a major source of potential liability which would apply to virtually *every* claim petitioner might reasonably be expected to file. Under the Panel's reading of the Violation of Statutes exclusion to incorporate the FDCPA, a statutory regime aimed exclusively at debt collectors, the prospects of coverage by Cincinnati for claims made against petitioner are so remote that the professional liability insurance it sold petitioner can justifiably be deemed illusory and therefore worthless.

But North Dakota decisional law holds that when a policy's language is interpreted so broadly as to nullify most, if not all, of the coverage for which the insured thought he was paying premiums, producing dramatically different opinions by the insured and the insurer about the scope of coverage, the policy is ambiguous. This invokes another coherent body of North Dakota substantive law to resolve the ambiguity: the law addressing contracts of adhesion; the narrow reading of exclusions from coverage; a construction of the policy favoring the insured where the insurer drafted the policy; the unequal bargaining position of the parties; and the resort to other canons of construction such as *ejusdem generis* and *contra proferentem*, to resolve the contextual ambiguity created when a exclusion from coverage can be construed, as here, to destroy all coverage the insured understood he was purchasing.

All this substantive State law, if the Panel had applied it, would have conjoined to compel the conclusion that the Violation of Statues exclusion when read to include the FDCPA is overly broad, an overbreadth which renders ¶ 8.c. of the exclusion

ambiguous, invoking established rules of insurance contract interpretation under North Dakota law, rules which would render the exclusion inapplicable to the allegations of Williams' complaint and obligate Cincinnati to defend and indemnify petitioner for the "personal and advertising injury" she alleged therein. North Dakota's state courts, applying this State substantive law, including the *ejusdem generis* rule of construction, therefore would *not* have recognized Cincinnati's right under the policy to disclaim coverage for Williams' suit based on ¶ 8.c.'s exclusion or the FDCPA.

The Panel's ruling otherwise violates *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) because a civil action removed to federal court based on diversity of citizenship should not lead to a substantially different result than in State court a block away; it contravenes the rulings of courts in other jurisdictions construing the language of this identical exclusion, creating a remarkable split of authority about the meaning of this ambiguous boilerplate language used nationwide by insurance companies when writing commercial liability policies; and it is against the public policy of North Dakota since this overbroad reading of the exclusion is antithetical to the primary function of insurance which is to insure, not simply to collect premiums from policyholders without risk. See *Olds v. General Acc. Fire & Life Assur. Corporation*, 155 P.2d 676, 680 (Cal. App.1945) quoting *Bollinger v. National Fire Ins. Co.*, 154 P.2d 399, 403 (Cal.1944) (Traynor, J.).

The Panel's decision therefore presents a compelling question with national significance since its decision broadly interpreting the boilerplate Violation

of Statutes exclusion to encompass *any* statute "which prohibits or limits the sending, transmitting, communicating or distribution of material or information"-----even the FDCPA----affects the entire property and casualty industry and policyholders nationwide. That question is: whether the Violation of Statutes exclusion used nationwide by insurance companies when writing commercial liability policies can be enlarged despite its limiting language to incorporate the violation of *any* statute, ordinance or regulation "which prohibits or limits the...communicating...of material or information" in order to deny coverage for claims understood to be within the range of risks contemplated by the insured when it purchased the policy?

This exceptionally important issue, raised within the context of the Panel's refusal to apply North Dakota substantive law to resolve this controversy consistent with *Erie*, comes within Supreme Court Rule 10(c)'s guidance about the considerations which point toward the Court's granting a petition for certiorari, i.e., when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court."

The Court should grant certiorari to review the decision of the court of appeals, determine that the Panel either refused to apply or misread the substantive law of North Dakota regarding the ambiguity of this Violation of Statutes exclusion and that, had it faithfully applied substantive State law, would have concluded that Cincinnati was obliged

under its Umbrella Policy to defend and indemnify petitioner for the "personal and advertising injury" Williams alleged in her complaint. It should then remand the matter to the district court for the entry of a judgment declaring that Cincinnati has a duty under its Umbrella Policy to defend and indemnify petitioner in the Williams lawsuit and for an assessment of damages caused by its failure to do so.

Cincinnati's Violation of Statutes Exclusion Is Ambiguous.

According to ¶¶ 8.a. & b. of the policy's exclusion entitled "Distribution of Material in Violation of Statutes," Cincinnati's promise to petitioner to indemnify it for the "personal and advertising injury" alleged by Williams in her complaint does not include any liability arising from petitioner's violation of the TCPA or the CAN-SPAM Act of 2003.

The TCPA (47 U.S.C. § 227), enacted in 1991 and amended in 2005, prohibits certain *unsolicited*, automated calls, texts and faxes sent by telemarketers and others to random recipients. See *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 99-100 (2nd Cir. 2017) (Leval, J., concurring). The other enactment, Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") (15 U.S.C. §§ 7701-7713), effective 2004, regulates on a nationwide basis *unsolicited* commercial e-mail messaging and was enacted in response to the concerns associated with the rapid growth of *unsolicited*, deceptive spam e-mails sent to random recipients. *Martin v. CCH,* Inc., 784 F. Supp.2d 1000, 1004 (N.D. Ill. 2011). *Gordon v. Virtumundo*, 575

F.3d 1040, 1047-1048;1061 (9th Cir. 2009). Both these statutory enactments provide remedies for these recipients in the form of fines, attorney's fees and damages when soliciting telemarketers make these *unsolicited methods* of communications.

The language of ¶ 8.c. would also exclude coverage if the insured violates or is alleged to violate "[a]ny statute, ordinance or regulation, *other than* the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information" (App. 9;48-49) (emphasis supplied). Williams' lawsuit premised some of petitioner's liability on the FDCPA, a statutory scheme made effective in 1978. Its goal, as stated by Congress, was not to regulate the *methods* of unsolicited communications like those made by telemarketers but rather to regulate the *manner* of allowed communications by debt collectors when they sought to collect legitimate, outstanding debts due from individual debtors. See 15 U.S.C. §§ 1692c, d & e.

Petitioner argued that the phrase "other than" in ¶ 8.c. unambiguously does *not* encompass the FDCPA within its intendment because the exclusion's title ("Distribution of Material in Violation of Statutes") defines the offensive conduct and Williams' complaint against it did not implicate any "distribution of material;" that ¶ 8.c.'s exclusion itself omits any reference to the FDCPA; and that, in any event, the "other than" language of ¶ 8.c. could only include violations of statutes like the TCPA or CAN-SPAM, i.e., those which seek to regulate the *method* of unsolicited communications by telemarketers with random recipients. Since the FDCPA regulates the

manner of permitted communications by debt collectors with individual debtors, it had nothing to do with the TCPA or CAN-SPAM statutory schemes or with the evils each sought to address.

Petitioner further asserted that if ¶ 8.c.'s meaning could be so enlarged to include a statute like the FDCPA, then its terms were ambiguously overly broad because it excludes from coverage a major source of potential liability which would apply to virtually *every* claim for coverage petitioner might reasonably be expected to file with Cincinnati, rendering the policy illusory and therefore worthless. In this case, application of traditional canons of construction under North Dakota law were necessary to resolve the ambiguous reach of ¶ 8.c., one which petitioner argued did *not* include the FDCPA.

The Panel nonetheless decided that ¶ 8.c. unambiguously included the FDCPA as a statutory violation which would exclude coverage for Williams' alleged "personal and advertising injury" (App. 7-8). It therefore concluded that Cincinnati could sell to petitioner, a law firm engaged primarily in debt collection, an insurance policy containing an exclusion for a major source of its potential liability, making the prospect of coverage by Cincinnati for any claims made against petitioner so remote that the policy could justifiably be deemed illusory and therefore worthless.

North Dakota law holds, however, that an insurance policy is ambiguous when its language is interpreted so broadly that it contradicts or renders meaningless another part of the policy; or when when good arguments can be made for either of two or more

contrary positions as to the meaning of a term; or when language can be reasonably construed as supporting an interpretation which provides coverage and one which does not. See, e.g., *Aid Ins. Services, Inc. v. Geiger*, 294 N.W.2d 411, 414 (N.D. 1980); *Kief Farmers Co-op Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28, 32 (N.D. 1995); *Link v. Federated Mut. Ins. Co.*, 386 N.W.2d 897, 900 (N.D. 1986) citing *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392, 398 (N.D. 1981); and *Brash v. Gulleson*, 835 N.W.2d 798, 803 (N.D. 2013).

Even assuming under the Panel's overly-broad reading (App. 10) that ¶ 8.c (in isolation) is unambiguous, this reading automatically contradicts and eliminates the policy's express promise of coverage for defamation liability ("Personal or advertising injury" includes "[d]efamation of character, including oral or written publication, in any manner..."), rendering this promise incoherent and thereby creating an ambiguity. See Abraham, Kenneth S., *Plain Meaning, Extrinsic Evidence, and Ambiguity: Myth and Reality in Insurance Policy Interpretation*, 21 Conn. Ins. Law J. 329, 343 (2019) (stating that the virtually complete absence of cases in which one policy provision is given precedence over another that contradicts it is "both because insurers try mightily not to draft contradictory language, and because the presumption of consistency is so strong."). Furthermore, the Panel's expansive reading contradicts and eliminates the policy's express promise of coverage for all other liability founded on "personal or advertising" injury, rendering it meaningless as well. Each of these contradictions in coverage thereby provides a reasoned argument that the phrase "other than" in ¶ 8.c. can be construed as supporting an

interpretation which provides coverage versus one which does not.

Under North Dakota law, ambiguous language can also foretell an illusory promise. When the ambiguous terms of a contract mask a failure of consideration by one of the parties so that the party is not really bound at all by its promises, the contract is illusory; the ambiguous language grants one of the parties so much discretion that it fails to create an actual legal obligation. *Harrington v. Harrington*, 365 N.W.2d 552, 555 (N.D. 1985). See *Brunsoman v. Scarlett*, 465 N.W.2d 162, 168-69 (N.D. 1991).

In determining whether a contract is ambiguous because it creates an illusory promise, the disputed language is examined in the context of the entire agreement as well as evidence relating to prior negotiations and other circumstances surrounding the making of the contract. *St. Clair v. Exeter Exploration Co.*, 671 F.2d 1091, 1095-1096 (8th Cir. 1982) (applying North Dakota law, quoting NDCC 9-07-12 and citing *Metcalf v. Security International Insurance Co.*, 261 N.W.2d 795, 799 (N.D. 1978)). Cincinnati was aware when writing its Umbrella Policy that petitioner is a law firm engaged primarily in debt collection with major exposure under the FDCPA. Thus a reading of ¶ 8.c.'s ambiguous language which protects Cincinnati from indemnifying petitioner for this major liability when that statutory scheme is not identified anywhere in the exclusion itself while other statutes are mentioned, is one which renders Cincinnati's promise to insure petitioner for its professional liability illusory or purely elective on its part. See 2 Arthur L. Corbin, *Corbin on Contracts* § 5.28 (2003) (explaining illusory

promises);1 Samuel Williston, *Contracts* § 4:24 (4th ed. 1991). See also Comment, *The Illusory Coverage Doctrine, A Critical Review*, 166 U. Penn. Law Rev. 1545, 1561-1562 (2018) ("coverage is illusory when there is no 'reasonably expected set of circumstances' under which the policyholder would be able to collect benefits from the policy.").

