IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

The Episcopal Church in South Carolina, Plaintiff, v. Church Insurance Company of Vermont and The Church Insurance Company, Defendants.	Case No.: 2:13-cv-02475-PMD **ORDER**

This matter is before the Court upon Defendant Church Insurance Company of Vermont's ("CIC-VT") Motion for Reconsideration or, in the Alternative, for Certification of the January 6, 2014 Order ("Motion to Reconsider"). In the January 6 Order ("Prior Order"), the Court denied CIC-VT's Motion to Dismiss and granted in part and denied in part Plaintiff's Motion for Summary Judgment. For the reasons that follow, the Court denies CIC-VT's Motion to Reconsider.

BACKGROUND

This case arises out of a state court action against Plaintiff seeking, *inter alia*, injunctive relief related to the alleged infringement of service marks ("Underlying Action"). After the Underlying Action was commenced against Plaintiff, Plaintiff requested that CIC-VT defend and indemnify it in the Underlying Action pursuant to the terms of the commercial liability policy ("Policy") issued by CIC-VT to Plaintiff. However, CIC-VT denied coverage on numerous grounds, including that the claims in the Underlying Action were not covered by the Policy. Plaintiff then filed the instant action against CIC-VT alleging causes of action for breach of

contract and insurance bad faith, and seeking a declaratory judgment that CIC-VT has a duty to defend and indemnify Plaintiff in the Underlying Action.

CIC-VT moved to dismiss the complaint for failure to state a claim, and Plaintiff moved for summary judgment. In its Prior Order, the Court denied CIC-VT's Motion to Dismiss and granted in part and denied in part Plaintiff's Motion for Summary Judgment. Specifically, the Court declared that CIC-VT has a duty to defend Plaintiff in the Underlying Action pursuant to the unambiguous terms of the Policy[1] and found that CIC-VT breached its contract with Plaintiff. However, the Court denied summary judgment on Plaintiff's claim for insurance bad faith. CIC-VT timely filed its Motion to Reconsider.

ANALYSIS

I. Motion to Reconsider

Reconsideration of a judgment is an extraordinary remedy that should be used sparingly. *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). A motion to alter or amend a judgment may be granted for only three reasons: (1) to follow an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *Id.* "Rule 59(e) permits a court to alter or amend a judgment, but it may not be used to relitigate old matters, or to raise arguments or present

[1] The Policy's Commercial Liability Coverage specifically provides coverage for "Advertising Injury Liability" under Coverage P:

> **We** pay all sums which an **insured** becomes legally obligated to pay as **damages** due to **personal injury** or **advertising injury** to which this insurance applies. 1. **We** cover: . . . **advertising injury** arising out of an offense committed in the course of advertising **your** goods, products, or services. 2. The **personal injury** or **advertising injury** offense must be committed: a. within the **coverage territory**; and b. during the policy period.

Commercial Liability Coverage 5, ECF 1-1, at 75 of 120. The Policy defines "**advertising injury**" to mean, in pertinent part: "injury . . . arising out of one or more of the following offenses: . . . b. misappropriation of advertising ideas or style of doing business" or "c. infringement of copyright, title, slogan, trademark, or trade name." *Id.* at 2. The Policy defines "**damages**" as "compensation in the form of money for a person who claims to have suffered an injury." *Id.* The Policy further provides that CIC-VT has "the right and duty to defend a suit seeking **damages** which may be covered under the Commercial Liability Coverage." *Id.* at 7.

evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (internal quotation omitted).

CIC-VT argues that reconsideration is warranted to correct a clear error of law and to prevent manifest injustice. Specifically, CIC-VT contends that the Court erred in concluding that the request for attorneys' fees in the Underlying Action constituted a request for "damages" covered under the Policy. CIC-VT's argument is based on the fact that the relevant statute, S.C. Code Ann. § 39-15-1170, appears to distinguish between an award of damages, as the term is commonly understood, and an award of attorneys' fees. CIC-VT thus concludes that under the language of the statute, attorneys' fees cannot constitute "damages" as a matter of law.

This argument would be persuasive if the Policy did not expressly define "damages." In the absence of a definition of a term in the policy, a court applies the "plain, ordinary, and popular meaning" of the word. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 514 S.E.2d 327, 330 (S.C. 1999). In cases where an insurance policy does not define "damages," courts have looked to the statute authorizing attorneys' fees for guidance in determining whether attorneys' fees are in fact "damages" under the policy. *See, e.g., Republic Franklin Ins. Co. v. Albemarle Cnty. Sch. Bd.*, 670 F.3d 563, 568 (4th Cir. 2012). However, where the term is defined in the policy, the court must apply the meaning agreed upon by the parties, even if it differs from the ordinary meaning of the term or its use in a related statute. *See B.L.G. Enters., Inc.*, 514 S.E.2d at 330 ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."). Thus, to determine whether or not an award of attorneys' fees constitutes "damages" under the Policy, the Court must look to the Policy's definition of "damages."