The exclusion is therefore ambiguous under the substantive law of North Dakota. Reinforcing this ambiguity are the decisions in other jurisdictions which have read this "other than" language contained in the Violation of Statutes boilerplate exclusion narrowly so as not to exclude the coverage the insured reasonably understood it was purchasing. See *West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc. et al.*, ___ N.E.3d ___ (Ill. 5/20/21); 2021 Il. 125978 at ¶¶ 53-59 (exclusion applies only to statutes like the TCPA and CAN-SPAM); *Bullseye Rest., Inc. v. James River Ins. Co.*, 387 F. Supp.3d 273, 281-284 (E.D.N.Y. 2019) (same). See also *Score v. American Family Mutual Ins. Co.*, 538 N.W.2d 206, 211 (N.D. 1995) (Meschke, J., dissenting) (that other courts have reached different conclusions about the meaning of the same or similar policy language proves its ambiguity); *Monticello Ins. v. Mike's Speedway Lounge*, 949 F. Supp. 694, 701-703 (S.D. Ind. 1996) (illusory insurance when all potential claims are excluded from coverage).

Moreover, as the court in *Bullseye* observed, an expansive reading of the exclusion----like the Panel's----would make *any* violation of a statute, ordinance or regulation, however remote or inconsequential, a reason for the insurer to deny coverage. 387 F. Supp.3d at 283. Thus violations of criminal statutes, the

Copyright Act, the Lanham Act, the Bankruptcy Code or any other statute, ordinance or regulation could trigger the exclusion, all results contrary to the insured's understanding of the coverage it was purchasing.

North Dakota Law Resolves The Ambiguity.

Because the Panel's reading of the exclusion renders illusory Cincinnati's duty to insure and because ¶ 8.c.'s "other than" language supports an interpretation which will provide coverage and one which will not, the exclusion is ambiguous under North Dakota substantive law. This invokes another coherent body of North Dakota law to resolve the ambiguity: the law addressing contracts of adhesion; the narrow reading of exclusions from coverage; a construction of the policy favoring the insured where the insurer drafted the policy; and the unequal bargaining position of the parties, to resolve the contextual ambiguity created when a exclusion from coverage can be construed to destroy all coverage the insured understood it was purchasing. See *Aid Ins. Services, Inc. v. Geiger*, 294 N.W.2d at 414 and cases cited ("If...language in an insurance contract support[s] an interpretation which...impose[s] liability on the insurer and one which will not, the former interpretation will be adopted."). See NDCC 9-07-19 (Uncertainty interpreted against party causing it).

North Dakota courts also resort to a cardinal canon of construction, *ejusdem generis*, in order to interpret this ambiguity. This rule provides that when a contract provision like ¶ 8.c.'s exclusion enumerates certain laws and then includes a phrase which might be

construed to include "other laws," those "other laws" are confined to the same kind or nature of the laws already enumerated by the contract provision. See *Resolution Trust v. Dickinson Econo-Storage*, 474 N.W.2d 50 (N.D. 1991) citing *Aanenson v. Bastien*, 438 N.W.2d 151, 156 (N.D. 1989); *Savelkoul v. Board of County Commissioners*, 96 N.W.2d 394, 398 (N.D. 1959). See also NDCC 31-11-05(25) (Particular expressions qualify those which are general).

Applied to ¶ 8's exclusion generally and ¶ 8.c.'s "other than" wording in particular, this canon would confine ¶ 8.c.'s exclusion to mean other statutes of the same general kind as the TCPA and CAN-SPAM, both of which regulate the *method* of unsolicited communications by telemarketers to random recipients, *not* ones that regulate the *manner* of permitted communications by debt collectors with individual debtors like the FDCPA.

Both decisional and statutory law in North Dakota would also construe ¶ 8.c.'s ambiguous "other than" language consistent with the petitioner's reasonable expectations about the extent of the insurance it was purchasing from Cincinnati. *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 671-673 (N.D. 1977) (doctrine of reasonable expectations recognized and compared to doctrine of contract adhesion in interpreting ambiguity in insurance policy). See NDCC 9-07-14 ("If the terms of a promise in any respect are ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it."). See also *Sorlic v. Ness*, 323 N.W.2d 841, 850 (N.D. 1982) (Pederson, J., dissenting).

North Dakota's substantive law, including the *ejusdem generis* rule of construction, therefore would *not* have given Cincinnati the right under the policy to disclaim coverage for Williams' claims against petitioner based on the FDCPA.

The Erie Violation.

The Panel's misreading of or its refusal to apply the substantive law of North Dakota violates *Erie* because it leads to a substantially different result than in State court a block away. Under *Erie*, when a federal court exercises its diversity jurisdiction over a controversy, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109 (1945). Avoiding results in federal court which undercut a litigant's rights which it otherwise would enjoy under State law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are expressions of their own sovereignty. *Bush v. Gore*, 542 U.S. 692,740-742 (2000) (Rehnquist, C.J., concurring). The Panel's decision here undermines all these concerns.

Subsequent decisions of the Court have reinforced *Erie's* notion of federalism. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991). Thus "a federal court is not free to apply a different rule however desirable it may believe it to be, and even though it

may think that the state Supreme Court may establish a different rule in some future litigation." *Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988). Where the state's highest court has spoken, its ruling must be "accepted by federal courts as defining state law." *West v. AT&T Co.*, 311 U.S. 223, 236 (1940). When it has not done so, the proper function of a federal court "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 497 (1941).

Even if the Panel's decision was an incorrect interpretation of North Dakota law, it still fails to hew to *Erie's* command that federal courts sitting in diversity apply the correct State substantive law as laid out by the North Dakota Supreme Court. As the Court stated in *Day Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975), "[a] federal court in a diversity case is not free to engraft onto those state rules [and decisions] exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Id.* See *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996) ("diversity jurisdiction does not carry with it generation of rules of substantive law.").

This refusal to apply the correct State substantive law repeals a substantial portion of insurance contract law in North Dakota , depriving petitioner of a remedy it otherwise would have in State court; and it undermines North Dakota's public policy of settling insurance contract disputes by resorting to jurisprudence which has been developed over time on notions of fairness and the reasonable expectations of

the parties, especially insureds. Finally, the court of appeals should have certified the question to the North Dakota Supreme Court *sua sponte* if it had any doubt about the meaning of ¶ 8.c.'s exclusion. See *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391 (1974); *Clay v. Sun Insurance Office*, 363 U.S. 207, 210-212 (1960).

The Due Process Deprivation.

Petitioner's right to have its claims fairly heard and decided by the federal courts in this removed diversity action----to have its day in court----is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). The actions of the federal courts in disposing of claims before it are encompassed within the fifth amendment's Due Process Clause. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984). The dismissal of petitioner's cause of action with prejudice by a federal court----using the *wrong* law to reach its decision----not only is in conflict with the law of the forum State, North Dakota, but also is a denial of a fair hearing on the issues and a denial of due process. See *Lewis v. Casey*, 518 U.S. 343, 346 (1996); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (A decision is arbitrary and capricious if the decision maker relies on factors it is *not* permitted to consider under the applicable law).

The Important National Public Policy Question.

The Panel's overly broad, expansive reading of this ambiguous Violation of Statutes exclusion found in ¶ 8.c. has created a remarkable split of authority about

the meaning of this language among it, Illinois' highest court and a federal district court applying New York law. This particular exclusion is standard boilerplate language developed by the Insurance Services Office (ISO), the primary organization involved in the drafting process for the insurance industry. The ISO then sells this language to insurance companies who include it in most general liability policy forms; it is now used nationwide by insurance companies when writing commercial liability policies. See Boardman, M. E., *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 Mich. L. Rev. 1105, 1113 (2006).

The Panel's ruling that this boilerplate exclusion now encompasses *any* statutory violation whatsoever to defeat coverage reasonably thought to have been purchased by an insured is a dramatic and alarming precedent which would swallow whole insurance coverage generally and render any particular coverage illusory. As such, it is against the public policy of North Dakota since this overbroad reading of the exclusion is antithetical to the primary function of insurance which is to insure, not simply to collect premiums from policyholders without risk. See NDCC 9-08-01 ("Any provision of a contract is unlawful if it is:...2. Contrary to the policy of express law, though not expressly prohibited....").

The Court should take this opportunity to address this exceptionally important, emerging conflict among the jurisdictions concerning the reach of this boilerplate exclusion used nationwide and rule that had the Panel faithfully applied the substantive State law of North Dakota, it would have concluded that Cincinnati was obliged under its Umbrella Policy to defend and

indemnify petitioner for the "personal and advertising injury" Williams alleged in her complaint.

CONCLUSION

For all of the reasons identified herein, this Court should grant a writ of certiorari to review and vacate the judgment of the court of appeals; determine that the Panel either refused to apply or misread the substantive law of North Dakota regarding the ambiguity of the Violation of Statutes exclusion and that, had it applied substantive State law, would have concluded that Cincinnati was obliged under its Umbrella Policy to defend and indemnify petitioner for the "personal and advertising injury" Williams alleged in her complaint; and remand the matter to the district court for the entry of a judgment declaring that Cincinnati has a duty under its Umbrella Policy to defend and indemnify petitioner in the Williams lawsuit and for an assessment of damages caused by its failure to do so; or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Clifton Rodenburg
Counsel of Record
Rodenburg Law Firm
300 NP Ave., Suite 105
P.O. Box 2427
Fargo, ND 58108-2427
(701) 235-6411
rodenburgc@aol.com

9 F.4th 1033
United States Court of Appeals, Eighth Circuit.

RODENBURG LLP, doing business as Rodenburg Law Firm, Plaintiff - Appellant
v.
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, SYNDICATE NO. 4020, SUBSCRIBING TO POLICY NUMBER DCLPLA 00574-00, Defendant
The Cincinnati Insurance Company, Defendant - Appellee

No. 20-2521

Submitted: May 11, 2021Filed: August 25, 2021

Appeal from United States District Court for the District of North Dakota - Eastern

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant was Clifton Rodenburg, of Fargo, ND. The following attorney(s) appeared on the appellant brief; Eeva Wendorf, of Fargo, ND.
Counsel who presented argument on behalf of the appellee was Elizabeth Ann Jenson Prouty, of Minneapolis, MN.

Before COLLOTON, WOLLMAN, and KOBES, Circuit Judges.

Opinion

WOLLMAN, Circuit Judge.

Rodenburg Law Firm (Rodenburg) appeals from the district court's[1] adverse grant of summary judgment, arguing that The Cincinnati Insurance Company (Cincinnati) breached its contractual duty to defend Rodenburg against a lawsuit filed by Charlene Williams (Williams). We affirm.

I. Background

Rodenburg purchased a Commercial Umbrella Liability Policy from Cincinnati. The policy is governed by North Dakota law and obligates Cincinnati to indemnify Rodenburg for liability to third parties for certain defined injuries, namely "bodily injury," "property damage," and "personal and advertising injury," if such injury was "caused by an 'occurrence.' " "Bodily injury" includes "humiliation, shock, fright, mental anguish or mental injury." "Personal and advertising injury" means "injury, including 'bodily injury', arising out of one or more of the following offenses: ... Malicious prosecution; [or] ... Defamation of character; [or] ... publication ... of material that violates a person's right of privacy." The policy excludes coverage for "bodily injury" that was "expected or intended from [Rodenburg's] standpoint," and for liability arising out of conduct alleged to violate certain statutes. Cincinnati has a "duty to defend [Rodenburg] against any 'suit' seeking damages because of 'bodily injury', 'personal and advertising injury', or 'property damage' to which [the policy] applies."

Rodenburg, whose primary business is debt collection, obtained a default judgment on a debt owed by a "Charlene Williams." In early November 2016, Rodenburg served a notice of intent to garnish "Charlene Williams's" wages at the residential address

associated with the debt. Receiving no answer, Rodenburg then served US Foods, Williams's employer, with a garnishment notice. Williams contacted Rodenburg on December 21, 2016, and allegedly informed it that she was not the debtor against whom it had a default judgment. Rodenburg allegedly ignored this information and proceeded to garnish Williams's paychecks for six weeks beginning on December 29, 2016. After a lawyer informed Rodenburg in February 2017 that it indeed had the wrong "Charlene Williams," Rodenburg ceased garnishment and returned the wrongfully garnished funds to Williams.

Williams thereupon sued Rodenburg, asserting several theories including wrongful garnishment, tort-based claims, and violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C § 1692 et seq. The complaint alleged that Rodenburg violated the FDCPA by: communicating with third parties, including her employer, about the alleged debt, see id. § 1692c(b); garnishing her wages even after learning that it had identified the wrong person, see id. § 1692d (prohibiting conduct in connection with a debt collection that harasses, oppresses, or abuses); representing that Williams owed a debt, representing that it had a right to collect the debt, attempting to induce Williams to pay the debt, and implying that Williams had committed other disgraceful conduct, see id. § 1692e (prohibiting the use of "false, deceptive, or misleading representation or means in connection with" debt collection); and collecting or attempting to collect the debt without legal authority to do so, see id. § 1692f (prohibiting the use of "unfair or unconscionable means" to collect a debt). Citing the FDCPA's recognition of "a person's inherent right to privacy in collection matters," see id. § 1692(a) ("Abusive debt collection practices contribute ... to invasions of

individual privacy."), the complaint also alleged that Rodenburg's actions—communicating to Williams's employer about the debt, garnishing her wages without legal authority, and willfully continuing to collect the debt after having been told about its potential mistake—amounted to common law invasion of privacy. Williams also alleged that Rodenburg had converted her wages and that its actions caused her to suffer emotional distress, humiliation, and temporary interference with the use and enjoyment of her property.

Rodenburg filed a claim under the policy for coverage of the Williams lawsuit. Cincinnati denied coverage, and Rodenburg later settled with Williams. Rodenburg then brought this action seeking a declaratory judgment that Cincinnati had breached its policy-created contractual duties to defend and indemnify Rodenburg. The district court found that the policy did not provide coverage for any alleged interference with Williams's use and enjoyment of her wages. It concluded that the alleged emotional distress was "bodily injury" under the policy, but that it either was not "caused by an 'occurrence' " or was excluded from coverage by the policy's "Expected or Intended Injury" exclusion. Although the district court then found that the Williams complaint's factual allegations implicated injury that was "personal and advertising injury" under the policy, it held that the policy's "Distribution of Materials in Violation of Statutes" exclusion (Violation of Statutes Exclusion) excluded coverage for that injury. Concluding that the policy did not provide coverage for the Williams lawsuit, the district court held that Cincinnati had no duty to defend Rodenburg under the policy and granted summary judgment in Cincinnati's favor.

Rodenburg appeals, arguing that the alleged emotional distress was covered by the policy because it was "caused by an 'occurrence' " and was not expected or intended. Rodenburg also argues that the policy's Violation of Statutes Exclusion did not apply.[2]

II. Discussion

We review the district court's grant of summary judgment *de novo*. Landers Auto Grp. No. One, Inc. v. Cont'l W. Ins. Co., 621 F.3d 810, 812 (8th Cir. 2010). We will affirm the grant of summary judgment only if there is no genuine issue of material fact that Cincinnati did not breach its contractual duties to defend and indemnify Rodenburg under North Dakota law and thus is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Hiatt v. Mazda Motor Corp., 75 F.3d 1252, 1255 (8th Cir. 1996) (we apply state substantive law and federal procedural law in diversity cases). Because "[a]n insurer's duty to defend is broader than its duty to indemnify," Forsman v. Blues, Brews & Bar-B-Ques, Inc., 903 N.W.2d 524, 535 (N.D. 2017), Cincinnati's duty to indemnify arises under the policy only if it first had a duty to defend. We thus focus our analysis on whether Cincinnati had a duty to defend Rodenburg in the Williams lawsuit.

Cincinnati had a duty to defend the entire lawsuit if there was a possibility of policy coverage for any one of Williams's claims against Rodenburg. See Tibert v. Nodak Mut. Ins. Co., 816 N.W.2d 31, 42 (N.D. 2012). The language of the contract determines the scope of the policy's coverage. K & L Homes, Inc. v. Am. Fam. Mut. Ins. Co., 829 N.W.2d 724, 728 (N.D. 2013). We "resolve any doubt ... in favor of the duty to defend." First Nat'l Bank & Trust Co. of Williston v. St. Paul Fire & Marine

Ins. Co., 971 F.2d 142, 144 (8th Cir. 1992) (citation omitted) (applying and interpreting North Dakota law). "[I]f the policy language is clear on its face, there is no room for construction," however, and if the policy unambiguously precludes coverage, "we will not rewrite a contract to impose liability on an insurer." K & L Homes, 829 N.W.2d at 728 (citation omitted). After determining the scope of the policy's coverage, we determine whether Williams's claims were possibly covered based on the allegations in the complaint. See First Nat'l Bank, 971 F.2d at 144. "[T]he duty to defend does not depend on the nomenclature of the claim. Rather, the focus is on the basis for the injury." Nodak Mut. Ins. Co. v. Heim, 559 N.W.2d 846, 852 (N.D. 1997) (citation omitted).

A. Covered Injuries

Cincinnati had a duty to defend Rodenburg if Williams alleged either "bodily injury" or "personal and advertising injury" that was "caused by an 'occurrence.' " Williams's alleged emotional distress meets the policy's definition of "bodily injury." Any injury allegedly caused by certain enumerated offenses meets the policy's definition of "personal and advertising injury." Neither party disputes that Williams's complaint alleged both "bodily injury" and "personal and advertising injury." The question then is whether those injuries were "caused by an 'occurrence.' "

The policy first defines "occurrence" as "[a]n accident ... that results in 'bodily injury.' " Rodenburg contends that Williams's alleged "bodily injury" was the result of an accident—its mistaking Williams for its judgment debtor. Williams's complaint does not allege that she suffered emotional distress as a result of

Rodenburg's mistake about Williams's identity, however. It instead alleges that she suffered emotional distress as a result of Rodenburg's contacting her employer and co-workers about her alleged debt, ignoring her when she informed Rodenburg of its mistake, and subsequently garnishing her wages for six weeks. See Landers Auto Grp., 621 F.3d at 815 (applying Arkansas law and concluding that the claims against the insured did not arise from the accident—mistakes in accounting—but from the subsequent intentional acts—repossessing the vehicle and failing to negotiate in good faith—taken by the insured). We reject Rodenburg's contention that its mistaken belief about its rights transforms those conscious actions into "accidents." Under that approach, "any conscious decision that in retrospect appears to have been imprudent may be termed a 'mistake.' " First Nat'l Bank, 971 F.2d at 145. The complaint clearly alleges that Williams's emotional distress was the result of Rodenburg's intentional actions and therefore was not "caused by an ['accident that results in ... "bodily injury" ']."

The policy also defines an "occurrence" as an "offense that results in 'personal and advertising injury.' " The policy does not define "offense," but does provide a list of "offenses," including defamation, malicious prosecution, and publication of information in violation of privacy, that give rise to "personal and advertising injury." Thus, if Williams's complaint alleged injury resulting from any of those offenses, such injury would both meet the definition of "personal and advertising injury"—which, as set forth above, includes alleged "bodily injury"—and have been "caused by an 'occurrence.' "

As noted above, Williams's complaint alleged that she suffered injury as a result of Rodenburg's

communication of information about the debt to third parties and that that communication violated her privacy, was potentially disgraceful to her, and "intruded upon and interfered with [her] place of employment." The complaint thus alleged injury resulting from defamation and Rodenburg's privacy-violating publication of information. See N.D. Cent. Code § 14-02-02 (defamation is effected by libel); id. § 14-02-03 (civil libel is "false and unprivileged publication ... which exposes any person to hatred, [or] contempt, ... or which has a tendency to injure the person in the person's occupation"); see also 15 U.S.C. § 1692(a). Williams's complaint also averred malicious prosecution-based injury resulting from Rodenburg's attempted debt collection in the absence of legal authority. See N.D. Pattern Jury Instruction Civ. No. C-13.00 (2019) (to prove malicious prosecution under North Dakota law, a plaintiff must establish, among other things, that the defendant instituted a civil proceeding against the plaintiff and that there was no probable cause for the proceeding). Cincinnati therefore had a duty to defend Rodenburg against the Williams lawsuit because the complaint alleged "personal and advertising injury" that was "caused by an 'occurrence.' " See First Nat'l Bank, 971 F.2d at 144 (we "resolve any doubt ... in favor of the duty to defend.")

B. The Exclusions

Cincinnati may still prove that it did not breach its duty to defend, however, by showing that any possibly covered injuries are excluded from coverage under one of the policy's exclusions. See Forsman, 903 N.W.2d at 531 (once the insured establishes that there

were covered injuries, the insurer has the burden to prove that an exclusion to coverage applies).

> The Violation of Statutes Exclusion excludes coverage for:
>
> 8. Distribution of Material in Violation of Statutes
> Any liability arising directly or indirectly out of any action or omission that violates or is alleged to violate:
> (a) The Telephone Consumer Protection Act (TCPA), ... ;
> (b) The CAN-SPAM Act of 2003, ... ; or
> (c) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Cincinnati argues that the exclusion applied because the FDCPA is a statute that "prohibits or limits the ... communicating ... of material or information." See 15 U.S.C. § 1692d (limiting debt collectors' ability to use threats of violence, publicize lists of consumers allegedly refusing to pay debts, cause a telephone to ring repeatedly or continuously, or engage someone in telephone conversation repeatedly or continuously).

Rodenburg asks that we construe the Violation of Statutes Exclusion more narrowly, arguing that FDCPA violations are not included in Subsection 8(c) because the FDCPA does not limit communication in the same way that the TCPA and the CAN-SPAM Act of 2003 do.[3] See Bullseye Rest., Inc. v. James River Ins. Co., 387 F. Supp. 3d 273, 282–84 (E.D.N.Y. 2019) (applying New York law and finding, based on rules of

construction, including *ejusdem generis*, more than one reasonable reading of an identical exclusion). Rodenburg reasons that applying a literal reading of Subsection 8(c) would exclude from insurance coverage a major source of potential liability—alleged FDCPA violations—for a debt collection law firm like itself.

North Dakota law does not permit us to apply rules of construction to the policy's language, however, unless we first find that the language is ambiguous. K & L Homes, 829 N.W.2d at 728. "Ambiguity ... exists when the language can be reasonably construed as having at least two alternative meanings ...." Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 32 (N.D. 1995). Although the Violation of Statutes Exclusion uses broad language, the words are not susceptible to multiple meanings, contra Herald Sq. Loft Corp. v. Merrimack Mut. Fire Ins. Co., 344 F. Supp. 2d 915, 919–20 (S.D.N.Y. 2004) ("pollutant" could be interpreted narrowly within exclusion's traditional understanding and purpose or literally and expansively); the literal reading does not contradict another policy provision, see Aid Ins. Servs., Inc. v. Geiger, 294 N.W.2d 411, 414 (N.D. 1980) (finding "patent" ambiguity where literal, broad reading of an exclusion contradicted another exclusion); and a lay person would understand the exclusion as written, see Kief Farmers, 534 N.W.2d at 32 ("We consider whether a person not trained in the law or in the insurance business can clearly understand the language."). The policy language is unambiguous and clear on its face. We therefore must enforce it as written. The Violation of Statutes Exclusion excludes coverage for Rodenburg's potential FDCPA liability because the statute falls within the plain language of Subsection 8(c). See 15 U.S.C. § 1692d.