The Policy defines "damages" to mean "compensation in the form of money for a person who claims to have suffered an injury." Commercial Liability Coverage 2, ECF 1-1, at 72 of 120. Importantly, unlike most commonly used definitions of "damages," the Policy's definition is not limited to compensation *for an injury*. *Cf.* Webster's II New College Dict. 285 (1st ed. 1995) (defining "damages" as "[m]oney to be paid as compensation *for injury or loss*" (emphasis added)); Black's Law Dict. 416 (8th ed. 2004) (defining "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation *for loss or injury*" (emphasis added)); *see also AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1267 (Cal. 1990) (collecting statutory and dictionary definitions of "damages" and observing that each definition "requires there to be 'compensation' in 'money,' 'recovered' by a party *for 'loss'* or 'detriment' it has suffered through the acts of another" (emphasis added)). Instead, the Policy's definition includes all monetary compensation *for a person* who claims to have suffered an injury. Under the Policy's definition, the monetary compensation does not technically have to be related to the injury; rather, it simply must be compensation for a person who alleges an injury.

As the Court stated in its Prior Order, attorneys' fees are a form of monetary compensation. Because "compensation" is not defined in the Policy, the Court must give the term "its plain, ordinary, and popular meaning." *B.L.G. Enters., Inc.*, 514 S.E.2d at 330. Webster's II New College Dictionary defines "compensation" as "[s]omething given or received as payment or reparation, as for goods, services, or loss." Webster's II New College Dict. 229. Similarly, Black's Law Dictionary defines "compensation" as "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another." Black's Law Dict. 301. The Court concludes that the ordinary meaning of the term "compensation" includes an award of attorneys' fees. Moreover, other courts have held that attorneys' fees can

be a form of compensation. *See, e.g.*, *Republic Franklin Ins. Co.*, 670 F.3d at 568 (finding that attorneys' fees authorized by the Fair Labor Standards Act are compensatory in nature); *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004) (observing, in a patent infringement case, that "[a]ttorney fees are compensatory, and may provide a fair remedy in appropriate cases"); *Kittansett Club v. Phila. Indem. Ins. Co.*, CIV. A. 11-11385-DJC, 2012 WL 3947954, at *7 (D. Mass. Sept. 10, 2012) ("Attorney's fees and costs are also inherently compensatory; they are intended to make a plaintiff whole after the defendant's wrongful act forced the plaintiff to litigate."). Thus, the Court reaffirms its conclusion that the Policy's definition of the term "damages" is broad enough to include an award of attorneys' fees.

Because attorneys' fees are monetary compensation, and the plaintiffs in the Underlying Action who seek the attorneys' fees claim that they suffered an injury by Plaintiff's alleged trademark infringement, the Court properly concluded that the Underlying Action seeks "damages" as defined by the Policy. As there was no clear error of law in the Court's interpretation of the Policy, the Court denies CIC-VT's Motion to Reconsider.

II. CIC-VT's Request for an Interlocutory Appeal

Alternatively, CIC-VT requests that the Court certify its Prior Order for an immediate appeal. Appellate review of interlocutory determinations may be accomplished through certification by the district court under 28 U.S.C. § 1292 or Rule 54(b) of the Federal Rules of Civil Procedure. 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Thus, according to the statute, "certification by a district court is appropriate if the district court's order (1) involves a controlling question of law (2) as to which there is a substantial ground for difference of opinion and (3) immediate appeal may materially advance the ultimate termination of the litigation." *Michelin N. Am., Inc. v. Inter City Tire & Auto Ctr., Inc.*, C.A. No. 6:13–1067–HMH, 2013 WL 5946109, at *2 (D.S.C. Nov. 6, 2013) (citing *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 195 (4th Cir. 2011)). Certification under § 1292(b) "should be used sparingly and . . . its requirements must be strictly construed." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989). Although the decision to certify an interlocutory appeal is firmly within the district court's discretion, "the district court should grant this extraordinary remedy only in exceptional circumstances where early appellate review would avoid a protracted and expensive litigation process." *Michelin N. Am., Inc.*, 2013 WL 5946109, at *2 (internal quotation marks omitted).

Although the Court agrees that the determination that attorneys' fees are "damages" under the Policy is a controlling question of law, the Court does not agree with CIC-VT that there is substantial ground for difference of opinion on this issue. As explained above in Part I, the Policy language unambiguously defines "damages," and that definition is broad enough to encompass the attorneys' fees requested in the Underlying Action. CIC-VT's Motion to Reconsider, which does not even discuss the Policy's definition of "damages," fails to make any argument tending to show that there is substantial ground for difference of opinion on the interpretation of the Policy's definition of "damages." Accordingly, the Court concludes that certification under § 1292(b) is inappropriate in this case.

Similarly, the Court declines to enter final judgment under Rule 54(b). "Rule 54(b) permits a district court to enter final judgment as to one or more but fewer than all claims in a multiclaim action, thus allowing an appeal on fewer than all claims in a multiclaim action." *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1335 (4th Cir. 1993). "Rule 54(b) certification is recognized as the exception rather than the norm [and should be granted neither] routinely nor as an accommodation to counsel." *Id.* (citation omitted). "The burden is on the party endeavoring to obtain Rule 54(b) certification to demonstrate that the case warrants certification." *Id.* CIC-VT repeats the same arguments as above for requesting Rule 54(b) certification, and for the reasons stated above, the Court concludes that CIC-VT has failed to meet its burden of showing that this case warrants certification. Accordingly, CIC-VT's request for certification for appellate review is denied.

CONCLUSION

For the foregoing reasons, it is **ORDERED** that CIC-VT's Motion for Reconsideration, or in the Alternative, for Certification of the January 6, 2013 Order, is **DENIED**.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

March 4, 2014
Charleston, SC