Rodenburg argues that even if the policy excluded coverage for the injury caused by the alleged FDCPA violations, it did not exclude coverage for the injury caused by the alleged intentional torts because "Cincinnati cannot show that a violation of the FDCPA caused Rodenburg to invade [Williams's] privacy, defame her, or maliciously prosecute her." The language of the Violation of Statutes Exclusion is broad, however, excluding coverage for not only statutory liability but also "[a]ny liability arising directly or indirectly out of any action or omission that violates or is alleged to violate" the FDCPA. "The words 'arising out of' mean causally connected with, not 'proximately caused by' ...." Norgaard v. Nodak Mut. Ins. Co., 201 N.W.2d 871, 875 (N.D. 1972) (citation omitted). "The term is ordinarily understood to mean 'originating from,' or 'growing out of,' or 'flowing from.' " Id. (citation omitted).

The question, therefore, is whether Williams's complaint alleged covered injury that did not originate from allegedly FDCPA-violating conduct. It did not. As discussed above, the policy covers only Williams's alleged injury that was caused by defamation, malicious prosecution, or publication in violation of privacy. The complaint alleges the conduct underlying the FDCPA claims was the same conduct underlying the invasion of privacy claim. The unpled defamation and malicious prosecution offenses similarly flow from Rodenburg's allegedly FDCPA-violating conduct—unprivileged communication with third parties allegedly violates 15 U.S.C. § 1692c(b), and Rodenburg's collection actions lacking probable cause allegedly violate 15 U.S.C. § 1692f. Thus, the Violation of Statutes Exclusion excludes coverage for liability arising from those offenses, and the policy does not cover Rodenburg's potential liability to

Williams for any of the covered injury alleged in the complaint.[4]

III. Conclusion

Williams's complaint alleged "personal and advertising injury" that was "caused by an 'occurrence.' " Any potential liability arose either directly or indirectly from conduct that was alleged to violate the FDCPA, however, and was thus excluded from coverage by the Violation of Statutes Exclusion. Cincinnati therefore did not breach its contractual duty to defend Rodenburg, and so we need not reach the question whether Cincinnati had a duty to indemnify Rodenburg for the Williams lawsuit.

The judgment is affirmed.

Footnotes

1The Honorable Peter D. Welte, United States District Judge for the District of North Dakota.

2Rodenburg does not appeal the district court's finding that the alleged interference with Williams's use and enjoyment of her property was not a policy-covered injury.

3The TCPA prohibits or limits telemarketing and use of automatic dialing systems or artificial or prerecorded voices. See 47 U.S.C. § 227(b)(1)(A). The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act) prohibits or limits unsolicited commercial electronic mail. 15 U.S.C. § 7701 et seq.

4Because the Violation of Statutes Exclusion excludes coverage for any covered injury alleged in

Williams's complaint, including alleged "bodily injury" "caused by an ['offense that results in "personal and advertising injury" ']," we need not reach the policy's Expected or Intended Injury exclusion.

468 F.Supp.3d 1125
United States District Court, D. North Dakota, Eastern Division.

RODENBURG LLP, doing business as Rodenburg Law Firm, Plaintiff,
v.
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Syndicate No. 4020, subscribing to Policy Number DCLPLA 00574-00; and The Cincinnati Insurance Company, Defendants.
Case No. 3:19-cv-00027

Signed 06/24/2020

Attorneys and Law Firms

Clifton G. Rodenburg, Eeva Wendorf, Rodenburg Law Firm, Fargo, ND, for Plaintiff.

Ian Ronald McLean, Ronald H. McLean, Serkland Law Firm, Fargo, ND, for Defendant Certain Underwriters at Lloyd's London.

Clifton G. Rodenburg, Eeva Wendorf, Rodenburg Law Firm, Fargo, ND, for Defendant Rodenburg LLP.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Peter D. Welte, Chief Judge

Before the Court is Defendant Certain Underwriters at Lloyd's, London's ("Lloyd's") motion for summary judgment filed on January 8, 2020. Doc. No. 61. The motion seeks dismissal of Plaintiff Rodenburg LLP's ("Rodenburg" or the "law firm") complaint, which

asserts that Lloyd's wrongfully denied coverage under an insurance policy. On January 30, 2020, Rodenburg responded in opposition to the motion. Doc. No. 71. Lloyd's filed a reply on February 14, 2020. Doc. No. 83. For the reasons below, the motion is granted.

I. BACKGROUND

Rodenburg is a North Dakota law firm that primarily engages in consumer debt collection. Doc. No. 1-4, ¶ 4. Lloyd's is a New York insurance carrier. Id. ¶ 2. A summary of the Policy is followed by the factual background and procedural history.

A. The Policy

Lloyd's issued a Lawyers Professional Liability Insurance Policy ("Policy") to Rodenburg effective from May 10, 2017 through May 10, 2018. Doc. No. 63-6, p. 5. The Policy's retroactive date is May 10, 2009. Id. In relevant part, the Policy provides:

> THIS IS A CLAIMS MADE AND REPORTED INSURANCE POLICY. COVERAGE IS LIMITED TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST [RODENBURG] AND REPORTED TO [LLOYD'S] DURING THE POLICY PERIOD.
> * * *
> [Lloyd's] agree[s] to pay on behalf of [Rodenburg], all sums which [Rodenburg] may be legally obligated to pay as Damages to others, up to the Limit of Liability, resulting from:
> 1. A Claim seeking Damages caused by a negligent act, error or omission in Professional

Services provided by, or that should have been provided by [Rodenburg] or any person for whose acts [Rodenburg], as a lawyer or notary public, is legally responsible;

2. A Claim seeking Damages for Personal Injury arising from the Professional Services of [Rodenburg].

The Claim must be made against [Rodenburg] during the Policy Period. The Claim must be based on an Incident that wholly occurs on or after the Retroactive Date. [Rodenburg] must provide written notification to [Lloyd's] of the Claim while this Insurance Policy is in effect.

In addition, [Lloyd's] will cover Claims arising from Incidents as follows:

1. Prior Incidents: [Lloyd's] will cover Claims arising from an Incident that occurred before the Effective Date of this Insurance Policy if the following conditions are met:

a. [Rodenburg] did not have knowledge of the Incident prior to the Effective Date of this Insurance Policy;

b [Rodenburg] was not aware of any Incident which could reasonably be expected to the basis for a Claim; and

c. The Claim results from an Incident which occurred on or after the Retroactive Date and is reported to [Lloyd's] while this agreement is in effect.

Id. at 9. The Policy defines a "Claim" as "a demand received by [Rodenburg] for money or services including the service of Suit." Id. at 13. An "Incident" is defined as "any circumstance, act, error or omission which [Rodenburg] could reasonably expect to be the basis of a

Claim or Suit covered by this Insurance Policy." Id. at 14.

B. Factual Background

The current lawsuit traces back to June 2010, when Portfolio Recovery Associates, LLC ("PRA") purchased the rights to a defaulted consumer credit card account from HSBC Bank Nevada, N.A. Doc. No. 82-6, p. 41. The account linked to a Best Buy consumer credit card with a $1,481.10 unpaid balance. Id. at 36. As alleged, an individual named Charlene Williams ("Williams") owed the debt. Doc. No. 1-4, ¶ 10. Williams admitted to filling out the application for the Best Buy card on May 9, 2005 and acknowledged that the address, social security number, driver's license number, date of birth, and phone number on the application matched her information.[1] Doc. No. 78 at 67:23-69:14. The application listed an address on Pillsbury Street in Minneapolis, Minnesota, that Williams resided at in 2005. Doc. No. 82-1.

PRA assigned the account to Rodenburg in January 2011 for collection. Doc. No. 63-7, ¶ 10. When providing the account information to Rodenburg, PRA listed an address on Crocus Street in Coon Rapids, Minnesota. Doc. No. 82, ¶ 11. Unknown to Rodenburg, the Coon Rapids address belonged to an individual named Charlene Williams-Mumbo ("Williams-Mumbo"). Doc. No. 63-1, p. 2. Based on the information PRA provided, Rodenburg proceeded to commence an action in Minnesota state court, ostensibly against Williams. Doc. No. 82, ¶ 13. Rodenburg served the summons and complaint, however, at the Coon Rapids address. Id. The Minnesota state court entered a default judgment on December 6, 2011. Id. ¶ 14. An attorney, Daniel York,

contacted Rodenburg to vacate the default judgment shortly after, but he never responded to the law firm's follow-up inquiries. See Doc. No. 84-1.

Fast forwarding to November 8, 2016, PRA relayed information to Rodenburg that Williams had secured employment with US Foods. Doc. No. 84, ¶ 17. Rodenburg served a notice of intent to garnish wages at the Coon Rapids address two days later. Doc. No. 63-7, ¶ 41. Receiving no response, Rodenburg then served US Foods with garnishment papers on November 22, 2016. Doc. No. 84, ¶ 17. Williams discovered Rodenburg had garnished her wages in December 2016 when reviewing her paycheck. Doc. No. 78 at 85:11-86:14.

By pure coincidence, on December 16, 2016, a representative from a title company called Rodenburg to inquire about the default judgment on Williams-Mumbo's behalf. Doc. No. 63-1, p. 2. A fax from the title company sent to Rodenburg later that day confirmed that Williams-Mumbo resided at the Coon Rapids address. Doc. No. 82-4. Rodenburg informed the title company that Williams-Mumbo's social security number did not match the Best Buy cardholder's social security number. Doc. No. 63-1, p. 2.

After learning Rodenburg had garnished her wages, Williams first contacted the law firm on December 21, 2016. Doc. No. 82, ¶ 20. Initially, Williams denied owing Best Buy the amount claimed but stated it was "fine" that Rodenburg had garnished her wages because the work at US Foods was "too hard" and that she planned to quit anyway. Doc. No. 63-1, p. 3. She subsequently called the law firm several more times that same day, becoming increasingly distraught. Doc. No. 82, ¶ 21. Williams more forcefully denied owing the debt, denied that she had ever lived at the Coon Rapids address, and denied that she had received notice of the

lawsuit or the judgment before garnishment commenced. Doc. No. 63-7, ¶ 63. She verbally requested that Rodenburg return her garnished wages during numerous phone calls between December 2016 and February 2017. See Doc. No. 63-1, pp. 3-4.

In at least one phone call, Rodenburg attempted to apprise Williams that York represented her in the matter. Doc. No. 78 at 92:20-93:15. But Williams denied hiring or knowing York. Id. at 93:16-18. On her own initiative, Williams then contacted York in late December 2016. Id. at 93:18-21. York confirmed that he had represented a different person named Charlene Williams in 2011 regarding the default judgment. Doc. No. 63-7, ¶ 69. The person he represented was Caucasian, while Williams is African-American. Doc. No. 78 at 97:25-98:15.

At the beginning of 2017, Williams filed complaints against Rodenburg with the Minnesota Attorney General's Office and the Consumer Financial Protection Bureau ("CFPB"). Doc. No. 82-6, pp. 10, 71. In addition to seeking information about the credit card debt, Williams' complaints stated, "I request that all my wages that [have] been garnished be refunded and the harassment and [defamation] of character be stopped." Id. at 8. Rodenburg responded to the complaints by claiming that the law firm had positively identified Williams as the judgment debtor. Id. at 55-56. Despite Williams' continued protests, Rodenburg garnished a total of $656.93 from four of her paychecks between December 29, 2016 and February 9, 2017. Doc. No. 63-7, ¶ 68.

Upon further investigation, PRA and Rodenburg decided on February 16, 2017 to terminate the wage garnishment, vacate the judgment, and dismiss the underlying lawsuit. Doc. No. 63-1, p. 3. Rodenburg

partner Eeva Wendorf conveyed the decision to Williams during a phone call later that day. Id. at 4. At that point, Williams stated that she considered the matter resolved. Id.

Reentering the picture one final time, York sent a letter to Rodenburg after Williams contacted him. Doc. No. 84-3. The law firm received the letter on March 1, 2017.[2] Id. York wrote, "I think you need to take a serious look at your file because I have referred the Charlene Williams you are now going after to attorney Todd Murray for the horrible way she has been treated and ignored during your collection efforts on the wrong person." Id. In reaction, Wendorf sent an email marked with high importance to Rodenburg's partners the next day with the subject line: "Charlene Williams – 106883 – ltr from york. Possible lawsuit against us. Please review." Doc. No. 63-4. Wendorf stated in the email, "We may have to deal with a threat of suit or suit from attorney Todd Murray." Id. She also wrote, "As soon as I saw this file after [Clifton Rodenburg] sent the second letter from the AG to me, I knew it was going to be [a] bomb." Id.

Also on March 1, 2017, Williams spoke with Rodenburg attorney Anita Sunde. Doc. No. 63-1, p. 4. Williams expressed dissatisfaction and confusion with Rodenburg's response to her initial CFPB complaint.[3] Id. In addition, she explained that Rodenburg had yet to return her wages. Id. Sunde responded that Rodenburg never took possession of her wages. Id. Instead, US Foods placed a garnishment hold on the wages, and a third-party servicer held the funds in anticipation of an eventual transfer to Rodenburg. Id. The next day, Sunde notified Williams that she had contacted US Foods to expedite return of the wages. Doc. No. 82, ¶ 26. Once again, Williams stated that she considered the matter

resolved. Id. Williams also told Sunde that she would recant her complaints sent to the Minnesota Attorney General's Office and the CFPB. Id. US Foods returned Williams' wages later in March 2017, and Rodenburg vacated the judgment the following month. Doc. No. 63-1, pp. 4-5.

On October 31, 2017, Williams filed suit against Rodenburg and PRA in the U.S. District Court for the District of Minnesota.[4] Doc. No. 63-7. Williams' complaint alleged nine counts, including violations of 15 U.S.C. § 1692, commonly known as the Fair Debt Collection Practices Act ("FDCPA"), as well as various Minnesota statutory and common-law claims. Id. Rodenburg reported Williams' lawsuit to Lloyd's on December 18, 2017. Doc. No. 63-8, p. 4. On January 18, 2018, Lloyd's denied coverage. Id. at 1. Rodenburg undertook its own defense and entered into a settlement with Williams in November 2018. Doc. No. 1-4, ¶ 9.

Rodenburg filed the present action in North Dakota state court on January 17, 2019, seeking a declaratory judgment and damages stemming from the denial of coverage. Doc. No. 1. On January 30, 2019, the Defendants[5] timely removed the case to federal court. Id.

II. LEGAL STANDARD

Summary judgment is required "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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "An issue is 'genuine' if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party." Schilf v. Eli Lilly & Co., 687 F.3d 947,

948 (8th Cir. 2012) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "A fact is material if it 'might affect the outcome of the suit.' " Dick v. Dickinson State Univ., 826 F.3d 1054, 1061 (8th Cir. 2016) (quoting Anderson, 477 U.S. at 248, 106 S.Ct. 2505). Courts must afford "the nonmoving party the benefit of all reasonable inferences which may be drawn without resorting to speculation." TCF Nat'l Bank v. Mkt. Intelligence, Inc., 812 F.3d 701, 707 (8th Cir. 2016) (quoting Johnson v. Securitas Sec. Servs. USA, Inc., 769 F.3d 605, 611 (8th Cir. 2014)). "At summary judgment, the court's function is not to weigh the evidence and determine the truth of the matter itself, but to determine whether there is a genuine issue for trial." Nunn v. Noodles & Co., 674 F.3d 910, 914 (8th Cir. 2012) (citing Anderson, 477 U.S. at 249, 106 S.Ct. 2505). If the movant demonstrates the absence of a genuine issue of material fact, "[t]he nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.' " Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

The parties agree North Dakota law controls. Accordingly, the Court will apply North Dakota Supreme Court precedent and attempt to predict how that court would decide any state-law questions it has yet to resolve. See Stuart C. Irby Co., Inc. v. Tipton, 796 F.3d 918, 922 (8th Cir. 2015).

"Insurance policy interpretation is a question of law." Forsman v. Blues, Brews & Bar-B-Ques, Inc., 2017 ND 266, ¶ 10, 903 N.W.2d 524 (citing K & L Homes, Inc. v. Am. Family Mut. Ins. Co., 2013 ND 57, ¶ 8, 829 N.W.2d

724). The North Dakota Supreme Court has consistently explained its approach to interpreting insurance policies this way:

> We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract. While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage. We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others.

Borsheim Builders Supply, Inc. v. Manger Ins., Inc., 2018 ND 218, ¶ 8, 917 N.W.2d 504 (citation omitted). The basic task is to determine if the insurance policy's affirmative coverage provisions apply, and if so, to then look at whether any exclusions bar coverage. "It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy." Forsman, 2017 ND 266, ¶ 12, 903 N.W.2d 524 (citation omitted). "If and only if a coverage provision applies to the harm at issue will the court then examine the policy's exclusions and limitations of coverage." Borsheim Builders, 2018 ND 218, ¶ 9, 917 N.W.2d 504 (citation omitted).

The complaint avers that Williams' lawsuit triggered both a duty to defend and a duty to indemnify. The duties to defend and indemnify "are two separate and distinct contractual obligations ... determined by applying different standards." Tibert v. Nodak Mut. Ins. Co., 2012 ND 81, ¶ 33, 816 N.W.2d 31 (citing Hanneman v. Cont'l W. Ins. Co., 1998 ND 46, ¶ 39, 575 N.W.2d 445). "An insurer's duty to defend is broader than [the] duty to indemnify." Id. ¶ 30 (citing Farmers Union Mut. Ins. Co. v. Decker, 2005 ND 173, ¶ 14, 704 N.W.2d 857). Corollary to that principle, if there is no duty to defend, there is no duty to indemnify. See Selective Ins. Co. of Am. v. Smart Candle, LLC, 781 F.3d 983, 985 (8th Cir. 2015) (citations omitted). "An insurer does not have a duty to defend an insured if there is no possibility of coverage under the policy." Decker, 2005 ND 173, ¶ 14, 704 N.W.2d 857 (citing Schultze v. Cont'l Ins. Co., 2000 ND 209, ¶ 8, 619 N.W.2d 510). "Any doubt about whether a duty to defend exists must be resolved in favor of the insured." Tibert, 2012 ND 81, ¶ 31, 816 N.W.2d 31 (citations omitted).

III. DISCUSSION

Lloyd's advances two independent arguments in support of summary judgment. According to Lloyd's, coverage is precluded because: (1) Williams first made her claim against Rodenburg before May 10, 2017 (the effective date of the Policy), and (2) even if Williams first made her claim during the policy period, Rodenburg knew of the circumstances that led to her claim prior to May 10, 2017 and could have reasonably expected a resulting lawsuit. Assuming without deciding that Williams first made her claim during the policy period, the Court agrees with the second contention.

Before examining coverage, though, a threshold issue demands attention. Namely, Rodenburg argues that the Policy's language for claims arising from incidents is ambiguous. At a foundational level, the Policy professes to cover claims based on incidents occurring on or after May 10, 2009 that are first made against Rodenburg and reported to Lloyd's between May 10, 2017 and May 10, 2018. Doc. No. 63-6, p. 9. But the Policy then goes on to state: "In addition, [Lloyd's] will cover Claims arising from Incidents as follows...." Id. Trying to paint this provision as ambiguous, Rodenburg contends that the introductory clause creates additional coverage for claims arising from incidents rather than a limitation on coverage. Relying on that perceived ambiguity and the resulting inconsistency with the remainder of the Policy, Rodenburg asserts that the Court should essentially strike the ensuing language that sets the coverage terms for claims arising from prior incidents.

Ambiguity in an insurance policy "exists when the language can be reasonably construed as having at least two alternative meanings." Wisness v. Nodak Mut. Ins. Co., 2011 ND 197, ¶ 13, 806 N.W.2d 146 (cleaned up). Applying equivalent Minnesota law, the Eighth Circuit Court of Appeals has explained:

> In deciding whether an ambiguity truly exists, however, a policy must be read as a whole. The language must be considered within its context, and with common sense. If a phrase is subject to two interpretations, one reasonable and the other unreasonable in the context of the policy, the reasonable construction will control and no ambiguity exists.

3M Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 858 F.3d 561, 566 (8th Cir. 2017) (internal citations and quotation marks omitted). "It is not permissible to lift one sentence from a policy and try to attach a particular meaning to that sentence standing alone." 2 Lee R. Russ et al., Couch on Insurance § 21:19 (3d ed. 1995).

To be sure, Rodenburg is correct that the introductory clause—when isolated from the rest of the Policy—is amenable to two different interpretations. On one hand, the phrase "[i]n addition, [Lloyd's] will cover Claims arising from Incidents as follows" might indicate coverage beyond that provided by the immediately preceding language. Doc. No. 63-6, p. 9. On the other, the same phrase could evince that additional conditions for coverage apply when a claim arises from an incident. But when that language is considered in the context of the Policy as a whole, only the latter interpretation makes sense. Rodenburg demonstrates in its own brief the absurd results that follow if the introductory clause is interpreted to provide additional coverage. Specifically, Rodenburg points out that the supposed additional coverage would actually afford narrower coverage, sapping all meaning from that section of the Policy. Doc. No. 71, pp. 14-16. The interpretation Lloyd's proffers, meanwhile, is consistent with the purposes of claims made and reported policies generally while also giving meaning and effect to each clause. The Policy therefore unambiguously requires claims arising from incidents to comply with the enumerated additional conditions for coverage.

With that resolved, all agree that Williams' lawsuit arose from events occurring prior to May 10, 2017. Coverage is accordingly contingent on three conditions:

> 1. Prior Incidents: [Lloyd's] will cover Claims arising from an Incident that occurred before the Effective Date of this Insurance Policy if the following conditions are met:
> a. [Rodenburg] did not have knowledge of the Incident prior to the Effective Date of this Insurance Policy;
> b. [Rodenburg] was not aware of any Incident which could reasonably be expected to the basis for a Claim; and
> c. The Claim results from an Incident which occurred on or after the Retroactive Date and is reported to [Lloyd's] while this agreement is in effect.

Doc. No. 63-6, p. 9. The Court need only consider the first condition here. With the relevant definitions included, that condition bars coverage if Rodenburg had knowledge of the circumstance, act, error, or omission which could reasonably have been expected to form the basis of Williams' lawsuit. See id. at 9, 13-14.

Although there is a dearth of North Dakota case law construing similar policy language, federal courts typically employ a hybrid subjective-objective test most prominently articulated in Colliers Lanard & Axilbund v. Lloyds of London, 458 F.3d 231 (3d Cir. 2006). The Colliers test encompasses two parts. The first part looks to whether the insured had subjective awareness of an act, error, or omission. Id. at 237. If so, then the second part calls for an objective inquiry to determine "whether a reasonable professional in the insured's position might expect a claim or suit to result." Id. Under this second prong, the insured's subjective expectation of a lawsuit is irrelevant. Id.

In application, Rodenburg indisputably possessed subjective awareness of the acts that led to Williams' lawsuit before May 10, 2017. Rodenburg served the summons and complaint in the original collection lawsuit, as well as the November 2016 garnishment notice, at the Coon Rapids address that turned out to belong to Williams-Mumbo. The law firm then proceeded to garnish Williams' wages between December 2016 and February 2017. During that time, Rodenburg fielded numerous calls from Williams regarding the wrongful garnishment. Rodenburg also responded to Williams' complaints sent to the Minnesota Attorney General's Office and the CFPB. Beyond interactions with Williams, the law firm received information from both the title company and York indicating that Rodenburg failed to obtain a valid judgment against Williams before garnishing her wages. Thus, the first prong of the Colliers test is satisfied.

So too for the second prong. In deposition testimony, Rodenburg acknowledged that the FDCPA imposes strict liability on debt collectors for "any error, even unintentional." Doc. No. 63-9 at 43:2-12. The law firm further conceded that wrongful wage garnishment supplies a basis for an FDCPA claim. Id. at 39:9-15. In light of that, York's March 1, 2017 letter is all but dispositive. York overtly informed Rodenburg that he had referred Williams to a consumer rights attorney "for the horrible way she has been treated and ignored during your collection efforts on the wrong person." Doc. No. 84-3. Williams' statement to Sunde the next day that she considered the matter resolved and her accompanying commitment to recant her regulatory complaints is of no consequence. By that time, Rodenburg knew of the facts that supported Williams' FDCPA claim and knew that York had referred her to a

consumer rights attorney. Wendorf's March 2, 2017 email to Rodenburg's partners underscores that reality. Her email explicitly stated, "We may have to deal with a threat of suit or suit from attorney Todd Murray." Doc. No. 63-4. And Wendorf colorfully exclaimed that she knew Williams' file "was going to be [a] bomb" upon reviewing an earlier letter from the Minnesota Attorney General's Office. Id. Most importantly, that email came after the law firm believed that Williams considered the matter resolved following Wendorf's February 16, 2017 phone conversation with her. Rodenburg's own words demonstrate that a reasonable attorney could have expected a claim to result from garnishing Williams' wages.

As a last effort, Rodenburg contends that it could not have expected Williams' claim because no one else who had filed regulatory complaints against the law firm later filed suit.[6] But that reasoning is flawed; correlation does not equal causation. The resolution of unrelated regulatory complaints plainly has no bearing on Williams' unique situation. Faced with the circumstances presented here, a reasonable attorney in Rodenburg's position could have expected a claim. Because Rodenburg possessed subjective awareness of acts that could have reasonably been expected to result in Williams' lawsuit prior to May 10, 2017, there is no possibility of coverage under the Policy.

IV. CONCLUSION

No genuine issues of material fact remain, and Lloyd's is entitled to judgment as a matter of law. The Court has reviewed the record, the parties' filings, and the relevant legal authority. For the reasons above, the motion for summary judgment (Doc. No. 61) is

GRANTED. The complaint is hereby DISMISSED WITH PREJUDICE.
IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Footnotes

` 1Williams maintained that she did not owe the debt throughout her interactions with Rodenburg. That said, she provided conflicting reasons. At times she claimed identify theft and at others asserted that she had paid off the balance on her Best Buy card, that she had a different type of account, or that her credit limit was too low to owe the $1,481.10 amount. See Doc. No. 82, ¶¶ 20-21. Whether Williams actually owed the debt is ultimately immaterial to the outcome.

2York dated the letter February 13, 2017 and postmarked it on February 23, 2017. See Doc. No. 84-3.

3The CFPB allows debt collectors a set of predetermined resolution options when responding to a consumer complaint. Doc. No. 63-9 at 33:9-21. Rodenburg selected "nonmonetary relief" for Williams' first complaint, and she received the response after Wendorf promised the return of her wages. Doc. No. 82-6, p. 81.

4Williams apparently contacted Murray, a consumer rights attorney, regarding Rodenburg's conduct. Doc. No. 78 at 99:13-100:10. Murray declined the representation but referred Williams to Adam Strauss, the attorney who represented her in the underlying lawsuit in the District of Minnesota. Id.

5The Court previously granted a separate summary judgment motion that dismissed The Cincinnati Insurance Company as a Defendant. Doc. No. 64.

6Between January 1, 2014 and February 17, 2020, a total of 62 regulatory complaints were filed against Rodenburg. Doc. No. 82, p. 3.

United States District Court, D. North Dakota,
EASTERN DIVISION.

RODENBURG LLP, doing business as Rodenburg Law Firm, Plaintiff,
v.
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Syndicate No. 4020, subscribing to Policy Number DCLPLA 00574-00; and The Cincinnati Insurance Company, Defendants.

Case No. 3:19-cv-00027
Signed 01/09/2020

Attorneys and Law Firms

Clifton G. Rodenburg, Eeva Wendorf, Rodenburg Law Firm, Fargo, ND, for Plaintiff.

Ian Ronald McLean, Ronald H. McLean, Serkland Law Firm, Fargo, ND, Stephen M. Warner, Elizabeth A. Jenson Prouty, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, MN, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Peter D. Welte, Chief Judge

Before the Court are cross motions for summary judgment filed by Plaintiff Rodenburg LLP ("Rodenburg" or the "law firm") and Defendant The Cincinnati Insurance Company ("Cincinnati"). Doc. Nos. 46, 52. Defendant Certain Underwriters at Lloyd's,

London ("Lloyd's") filed a separate motion for summary judgment on January 8, 2020, which the Court will address after briefing has concluded. Doc. No. 61. Rodenburg filed its initial summary judgment motion on August 30, 2019. Doc. No. 46. Cincinnati responded on September 19, 2019, simultaneously filing a summary judgment motion of its own. Doc. Nos. 52, 56. Rodenburg filed a combined response/reply brief on October 10, 2019, and Cincinnati submitted its final reply on October 24, 2019. Doc. Nos. 58, 60. Rodenburg seeks a judgment declaring that Cincinnati wrongfully denied coverage under an insurance policy, as well as damages for breach of contract. Cincinnati asks for the inverse – a declaration that it properly denied coverage and dismissal of the complaint. For the reasons below, Cincinnati's motion for summary judgment is granted, and Rodenburg's motion is denied.

I. BACKGROUND

Rodenburg is a North Dakota law firm that primarily engages in debt collection. Doc. No. 50, ¶ 1. Cincinnati issued a North Dakota CinciPak Policy ("CinciPak Policy") to Rodenburg effective from May 1, 2015 through May 1, 2018. See Doc. No. 54-2. The CinciPak Policy included Commercial General Liability Coverage ("CGL Policy") and Commercial Umbrella Liability Coverage ("Umbrella Policy"). See id.

The pending motions represent the culmination of an interconnected web of three separate lawsuits. The first is the present action in which Rodenburg seeks a declaration that Cincinnati improperly denied coverage under the Umbrella Policy. Second is an underlying lawsuit against Rodenburg that is the subject of the

insurance claim. And third is a debt collection action the law firm pursued that started the chain of litigation.

The dispute traces back to June 2010, when Portfolio Recovery Associates, LLC ("PRA") purchased the rights to a defaulted consumer credit card account. Doc. No. 54-1, ¶ 7. As alleged, an individual named Charlene Williams ("Williams") owed the debt.[1] Doc. No. 1-4, ¶ 10. PRA assigned the account to Rodenburg in January 2011 for collection. Id. When providing the account information to Rodenburg, PRA listed an address in Coon Rapids, Minnesota, that belonged to an individual named Charlene Williams-Mumbo ("Williams-Mumbo"). Id. ¶¶ 10-11. Based on this information, Rodenburg proceeded to commence an action in Minnesota state court, ostensibly against Williams. Id. ¶

However, Rodenburg served the summons and complaint on Williams-Mumbo at the Coon Rapids address. Id. ¶ 11. The Minnesota state court entered a default judgment on December 6, 2011. Doc. No. 54-1, ¶ 20. Williams-Mumbo retained an attorney to vacate the default judgment, but the attorney did not respond to Rodenburg's inquiries regarding the judgment and apparently withdrew from the representation. Doc. No. 1-4, ¶ 12; Doc. No. 54-1, ¶ 19. Because Williams never received notice of the lawsuit, Rodenburg did not obtain a valid judgment against her.

Attempting to collect on the judgment debt, Rodenburg served a notice of intent to garnish wages at the Coon Rapids address on November 8, 2016. Doc. No. 54-1, ¶ 42. After receiving no response, Rodenburg served Williams' employer with garnishment papers on November 22, 2016. Doc. No. 1-4, ¶ 13. Williams, who had never lived at the Coon Rapids address, learned from her employer that Rodenburg intended to garnish her wages in December 2016. Doc. No. 54-1, ¶¶ 43, 59. Williams

subsequently informed Rodenburg of the wrongful garnishment multiple times, first contacting the law firm on December 21, 2016. Doc. No. 1-4, ¶ 14. Williams asserted that she did not owe the debt and had never received notice of the lawsuit or the judgment before the garnishment commenced. Doc. No. 54-1, ¶ 63. Additionally, she filed complaints against Rodenburg with the Minnesota Attorney General's Office and the Consumer Financial Protection Bureau in January 2017. Doc. No. 1-4, ¶ 14. Despite these protests, Rodenburg continued to garnish a total of $656.93 from four of Williams' paychecks between December 29, 2016 and February 9, 2017. Doc. No. 54-1, ¶ 68. Rodenburg determined that Williams was not the judgment debtor later in February 2017, ceasing collection efforts that same month and eventually returning the improperly garnished funds. Id. ¶ 77.

On October 31, 2017, Williams filed suit against Rodenburg in the U.S. District Court for the District of Minnesota. See Doc. No. 54-1. Williams' complaint alleged nine counts, including violations of 15 U.S.C. § 1692, commonly known as the Fair Debt Collection Practices Act ("FDCPA"), as well as various Minnesota statutory and common-law claims. See id. In addition to the loss of her improperly garnished wages, the injuries Williams claimed included "extreme emotional distress, anxiety, and fear," as well as "confusion, inconvenience, humiliation, embarrassment and annoyance." Id. ¶¶ 88, 91. She also asserted a claim that Rodenburg violated her right of privacy. Id. ¶¶ 140-48.

After Williams filed her lawsuit, Rodenburg sought coverage under the CinciPak Policy. Doc. No. 50, ¶ 5. Cincinnati denied coverage in March 2018, refusing to defend or indemnify Rodenburg under both the CGL Policy and Umbrella Policy. See Doc. No. 54-3.

Rodenburg undertook its own defense and ultimately entered into a settlement with Williams in November 2018. Doc. No. 50, ¶ 8. Not long after, Rodenburg filed the present action in North Dakota state court, seeking a declaratory judgment and damages stemming from Cincinnati's denial of coverage. See Doc. No. 1-4. Cincinnati and Lloyd's timely removed the case to federal court on January 30, 2019. See Doc. No. 1.

II. DISCUSSION

"In a case of actual controversy within its jurisdiction," a federal court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Summary judgment is required "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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "An issue is 'genuine' if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party." Schilf v. Eli Lilly & Co., 687 F.3d 947, 948 (8th Cir. 2012) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "A fact is material if it 'might affect the outcome of the suit.' " Dick v. Dickinson State Univ., 826 F.3d 1054, 1061 (8th Cir. 2016) (quoting Anderson, 477 U.S. at 248, 106 S.Ct. 2505). Courts must afford "the nonmoving party the benefit of all reasonable inferences which may be drawn without resorting to speculation." TCF Nat'l Bank v. Mkt. Intelligence, Inc., 812 F.3d 701, 707 (8th Cir. 2016) (quoting Johnson v. Securitas Sec. Servs. USA, Inc., 769 F.3d 605, 611 (8th Cir. 2014)). "At summary judgment, the court's function is not to weigh the evidence and

determine the truth of the matter itself, but to determine whether there is a genuine issue for trial." Nunn v. Noodles & Co., 674 F.3d 910, 914 (8th Cir. 2012) (citing Anderson, 477 U.S. at 249, 106 S.Ct. 2505). If the movant demonstrates the absence of a genuine issue of material fact, "[t]he nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.' " Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

Neither party seriously disputes the facts here. The only question for resolution is whether the Umbrella Policy imposed duties on Cincinnati to defend and indemnify Rodenburg in Williams' lawsuit. The parties agree that North Dakota law governs this question. Accordingly, the Court will apply North Dakota Supreme Court precedent and attempt to predict how that court would decide any state-law questions it has yet to resolve. See Stuart C. Irby Co., Inc. v. Tipton, 796 F.3d 918, 922 (8th Cir. 2015).

"Insurance policy interpretation is a question of law." Forsman v. Blues, Brews & Bar-B-Ques, Inc., 2017 ND 266, ¶ 10, 903 N.W.2d 524 (citing K & L Homes, Inc. v. Am. Family Mut. Ins. Co., 2013 ND 57, ¶ 8, 829 N.W.2d 724). The North Dakota Supreme Court has consistently explained its approach to interpreting insurance policies this way:

> We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. If coverage hinges on an undefined term, we apply the plain,

> ordinary meaning of the term in interpreting the contract. While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage. We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others.

Borsheim Builders Supply, Inc. v. Manger Ins., Inc., 2018 ND 218, ¶ 8, 917 N.W.2d 504 (citation omitted).

The basic task is to determine if the insurance policy's affirmative coverage provisions apply, and if so, to then look at whether any exclusions bar coverage. "It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy." Forsman, 2017 ND 266, ¶ 12, 903 N.W.2d 524 (citation omitted). "If and only if a coverage provision applies to the harm at issue will the court then examine the policy's exclusions and limitations of coverage." Borsheim Builders, 2018 ND 218, ¶ 9, 917 N.W.2d 504 (citation omitted). "While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions." Id. ¶ 10 (citation omitted). "Exclusions from coverage ... must be clear and explicit and are strictly construed against the insurer." Id. ¶ 8 (ellipses in original) (citation omitted).

Rodenburg argues that Williams' lawsuit triggered both a duty to defend and a duty to indemnify. The duties to defend and indemnify "are two separate

and distinct contractual obligations ... determined by applying different standards." Tibert v. Nodak Mut. Ins. Co., 2012 ND 81, ¶ 33, 816 N.W.2d 31 (citing Hanneman v. Cont'l W. Ins. Co., 1998 ND 46, ¶ 39, 575 N.W.2d 445). "While the duty to defend focuses on the complaint's allegations, the duty to indemnify generally is determined by the actual result in the underlying action." Forsman, 2017 ND 266, ¶ 32, 903 N.W.2d 524 (citing Tibert, 2012 ND 81, ¶ 33, 816 N.W.2d 31).

"An insurer's duty to defend is broader than its duty to indemnify." Id. ¶ 31 (citing Farmers Union Mut. Ins. Co. v. Decker, 2005 ND 173, ¶ 13, 704 N.W.2d 857). As a corollary to this principle, if there is no duty to defend, there is no duty to indemnify. See Selective Ins. Co. of Am. v. Smart Candle, LLC, 781 F.3d 983, 985 (8th Cir. 2015) (citations omitted). "An insurer does not have a duty to defend an insured if there is no possibility of coverage under the policy." Decker, 2005 ND 173, ¶ 14, 704 N.W.2d 857 (citing Schultze v. Cont'l Ins. Co., 2000 ND 209, ¶ 8, 619 N.W.2d 510). "When several claims are made against the insured in the underlying action, the insurer has a duty to defend the entire lawsuit if there is potential liability or a possibility of coverage for any one of the claims." Tibert, 2012 ND 81, ¶ 30, 816 N.W.2d 31 (citations omitted). "Any doubt about whether a duty to defend exists must be resolved in favor of the insured." Id. ¶ 31 (citations omitted).

With this foundation in mind, a truncated summary of the CinciPak Policy is useful to frame the issues. Both the CGL Policy and Umbrella Policy provide Rodenburg with insurance for damages resulting from three types of injuries: "bodily injury," "personal and advertising injury," and "property damage." Doc. No. 54-2, p. 22; id. at 70. For coverage to apply, the injuries must result from an "occurrence,"

meaning for practical purposes, an accident.[2] Id. at 40, 85. Two exclusions are at play as well. The first bars coverage for injuries that Rodenburg "expected or intended" to cause, while the second bars coverage if Rodenburg's conduct violated certain categories of statutes. Id. at 62, 91 (expected or intended injury exclusions); id. at 28, 72 (violation of statutes exclusions). Rodenburg does not dispute the denial of coverage under the CGL Policy, asserting only that Cincinnati improperly denied Umbrella Policy coverage. Doc. No. 1-4, ¶ 23.

A. Umbrella Policy Applicability

As an initial roadblock, Cincinnati contends that because it denied Rodenburg Umbrella Policy coverage based on some of the same provisions that it denied CGL Policy coverage, the Umbrella Policy is inapplicable altogether. The Umbrella Policy sets out its threshold requirements as follows:

> 1. We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages for "bodily injury", "personal and advertising injury" or "property damage" to which this insurance applies:
>
> a. Which is in excess of the "underlying insurance"; or
>
> b. Which is either excluded or not insured by "underlying insurance".

Doc. No. 54-2, p. 70 (emphasis added). The Umbrella Policy defines "underlying insurance" as the CGL Policy. Id. at 87. Because the CGL Policy did not cover

Rodenburg's liability to Williams, subsection 1.b. is the sole tension point here.

Cincinnati enthusiastically points out that it denied coverage under the CGL Policy and Umbrella Policy based on identical provisions found in both policies – the definition of an occurrence, as well as the violation of statutes and expected or intended injury exclusions. See Doc. No. 54-3. Because Rodenburg did not challenge the denial of CGL Policy coverage, the argument goes, Rodenburg tacitly admitted that the denial of Umbrella Policy coverage was also proper on these same grounds. Cincinnati argues that the Court should not even reach the substantive provisions of the Umbrella Coverage because of this supposed admission. But this approach puts cart before horse.

Indeed, Cincinnati's preferred reading strikes the words "to which this insurance applies" from the Umbrella Policy. As written, the language looks initially to whether the provisions in "this insurance" for bodily injury, personal and advertising injury, or property damage apply. If they do not, or if the Umbrella Policy's own exclusions defeat coverage, then there is no need to continue to subsection 1.b. to consider the CGL Policy at all. Only if the Umbrella Policy does apply is a comparison with the CGL Policy warranted. So rather than a short track to cutting off claims, as Cincinnati sees it, this provision is in reality a back stop that kicks in when the Umbrella Policy would otherwise apply. Adhering to the plain language, the Court will therefore determine whether the Umbrella Policy provides coverage and then compare that coverage with the CGL Policy if necessary.

B. Bodily Injury, Personal and Advertising Injury, and Property Damage

The inquiry now becomes whether any allegations in Williams' complaint fall within the Umbrella Policy's definitions of bodily injury, personal and advertising injury, or property damage. Taking these terms in turn, bodily injury is defined as "bodily harm or injury, sickness, disease, disability, humiliation, shock, fright, mental anguish or mental injury." Doc. No. 54-2, p. 83. Williams' complaint alleges "extreme emotional distress, anxiety, and fear" and "confusion, inconvenience, humiliation, embarrassment and annoyance." Doc. No. 54-1, ¶¶ 88, 91. These injuries clearly meet the Umbrella Policy's definition for bodily injury, and Cincinnati acknowledges as much. See Doc. No. 53, p. 13 n.1.

Williams' complaint also alleges personal and advertising injury, defined as injuries arising from the commission of certain intentional torts. Doc. No. 54-2, pp. 85-86. Pertinent here, Rodenburg argues that Williams' complaint implicates violation of the right of privacy, malicious prosecution, and defamation. The complaint specifically alleged Rodenburg's conduct violated Williams' right of privacy. Doc. No. 54-1, ¶¶ 140-48. Not included, however, are claims for malicious prosecution and defamation. In Cincinnati's view, the complaint does not trigger the duty to defend for these omitted offenses because they amount to "mere speculation that additional ... causes of action may be developed at a later time." Schultze, 2000 ND 209, ¶ 10, 619 N.W.2d 510. Nonetheless, "the duty to defend does not depend on the nomenclature of the claim. Rather, the focus is on the basis for the injury." Nodak Mut. Ins. Co. v. Heim, 1997 ND 36, ¶ 31, 559 N.W.2d 846. The basis for Williams' injuries is that Rodenburg wrongfully instituted a wage garnishment proceeding, informing her employer of that proceeding and eventually terminating it in her favor.

This conduct raises the specter of defamation and malicious prosecution claims. See N.D. Cent. Code § 14-02-03 (libel elements); N.D. Pattern Jury Instruction C–13.00 (2019) (malicious prosecution elements). Although Williams did not overtly allege malicious prosecution or defamation, these offenses are not claims that "may be developed at a later time" because the complaint's factual allegations already support them. As a result, Williams' complaint satisfies the Umbrella Policy's definition of personal and advertising injury because it alleges conduct that implicates violation of the right of privacy, malicious prosecution, and defamation.

Less availing, though, is Rodenburg's argument that Williams' complaint alleges property damage. The Umbrella Policy defines property damage as either "[p]hysical injury to or destruction of tangible property" or "[l]oss of use of tangible property that is not physically injured." Doc. No. 54-2, p. 86. Rodenburg characterizes Williams' injury as the loss of the wages in her bank account, while Cincinnati contends the injury is only to Williams' expectancy in receiving those wages. The distinction is immaterial. The North Dakota Supreme Court has yet to decide whether funds in a bank account are tangible or intangible property. Still, the weight of authority holds that bank-account funds are intangible. See Mullin v. Travelers Indem. Co. of Conn., 541 F.3d 1219, 1223 (10th Cir. 2008) (collecting cases describing bank-account funds as intangible property and predicting the Utah Supreme Court would so hold). The Court predicts that the North Dakota Supreme Court would adopt this position. Regardless of whether Williams suffered an injury to her wages or merely to an expectancy in her wages, the injury would be intangible. Thus, the Umbrella Policy's definition of property damage does not apply to Williams' complaint.

C. Occurrence Definition and Expected or Intended Injury Exclusion

Williams' claims, as previously established, meet the definitions of bodily injury and personal and advertising injury. Even so, the Umbrella Policy limits coverage to injuries caused by an occurrence:

> 2. This insurance applies to "bodily injury", "personal and advertising injury" or "property damage" only if:
> a. The "bodily injury", "personal and advertising injury" or "property damage" is caused by an "occurrence"....

Doc. No. 54-2, p. 70. An occurrence is defined as either "[a]n accident ... that results in 'bodily injury' or 'property damage' " or "[a]n offense that results in 'personal and advertising injury'." Id. at 85. Williams' complaint alleges offenses that resulted in personal and advertising injury. To that extent, Rodenburg has demonstrated that the Umbrella Policy's affirmative coverage provisions apply.

Williams' bodily injury claims, however, require additional consideration. Cincinnati argues Rodenburg intentionally garnished Williams' wages, and her resulting mental and emotional injuries therefore did not stem from an occurrence. Meanwhile, Rodenburg contends it made a mistake in wrongfully garnishing Williams' wages because the law firm believed she was the correct judgment debtor, qualifying as an accident.

As a starting point, the Umbrella Policy does not define "accident." The North Dakota Supreme Court defines the term as "happening by chance, unexpectedly taking place, not according to the usual course of things." K & L Homes, 2013 ND 57, ¶ 11, 829 N.W.2d 724 (quoting

Wall v. Penn. Life Ins., 274 N.W.2d 208, 216 (N.D. 1979)). Relevant, too, at this juncture is the Umbrella Policy's expected or intended injury exclusion, precluding coverage for bodily injury and property damage "expected or intended from the standpoint of the insured." Doc. No. 54-2, p. 91. The North Dakota Supreme Court generally views expected or intended injury exclusions and occurrence provisions as one and the same, and so consideration of this exclusion now is appropriate. See Nat'l Farmers Union Prop. & Cas. Co. v. Kovash, 452 N.W.2d 307, 311 n.3 (N.D. 1990).

Coverage is precluded under either the definition of an occurrence or the expected or intended injury exclusion if Rodenburg (1) undertook an intentional act and (2) the resulting injuries were the "natural and probable consequences" of that act. Tibert, 2012 ND 81, ¶ 18, 816 N.W.2d 31. "[I]t is not enough for the insurer to show that the act was intentional and the result was foreseeable. In order to infer intent to injure, the insurer must show the act was done intentionally and was of such a character that harmful consequences 'are substantially certain to result from the act.' " Id. ¶ 20 (citations omitted). Both parties agree that Rodenburg acted intentionally to garnish Williams' wages. The debate is whether harmful consequences were "substantially certain" to follow.

The Eighth Circuit Court of Appeals, applying North Dakota's natural and probable consequences standard, determined that an insurer had no duty to defend under similar circumstances. See First Nat'l Bank and Tr. Co. of Williston v. St. Paul Fire & Marine Ins. Co., 971 F.2d 142, 146 (8th Cir. 1992). In St. Paul Fire, a business owner sought a line of credit from a bank. The bank erroneously sent a commitment letter to the customer indicating the line of credit had been

approved. Later, the bank backtracked and told the customer he needed to meet additional conditions to obtain the credit, to which the customer responded that his business would suffer "serious hardship" if the bank turned him down. Id. at 143. The bank eventually refused to extend the credit, and the customer's business closed. The customer sued for mental and emotional injuries, among others, and the bank's insurer refused to defend. Id. at 143-44.

On appeal after the district court granted summary judgment for the insurer in the ensuing declaratory judgment action, the bank argued that because at least some of its acts were mistakes, including the commitment letter it sent in error, the injuries resulted from an accident. The Eighth Circuit rejected this argument, warning, "Under this approach, any conscious decision that in retrospect appears to have been imprudent may be termed a 'mistake.' " Id. at 145. The court went on to explain that the bank had "specific notice" of the potential harm that would befall the customer's business without the line of credit. Id. at 146. When faced with that information, the bank "made thoughtful choices" in refusing to extend credit that evinced intentional conduct, the natural and probable consequence of which was the business's closing and the customer's concomitant mental and emotional injury. Id. at 145-46. Accordingly, the Eighth Circuit affirmed summary judgment.

Based on the undisputed facts here, Williams' injuries were the natural and probable consequence of Rodenburg's intentional acts. Williams first told the law firm it was wrongfully garnishing her wages on December 21, 2016, and she called several more times to express the same concerns. Doc. No. 1-4, ¶ 14. Added to that, the Minnesota Attorney General's Office and the

Consumer Financial Protection Bureau directed Rodenburg to respond to inquiries regarding Williams' complaints. Doc. No. 54-1, ¶¶ 70-71. Yet Rodenburg persisted in garnishing four of her paychecks beginning on December 29, 2016—when the law firm already knew she may not have been the correct judgment debtor. Id. ¶ 68. Presented with information that Williams never lived at the address where the garnishment papers had been sent and never received notice of the lawsuit or the judgment, Rodenburg refused to investigate her claims and continued to garnish her wages anyway. Id. ¶ 64. The only thing that happened unexpectedly was that Williams turned out to be right. Rodenburg's "conscious decision" to garnish her wages "that in retrospect appears to have been imprudent" cannot morph intentional conduct into an accident. St. Paul Fire, 971 F.2d at 145.

More fundamentally, it is the allegations in the complaint that trigger the duty to defend. See Forsman, 2017 ND 266, ¶ 32, 903 N.W.2d 524. Williams' complaint alleges intentional conduct. The pleading is awash in phrases such as "willfully ignored," "intentionally invaded," "intentionally deprived," "intentionally made material misrepresentations"– the list goes on. Doc. No. 54-1, ¶¶ 64, 83, 121-22. Rodenburg appears to argue that because it initially believed Williams to be the correct judgment debtor, all the actions that followed were merely negligent. But this disregards the meat of Williams' complaint. It does not allege a simple mix-up. Instead, the complaint's gravamen, and the basis for Williams' mental and emotional injuries, is that Rodenburg deliberately garnished Williams' wages after it had notice that she was potentially not the judgment debtor.

Further, as Rodenburg acknowledges, garnishing someone's wages ordinarily causes mental distress. See Doc. No. 50, p. 10. Williams even told Rodenburg "she was angry, confused, distressed, and upset" upon finding out the law firm intended to garnish her wages. Doc. No. 54-1, ¶ 65. So, like the bank in St. Paul Fire, Rodenburg possessed "specific notice" of the potential for injury. Rodenburg then made "thoughtful choices" to press on, repeatedly garnishing Williams' wages. The harmful mental and emotional consequences that ensued were substantially certain to result from the law firm's actions. Thus, Rodenburg's conduct is unambiguously precluded from the Umbrella Policy's coverage because Williams' bodily injury resulted from intentional acts.[3]

D. Violation of Statutes Exclusion

With Rodenburg's arguments for coverage based on bodily injury and property damage whittled down, only Williams' claims for personal and advertising injury trigger the Umbrella Policy's affirmative coverage provisions. Turning now to the exclusions, the violation of statutes exclusion precludes coverage for the personal and advertising injury Rodenburg caused. The exclusion bars coverage for:

> Any liability arising directly or indirectly out of any action or omission that violates or is alleged to violate:
>
> a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
> b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

> c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Doc. No. 54-2, p. 72. At issue is whether Rodenburg's alleged violations of the FDCPA invoke this exclusion.

At the outset, the Court finds that the FDCPA is a statute that falls within the exclusion's catch-all subsection 8.c. because it prohibits or limits the communicating of information.[4] For example, 15 U.S.C. § 1692c states that a debt collector "may not communicate" or "shall not communicate" debt collection information using specified means; 15 U.S.C. § 1692d prohibits "the use of ... language the natural consequence of which is to abuse the hearer or reader" in connection with debt collection; and 15 U.S.C. §§ 1692e and 1692f collectively enumerate more than 20 distinct methods of proscribed communication. Williams' complaint alleges Rodenburg violated each of these FDCPA provisions. See Doc. No. 54-1, ¶¶ 95, 100, 104, 108.

Nevertheless, Rodenburg contends that alleged violations of the FDCPA do not qualify under subsection 8.c. for two reasons. First, the law firm argues the FDCPA is dissimilar to the TCPA and the CAN-SPAM Act, so it is not the type of statute to which the exclusion applies. But by its terms, the exclusion is not limited only to statutes similar to the TCPA or the CAN-SPAM Act. Instead, it applies to "[a]ny statute" that meets the criteria in the exclusion's catch-all provision. Doc. No. 54-2, p. 72. Regardless of whether the FDCPA is similar to the exclusion's two enumerated statutes, a question the Court need not reach, it is a statute that

independently meets the requirements of the catch-all provision. That is enough to defeat coverage.

The law firm's second contention is that Cincinnati's failure to specifically include the FDCPA in the exclusion either evinces an intent to omit FDCPA violations or at least leaves the exclusion ambiguous. Thus, Rodenburg contends, the exclusion must be construed in favor of coverage. Such an interpretation, however, would prevent the catch-all provision from applying unless a statute is specifically included in the policy language. This, in turn, would then mean that any specifically included statute would no longer fall within the catch-all provision. Rodenburg's proposed construction would therefore render subsection 8.c. perpetually useless. Construing the insurance contract to give meaning and effect to each part, the Court rejects this invited interpretation. See Borsheim Builders, 2018 ND 218, ¶ 8, 917 N.W.2d 504.

As a final effort, Rodenburg asserts that because not all of Williams' claims allege violations of the FDCPA, the other statutory and common-law claims still trigger coverage. But the exclusion says otherwise. The FDCPA, as explained above, qualifies as a statute that prohibits or limits the communicating of information. As a result, the violation of statutes exclusion precludes coverage for "[a]ny liability arising directly or indirectly out of any action" that is alleged to violate the FDCPA. Doc. No. 54-2, p. 72. The North Dakota Supreme Court construes "arising out of" to mean "causally connected with, not 'proximately caused by.' " Norgaard v. Nodak Mut. Ins. Co., 201 N.W.2d 871, 875 (N.D. 1972). Rodenburg argues that at least some of Williams' injuries are causally connected to offenses other than the FDCPA violations. While true, liability for those offenses is cut off from coverage because that

liability also arises from Rodenburg's alleged violations of the FDCPA. Stated differently, Williams' claims originated from a single course of conduct; because that conduct allegedly violated the FDCPA, all resulting liability—including for non-FDCPA claims—is excluded from coverage. See Nw. G.F. Mut. Ins. Co. v. Norgard, 518 N.W.2d 179, 184 (N.D. 1994); see also Hartford Cas. Ins. Co. v. Gelshenen, 387 F. Supp. 3d 634, 642 (W.D.N.C. 2019).

III. CONCLUSION

The Umbrella Policy's violation of statutes exclusion bars Williams' claims for personal and advertising injury. The bodily injury claims do not meet the definition of an occurrence and are also precluded under the expected or intended injury exclusion. Finally, Williams' complaint does not state claims that fall within the definition of property damage. As a matter of law, there is no possibility of coverage for any of Williams' claims under the Umbrella Policy. A comparison with the CGL Policy's coverage is consequently unnecessary. The Court concludes that Cincinnati did not have a duty to defend or indemnify Rodenburg in Williams' lawsuit.

No genuine issues of material fact remain, and Cincinnati is entitled to judgment as a matter of law. The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons above, Cincinnati's motion for summary judgment (Doc. No. 52) is GRANTED. Rodenburg's motion for summary judgment (Doc. No. 46) is DENIED. The complaint against Cincinnati is hereby DISMISSED WITH PREJUDICE. Considering the comprehensive briefing, Cincinnati's motions for hearing (Doc. Nos. 55, 57) are DENIED.

IT IS SO ORDERED.

Footnotes

1Williams' underlying complaint asserts that she never owed the credit card debt. Doc. No. 54-1, ¶ 52. Though the record does not clarify this discrepancy, whether Williams owed the credit card debt does not alter the outcome.

2The Umbrella Policy's definition of an occurrence encompasses intentional torts for personal and advertising injury. Doc. No. 54-2, p. 85.

3The same reasoning would apply to defeat coverage for any injuries Williams sustained from the loss of her wages.

4Another district court has found the FDCPA to be a statute that prohibits or limits communicating information under a similar violation of statutes insurance exclusion. See Zurich Am. Ins. Co. v. Ocwen Fin. Corp., 357 F. Supp. 3d 659, 672 (N.D. Ill. 2018).

United States Court of Appeals, Eighth Circuit.

RODENBURG LLP, doing business as Rodenburg Law Firm, Plaintiff - Appellant

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, SYNDICATE NO. 4020, SUBSCRIBING TO POLICY NUMBER DCLPLA 00574-00, Defendant

The Cincinnati Insurance Company, Defendant - Appellee

No. 20-2521

9/30/21

Appeal from United States District Court for the District of North Dakota - Eastern

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Erickson did not participate in the consideration or decision of this matter. September 30, 2021

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans