IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BANCINSURE, INC., Plaintiff, vs. FIRST INTERSTATE BANK, Defendant.	CV-11-58-BLG-RKS **ORDER**

SYNOPSIS

First Interstate Bank deliberately set in motion a chain of related lawsuits designed to collect principal and interest under a loan agreement and a guaranty. The Bank was required to give back money it wrongfully took for principal and interest on a loan. The policies of liability insurance BancInsure sold to First Interstate Bank did not cover and excluded these related lawsuits. BancInsure had no duty to defend. First Interstate Bank's untimely notice did not affect coverage because no coverage existed.

JURISDICTION

Jurisdiction lies under 28 U.S.C. §1332. The parties' citizenship is diverse and the amount in controversy exceeds the jurisdictional amount. Neither party

contests jurisdiction or venue. The parties consented to magistrate judge jurisdiction for all purposes. C.D. 44.

STATUS

BancInsure, Inc. (BI) filed this action seeking a declaratory judgment that it owes no duty to indemnify First Interstate Bank (Bank) under any of three insurance policies for any of the loss or expense the Bank incurred in litigation involving Mr. Pariser or his related entities. Bank counterclaimed seeking a declaration of a duty to indemnify and seeking contract and tort damages.

The cause is at issue. Discovery continues. A trial date is to be set at the close of discovery. The parties have filed dispositive motions. One dispositive motion has been decided. C.D. 52. That ruling is erroneous in light of a more complete record. Its reversal is explained below.

STANDARDS APPLICABLE TO DECISION

The parties recognize and apply the standards governing motions for summary judgment under Rule 56, F.R.Civ. P. Anderson v. Liberty Lobby, 477 U.S. 242, 250-1 (1986); Celotex v Catrett, 477 U.S. 317, 322 (1986), Albarran v. New Form, Inc., 545 F. 3d 702, 707 (9th Cir. 2008). The material facts here are not controverted. The parties have filed extensive recitals of the agreed and disputed facts. C.D. 35, 43, 64, 83, 89,93, 102.

A grant of summary judgment becomes the law of the case subject to appeal but a denial of summary judgment because of fact issues does not have preclusive effect and may be revisited. Switzerland Cheese Ass'n., Inc. v. E. Horne's Market,

Inc. 385 U.S. 23, 25 (1966). That rule has limits which do not apply here. Federal Ins. Co. v. Scarsella Bros., Inc., 931 F. 2d 599, 601, fn. 4 (9th Cir. 1991).

Controlling Montana law requires courts to interpret insurance contracts as a matter of law, applying the policy terms in their usual, common sense meaning from the perspective of a reasonable consumer of such insurance. Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 530 (9th Cir. 1997); Hanson v. Emp'rs Mut. Cas. Co., 336 F. Supp. 2d 1070, 1073 (D. Mont. 2004); City of Dillon v. Montana Municipal Insurance Authority, 2009 MT 393, 353 Mont. 370, 220 P.3d 623 (2009); Newman v. Scottsdale Ins. Co. 2013 MT 125 (Montana 2009). In this case the reasonable consumer of such bank liability insurance is a highly sophisticated financial enterprise with ready access to legal advice such as First Interstate Bank.

FACTS

These facts are undisputed. They are found in the parties' extensive statements of undisputed fact. C.D. 35, 83, 89, 93, 102. Internal citations are omitted.

In July of 2007 First Interstate Bank agreed to loan money to an entity called Village of Ocean Shores (VOS). The loan proceeds were to be used to finance a condominium project in Ocean Shores, Washington. The contracts establishing the relationship included a promissory note that VOS executed in favor of the Bank. As part of the parties' loan agreement, Mr. Paul Pariser, VOS' president, executed and delivered his personal guaranty of VOS' obligations to the Bank under the loan agreement and note. Mr. Pariser also had a deposit account with Bank containing at least $2,623,396.40, on April 2, 2009.

On April 2, 2009, the Bank-claiming the right to do so under its loan

agreement with VOS, the promissory note and its contract of guaranty with Mr. Pariser-took several steps to set in motion all the events that led to all the expenses for which the Bank seeks coverage from BI. The Bank decided to exercise what it claimed were its contract rights to collect principal and interest due the Bank under the VOS loan. To do so the Bank sued Mr. Pariser in Montana under his guaranty, declared the VOS loan in default and declared itself insecure under the loan agreement. Acting upon that declaration and the contract of guaranty, the Bank immediately removed $2,623,396.40 from Mr. Pariser's personal account with the Bank. The bank applied that money as a loan payment to reduce VOS' liability for principal and interest under VOS' promissory note to the Bank. Mr. Pariser countersued, alleging that the Bank violated those contracts and should be required to repay the $2,623,396.40 the bank took from his account. He sought damages he had incurred that flowed from what he alleged was the Bank's wrongfully taking his money. More litigation ensued. All the litigation was directly caused by and inextricably related to the Bank's decision to exercise its contract rights, collect the principal and interest immediately and pay itself from Mr. Pariser's account. Mr. Pariser and VOS sued the Bank in federal court in Washington and also in Montana State District Court.

This case is the result of the suit the Bank filed in Montana against Mr. Pariser on his contract of guaranty in April, 2009. That suit resulted in a verdict that determined that the Bank had not properly exercised its contract rights and thus was entitled no recovery of principal or interest or collection costs for the Bank. Mr. Pariser successfully counterclaimed against the bank in the same lawsuit the Bank started. Mr. Pariser asked for the return of the funds the Bank had applied to principal and interest on the VOS loan and for other damages flowing from the Bank's violation of its contractual relationships. Mr. Pariser

obtained a jury verdict against the Bank in the suit the Bank started for $2,623,396.40, the precise amount the Bank simply took from Mr. Pariser's personal account with the Bank when the Bank sued Mr. Pariser under his guaranty. There are additional words handwritten on the jury verdict form in Mr. Pariser's favor adjoining the line containing the amount awarded:

> "Principal+interest+fair compensation for the time & money properly expended in the pursuit of the property".

The Bank's counterclaims in this suit seek indemnity from BI under policies of insurance for the $2,623,396.40 and other fees and costs and extra-contractual damages alleged to have been incurred by the Bank in the various Pariser litigations that flowed from the first Montana suit.

The Bank has purchased three separate insurance policies from BI. Their terms are identical for the purposes of this suit. Each policy is a "claims made" policy, limiting coverage to claims first made during any given policy period and of which the company is given notice within the policy period or within 60 days after that policy period has expired. Each policy period runs a year: from October 1 to October 1 of the succeeding years. The policies here run successively from October 2008 through October 2011. This suit involves interpretation of policy language. The language of each policy is identical for each policy provision relevant to this dispute.

In capitalized, bold print on the first page of each policy this language appears:

> **"COVERAGE UNDER THIS POLICY IS LIMITED TO LIABILITY RESULTING FROM CLAIMS FIRST MADE DURING THE POLICY PERIOD AND REPORTED AS SOON AS PRACTICABLE, BUT NO LATER THAN 60 DAYS AFTER THE DATE OF TERMINATION OF THE POLICY PERIOD. . . DEFENSE EXPENSES, INCURRED IN THE DEFENSE OF A CLAIM, ARE A PART OF LOSS AND ARE INCLUDED IN**

EACH AGGREGATE LIMIT OF LIABILITY. THE INSURER HAS NO DUTY UNDER THIS POLICY TO DEFEND ANY CLAIM"

That language is prominent.

Each policy contains a provision entitled "SECTION IX, NOTICE OF CLAIM" which reads:

> "A. The insured persons and the company shall, as a condition precedent to their rights under this policy, give the Insurer notice, In (sic) writing, as soon as practicable of any claim and shall give the Insurer such information and cooperation as it may reasonably require.
>
> B. If, during the policy period, any Insured person or the company (1) receives written or oral notice from any party that it is the intention of such party to hold any insured person or the company responsible for a specific alleged wrongful act, or (2) becomes aware of any circumstances that may give rise to a claim against any Insured person or the company for a specific alleged wrongful act; and, as soon as practicable gives written notice of the potential claim to the Insurer as referred in subsections (1) and (2) above, which notice is in any event received by the Insurer no later than sixty (60) days following the end of the policy period, and such notice includes the:
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> 1. reasons for anticipating such a claim
>
> 2. nature and date of the alleged wrongful acts;
>
> 3. alleged injury;
>
> 4. names of the potential claimants and any insured person involved in the alleged wrongful acts; and
>
> 5. manner in which any insured person or the company first became aware of the potential claim;
>
> then any claim, the potential of which was specifically identified as required above, shall, for the purpose of this policy, be treated as a claim made during the policy period.
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> C. Notice shall be effective on the date of receipt by the Insurer at the address shown in item 7 of the Declarations.
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> D. In addition to furnishing the notice as provided in SECTION IX. A. and B., the insured persons and the company shall, as soon as practicable, furnish the Insurer with copies of reports, investigations, pleadings and all other papers in connection therewith".

(see, for example, C.D. 83-1 p. 11 of 14.)

Mr. Pariser asserted his (ultimately successful) counterclaim against the Bank June 25, 2009. The Bank formally notified BI of Mr. Pariser's claim by email sent October 18, 2010, more than a year after the year-long policy period during which Mr. Pariser first made the claim had expired. The very brief text of the email acknowledged that the notice did not comply with the notice condition precedent in the policy:

> "They won't be happy with the late notice, but these cases have been very well defended and there has been no prejudice".

Nothing in the record suggests that BI induced or influenced the Bank to wait so long before giving notice. The record does not disclose any reason for the delay. The notice was sent one year and four months after Mr. Pariser filed his counterclaim and one year and one month after the expiration of the policy period within which the Pariser claim was first made against the Bank.

The Bank's attorneys sent senior management of First Interstate BancSystem, Inc. a letter prominently labeled "Attorney-Client Communication/Attorney Work Product" dated June 30, 2009 summarizing certain litigation pending against BancSystem banks at that date. The same attorney for the Bank sent First Interstate BancSystem a similarly privileged letter in June of 2010 also summarizing certain pending litigation. The letters to BancSystem management were not addressed to BancInsure and they were not copied to BancInsure by the sender. The letters are conspicuously designated as privileged and work product to keep them confidential and privileged. BancSystem forwarded each letter to BI as a part of the annual policy renewal application. The June 2009 letter reached BI's underwriting department before the end of the 2008-

2009 policy period.

The letters were signed by the same attorney whose October 18, 2010 email sent "late notice" of the Pariser litigation. Neither letter was addressed to BI and neither letter contained any discussion of liability insurance or liability insurance coverage for any of the several lawsuits summarized. The litigation letter in June 2009 discussed with BancSystem management the Pariser litigation in detail along with lawsuits pending against BancSystem banks. Neither the 2009 letter nor the 2010 can be interpreted as a notice of claim under any insurance policy. Neither even mentioned BI, neither asked for indemnity for any potential judgment in the Pariser litigation or reflected any intent to do so. Neither asked that BI pay attorney fees or costs for the Pariser litigation or suggested in any way that the Bank was notifying BI of a claim under the policy because neither letter was even addressed to BI. Nothing in either letter suggested that senior management of BancSystems give notice to BI or make a demand upon BI. Nothing in either letter suggested that the Bank considered that the Pariser litigation was covered by any policy of insurance that BI had issued.

The 2009 letter to BI did contain this language as part of the discussion:

> "So, while there are now two lawsuits filed in two states involving the same troubled Villages of Ocean Shores project, this much can be summarized about the affirmative claims for damages asserted by Mr. Pariser and the borrower against the bank in both proceedings: (1) all claims involve a common nucleus of facts–the decision of the bank to deem itself insecure, make demand under Mr. Pariser's guarantee, and setoff his deposit account in the amount of nearly $2.7 million; (2) the decision of the bank to take such action was carefully considered when made, with full knowledge of the litigation likely to follow, including the associated liability that could arise; and (3) the actions taken by Mr. Pariser and the borrower have been predictable and entirely consistent with those known (and fully anticipated) risks".

The record does not reveal why either the attorney or the BancSystem senior management, possessing this detailed knowledge, did not immediately give notice to BI of the Pariser litigation if, indeed, the attorney or the BancSystem believed then, as now argued, the Bank was covered by liability insurance. The record does not reflect any reason why it was not practicable to do so. The language above is in a letter dated June 30, 2009, a few days after the Pariser counterclaim was filed. The description of the litigation as a contract based series of interrelated lawsuits based on the Bank's efforts to be paid principal and interest on its loan is relevant to BI's asserted policy exclusions set forth below.

The insurance policy in effect in June of 2009 when Mr. Pariser filed his ultimately successful counterclaim contained, in capitalized, bold, prominent letters the words:

> **"THE INSURER HAS NO DUTY UNDER THIS POLICY TO DEFEND ANY CLAIM."**

Each succeeding policy contained the same language. The policy in effect when Mr. Pariser filed his successful counterclaim contained an agreement to pay defense expenses the Bank incurred in the defense of any covered claim against it. Each succeeding policy contained that same agreement. The policy in effect when Mr. Pariser filed his successful counterclaim provided that the Bank retained the first $250,000 of expenses. The record does not reflect the extent to which that deductible would have been applied, if at all, to the covered defense expenses the Bank had accrued when the Bank gave notice in October of 2010.

Each insurance policy defined the loss for which the insurance company agreed to indemnify the Bank. See Section III, paragraph U.

> "U. Loss means any amount which any insured person or the company is legally obligated to pay as a result of a claim, and includes punitive, exemplary or multiple damages in excess of actual damages (except where uninsurable under applicable law), other damages, judgments, settlements and reasonable defense expenses; however, loss shall not include:
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> 1. damages or restitution awarded as a result of an administrative or regulatory proceeding;
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> 2. taxes, fines or penalties;
>
> 3. matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed; or
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> 4. any principal, interest or other monies paid, accrued or due as the result of any loan, lease or extension of credit.
>
> Where the company reasonably determines that punitive, exemplary or multiple damages are insurable under the applicable law, the Insurer shall not challenge that Interpretation of insurability".

The Bank seeks indemnity for the exact amount, $2,623,396.40, the Bank took from Mr. Pariser's account, the amount the jury ordered it to pay.

Each insurance policy contains several exclusions. BancInsure argues that these exclusions preclude coverage:

> Section IV. Exclusions
>
> A. The insurer shall not be liable to make any payment for loss in connection with any claim based upon, arising out of, relating to, in consequence of, or in any way involving:
>
> "3. any insured person or the company gaining in fact any profit or advantage to which they were not legally entitled;
>
> 13. any assumption by the company or an insured person of any liability or obligation under any contract or agreement, or the failure to perform any contract or agreement, unless such company or insured person would have been liable even in the absence of such contract or agreement;"

DISCUSSION

NOTICE

An earlier order concluded there were fact issues for a jury to resolve whether Bank had failed to give notice as the policy required and thus lost coverage for the Pariser claim. C.D. 52. A greatly expanded record discloses that no question of fact exists for a jury to determine. Under these circumstances a court may revisit its early order. It is appropriate to do so here. See Switzerland Cheese Ass'n., Inc. v. E. Horne's Market, Inc. 385 U.S. 23, 25 (1966) and Federal Ins. Co. v. Scarsella Bros., Inc., 931 F. 2d 599, 601 fn 4. (9th Cir. 1991). The earlier order addressed only the sufficiency of the record at that time. The parties have little disagreement on the law applicable to notice but since the earlier order have filed extensive undisputed fact statements.

These are "claims made" insurance policies. By the clearest of language the policies cover claims first made within a policy period that runs from October 1 to October 1 of succeeding years. There is a 60 day delayed notice period after each policy period expires. Courts interpret insurance contracts as a matter of law giving common meaning to the plain language. Modroo v. Nationwide Mut. Fire Ins. Co., 2008 MT 275, 191 P. 3d 389.

This is an insurance policy between a commercial insurance company and a commercial bank. Both parties are sophisticated, well accustomed to dealing with litigation and the meaning of contracts, well-supplied with lawyers to help them, as the record amply reflects. The notice language is clear, unambiguous and unmistakable. This court's role is simply to apply it. Newman v. Scottsdale Ins. Co., supra, 2013 MT 125, ¶22.

The Pariser claim was first made no later than June 26, 2009. The October 2010 notice was not given as soon as practicable and not given within 60 days of the expiration of the applicable policy period. That period expired October 1, 2009. Notice was due by November 30, 2009. No reason for the delay appears of record. That notice fails as a matter of law to comply with the policy. Atlantic Casualty Insurance Co. V. GTL, Inc., No. CV 12-14-M-DWM, 2013 U.S. Dist. LEXIS 5423 (D. Mont. Jan. 14, 2013). There is some irony here: a bank (which lives by, and here sued Pariser under the terms of its own contracts) having been successfully sued because of its own strict insistence on its own strict interpretation of its own contract rights now asserts it had no duty itself to adhere to unambiguous words of the insurance contract it negotiated with BI. The Bank asserts that the litigation summary letters and particularly the June 30, 2009 litigation summary letter gave notice under the terms of the policy.

The 2009 litigation letter does show that it would have been practicable for the Bank to notify BI by at least June 30, 2009. It supports a judgment that the Bank did not give notice as soon as practicable. Bank has shown nothing to the contrary. Atlantic Casualty Insurance Co. v. GTL, Inc., No. CV 12-14-M-DWM, supra 2013 U.S. Dist. LEXIS 5423.

The 2009 litigation summary letter is not notice to BI, even if BI received it, of a claimed right to coverage for the Pariser interrelated litigation. The attorneys wrote BancSystem senior management describing the existence and exposure to BancSystem banks from a number pending lawsuits as of June 30, 2009, including the Pariser litigation. The 2009 litigation letter lacks any suggestion even to BancSystem management that the Bank could, would, should or even might seek insurance coverage for any aspect of the Pariser litigation. The litigation summary letter in 2009 contained no mention that any of the possible loss might be

ameliorated by insurance. That same June 2009 letter, in paragraph 3, however, referred to ". . . substantial recoveries against bonds to mitigate losses. ." to BancSystem in a different litigated matter. The 2009 litigation summary, even if received eventually by BI, did not give BI notice that the Bank considered the Pariser loss covered by a policy of BI insurance. That a commercial bank is involved in a number of litigated matters does not give notice that insurance coverage is claimed under any specific one.

Under the undisputed facts and the plain meaning of the policy, BI is entitled to judgment as a matter of law that the Bank failed to meet an express condition precedent to coverage by providing notice of a claim first made as soon as practicable during within the policy period or within 60 days after its expiration. For that reason alone, BI had no duty to provide coverage for the interrelated Pariser claims. Modroo v. Nationwide Mut. Fire Ins. Co., 2008 MT 275, 191 P. 3d 389. The unambiguous language of other policy provisions entitle BI to summary judgment. First, though, it is necessary to examine some arguments the Bank advances to support coverage.

DUTY TO DEFEND

The Bank argues extensively that BI has waived any defenses to coverage because BI breached a duty to defend the Bank in the Pariser matter. Even apart from the inadequacy and lack of timeliness of notice, the Bank's argument fails. BI had no duty to defend the Bank. The policy language says so in the clearest of possible terms, on the top of the first page, in bold and capitalized prominent language. Courts interpret the insurance contract as a matter of law giving the words their common meaning to a reasonable consumer. Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 530 (9th Cir. 1997); Hanson v. Emp'rs Mut. Cas. Co., 336 F. Supp. 2d 1070, 1073 (D. Mont. 2004); City of Dillon

v. Montana Municipal Insurance Authority, 2009 MT 393, 353 Mont. 370, 220 P.3d 623 (2009). See, also, Modroo v. Nationwide Mut. Fire Ins. Co., 2008 MT 275, 191 P. 3d 389. There is nothing ambiguous about the policy language excluding a duty to defend. Montana Petroleum Tank Release Comp. Bd v. Crumleys, Inc., 2008 Mt 2, ¶34, 174 P. 3d 948 (Montana 2008). §28-11-316, MCA does not apply because the contract language controls under §28-11-313 MCA. A reasonable consumer of bank liability insurance, buying a policy of liability insurance, could not have mistaken the meaning of these words which appear on the first page in bold and capitalized:

> "**THE INSURER HAS NO DUTY UNDER THIS POLICY TO DEFEND ANY CLAIM."**

BancInsure had no duty to defend. The lengthy and repeated arguments Bank makes based on an asserted breach of this nonexistent duty must fail.

The Bank cites extensive Montana authority holding that a defense clause is broader than an indemnity obligation and that violation of the defense clause waives defenses to coverage. The cases they cite do, indeed, so hold and there are many of them. See, recently, Newman v. Scottsdale Ins. Co., supra, 2013 MT 125, ¶22. Those cases do not apply. This insurer has no duty to defend under the plain words of this policy. It is unnecessary to discuss cases where the insurer had a duty to defend because the court must apply the plain words of this contract. Modroo v. Nationwide Mut. Fire Ins. Co., supra, 2008 MT 275, ¶3. These words are not ambiguous. Montana Petroleum Tank Release Comp. Bd v. Crumleys, Inc., 2008 Mt 2, ¶34, 174 P. 3d 948 (Montana 2008).

The Bank's own conduct toward "defense" belies the Bank's argument. The Pariser lawsuit was one the Bank deliberately started in the first place. When Mr.

Pariser filed his counterclaim, the Bank did not ask BI to defend, did not demand indemnity, did not request defense costs and did not even directly tell BI about Mr. Pariser's claim for well over a year. The first litigation summary letter to BancSystem management, far from seeking indemnity, says that the Bank deliberately started a contract fight and anticipated all the fallout. When admittedly late notice was given in October 2010, no request for defense accompanied the notice. To the contrary, the notice email assured BI that the case was already well defended. The Bank's conduct is consistent with the plain meaning of the contract language. BI had no duty to defend. The Bank's argument that BI violated a duty to defend and thus waived its policy defenses is without merit.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Bank argues that the jury verdict of $2,623,396.40 in the Pariser litigation should be considered a covered loss because the verdict included a finding that the Bank breached the implied covenant of good faith and fair dealing arising in the contractual relationship between Mr. Pariser and his Bank. The Bank argues repeatedly that breach of the implied covenant of good faith and fair dealing is a tort, and thus a covered loss, and so not excluded from coverage. The Bank fundamentally misunderstands the two well established and separate remedies available under Montana law for breach of the implied covenant of good faith and fair dealing. The breach of the implied covenant applicable to the Pariser litigation is a contract breach only—not a tort.

After a period when courts in Montana had treated breach of the implied covenant of good faith and fair dealing in a contract setting as a tort justifying an award of tort general damages and punitive damages, the Montana Supreme Court "clarified" that law in a detailed and extensive opinion that holds today. Story v.

City of Bozeman, 242 Mont. 436, 791 P. 2d 767 (Mont. 1990). Every contract contains an implied covenant of good faith and fair dealing, which does not require breach of an express term of the contract for its breach, but breach of the implied covenant is breach of the contract, not entitling the aggrieved party to tort damages but only contract damages. Story, supra, at 791 P. 2d 767, 772, et seq. The Story court expressly and at length repudiated the tort theory the Bank advances here and recognized the existence of a tort of bad faith only under extremely limited circumstances not possibly applicable to the relationship between the Bank and Mr. Pariser. As the Court said:

> The tort of bad faith may still apply in exceptional circumstances. It serves to discourage oppression in contracts which necessarily give one party a superior position. The legislature has codified the tort's most common applications. See Wrongful Discharge from Employment Act, §§ 39–2–901 through –914, MCA; Unfair Trade Practices Act (Insurance) §§ 33–18–101 through –1005, MCA. The tort remedy may also be available in contracts involving special relationships which are not otherwise controlled by specific statutory provisions. To delineate those special relationships we adopt the following essential elements from California case law.
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> > "(1) the contract must be such that the parties are in inherently unequal bargaining positions; [and] (2) the motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection; [and] (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole"; [and] (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability".

Story, supra, 791 P. 2d at 776. The Pariser verdict cannot have been based upon tort. See Montana Pattern Jury Instruction 2d 13.18 and its application note. The Bank's misunderstanding of the contract nature of the recovery Mr. Pariser received pervades its arguments on why the Pariser verdict should be a covered loss and the Bank's arguments why the Pariser litigation is not excluded under the policy exclusions. Banks have known of and benefitted from the Story tort

"clarification"ever since Story was decided. See, for example, McCoy v. First Citizens Bank, 2006 MT 307, 335, Mont. 1, 148 P.3d 677 (2006)(citing cases)(No Story-defined tort special relationship between a bank and its customer).

The bank is in error when it argues that a duty of defense or the implied covenant of good faith and fair dealing affect BI's coverage. With this background understanding we can turn to BancInsure's asserted substantive policy coverage provisions and exclusions BI asserts justify declining coverage.

LOSS

BI argues that the $2,623,396.40 the jury awarded Mr. Pariser is the $2,623,396.40 the Bank took from Mr. Pariser's account and is thus not a covered loss as the policy defines loss. In particular BI cites the policy definitions in Article III Q ". . .loss shall not include. . . 4. any principal, interest or other monies paid, accrued or due as the result of any loan, lease or extension of credit." BI argues that the Bank paid itself the principal and interest allegedly due under the VOS loan from Mr. Pariser's account. BI in essence says the Bank is in the same position as one who removes an article from a store without paying—upon being relieved of the ill-gotten gains, they have not suffered a loss. The Bank's principal response to this specific argument is the "tort recovery argument" that has been rejected above as legally flawed under Story, supra. The facts of this case and specifically the facts of Mr. Pariser's recovery and the verdict form justify the conclusion BancInsure made: that the jury simply made the Bank return what the Bank wrongfully took. The Bank does not offer any alternate explanation. If there were any doubt the 2009 litigation summary of the nature of the litigation and its origin in the Bank paying itself removes that doubt.

The Bank argues that the court cannot consider, in determining whether the Pariser award was a covered loss or if so was excluded, the handwritten language that appears on the verdict for Mr. Pariser in the Montana case. That language was immediately next to the award amount of $2,623,396.40, the precise amount the Bank removed from Mr. Pariser's account. The jury wrote the words: "Principal+interest+fair compensation for the time & money properly expended in the pursuit of the property". If considered, the language leaves no doubt that the award was simply a return of the funds the Bank took from Mr. Pariser. The Bank filed a motion in limine, seeking to exclude consideration of that language citing Johnson v. Supersave Markets, 211 Mont. 465, 467, 686 P. 2d 209, 214 (1984). C.D. 57. That motion was denied as premature. C.D. 80. In light of the undisputed record facts now before the court including the description of the Pariser litigation contained in the June 30, 2009 litigation summary letter, it is undisputable that the verdict was for the return of money wrongfully taken as principal and interest payment and that all the litigation arose from that wrongful taking and application to principal and interest. It is thus unnecessary to consider the handwritten language on the verdict. This order does not do so.

BI cites a number of authorities in support of its argument but it appears that the decisions of the Montana Supreme Court control this court's decision in this area of Montana contract law. The reasoning of the Court and the holding in City of Dillon v. Montana Municipal Insurance Authority, 2009 MT 393, 220 P. 3d 623 (2009) apply equally to the definition of loss and the asserted exclusions discussed below. The City of Dillon over a period of years received money due to Mrs. Williams, kept it and spent it, and then refused to return some of it to her. When ordered to do so, the City sought insurance coverage for the money it had wrongfully received and withheld. City of Dillon, supra 2009 MT at ¶¶ 2,3. The

Court held that coverage was excluded under the financial gain exclusion. Ibid at ¶¶14-16. The same reasoning, however, applies to the provision requiring the insured to suffer a cognizable loss. See also Mut. Serv. Cas. Ins. Co. v. McGeHee, 219 Mont 304, 308, 711 P.2d 826, 828 (1986). First Interstate Bank did not suffer a covered loss. BI is entitled to summary judgment on that basis alone. However the loss is also excluded.

BI cited and argued the City of Dillon decision extensively. It controls on issues of loss and the application of exclusions. The Bank does not mention the decision, much less distinguish it, in any brief. The decision stands unchallenged.

EXCLUSIONS

BI asserts that Section IV.A.3 of the policy excludes this claim because the Bank seeks indemnity for a profit or advantage to which the Bank is not legally entitled. The Bank asserts that the exclusion is vague and ambiguous. Here, Mr. Pariser's claim arose immediately after the Bank took $2,623,396.40 from Mr. Pariser's account, applied it to principal and interest on a loan, and sued to keep that sum and to require Mr. Pariser to pay more. The Bank did so intentionally, deliberately and with full knowledge of the nature of its acts as the Bank lawyer summarizes in the 2009 litigation summary letter that eventually made its way to BI:

> "So, while there are now two lawsuits filed in two states involving the same troubled Villages of Ocean Shores project, this much can be summarized about the affirmative claims for damages asserted by Mr. Pariser and the borrower against the bank in both proceedings: (1) all claims involve a common nucleus of facts–the decision of the bank to deem itself insecure, make demand under Mr. Pariser's guarantee, and setoff his deposit account in the amount of nearly $2.7 million; (2) the decision of the bank to take such action was carefully considered when made, with full knowledge of the litigation likely to follow, including the associated liability that could arise; and (3) the actions taken by Mr. Pariser and the borrower have been predictable and entirely consistent with those known (and fully anticipated) risks".

Mr. Pariser countersued for his money back and won. It is clear to a legal certainty from the Bank's own description that the verdict requiring the Bank to pay $2,623,396.40 and all the associated Pariser expenses arose from the Bank taking the $2,623,396.40 in the first place, applying it to principal and interest and suing to keep it. The 2009 letter makes even more indisputable that all the litigation centered on the question whether the Bank took money it was not legally entitled to take. Under the facts of this case there is simply no other interpretation possible. The Bank does not advance any credible ambiguity here. The City of Dillon v. Montana Municipal Insurance Authority decision of the Montana Supreme Court is directly in point and controlling. The Bank does not mention it or attempt to distinguish that decision. The Pariser verdict and related litigation is excluded because it arises from the Bank taking and trying to keep money to which it was not legally entitled. BI is entitled to summary judgment on this basis independently of any other.

The same reasoning excludes coverage under the exclusion of Policy Section IV.A.13:

> "loss in connection with any claim based upon, arising out of, relating to, in consequence of or in any way involving. . . the failure to perform any contract or agreement".

The Bank's attorney in June 2009 describes how the Bank deliberately set this chain of events in motion when it, acting under its contracts--loan agreement with VOS, its guaranty agreement with Mr. Pariser and its account agreement with Mr. Pariser--took $2,623,396.40 from Mr. Pariser's account and applied that money toward the principal and interest the Bank asserted were due under their loan agreement. This dispute was a contract dispute and one that the Bank deliberately started under the guise of its own contract rights. If there had been no contracts there would have been no dispute. This exclusion prevents coverage by itself,

entitling BI to summary judgment.

FEES AND COSTS IN ALL THREE PARISER LAWSUITS

The Bank and Mr. Pariser (and Village of Ocean Shores) were involved in two other lawsuits but all three lawsuits involved the same issues and all arose from the Bank's decision to accelerate and offset under its various contracts. The reasoning set forth above applies to the expenses of each lawsuit. Those fees and costs are excluded for the reasons set forth above under the specific contract language found in Section IV, paragraph 10 and the definition of Interrelated wrongful acts found in Section III, paragraph Q of the policies. The language of the 2009 litigation summary letter which deals with the Pariser litigation summarizes succinctly how the claims are all interrelated to the Bank's wrongful act to take Mr. Pariser's money and apply it to the VOS loan principal and interest.

UNFAIR TRADE PRACTICES

The Bank asserts that BI violated the Montana Unfair Trade Practices Act. §33-18-201, et seq. Since BI not only had a reasonable basis for its ultimate denial but lacked a duty to defend or indemnify, it did not violate the MUTPA. §33-18-242(5) MCA, Dees v. Am. Nat's Fire Ins. Co. 260 Mont. 431, 450, 861 P. 2d 141, 153 (1993). That claim must be dismissed.

FRAUD

The Bank asserts that BI committed actual fraud by representing that the Bank gave late notice of the claim. Amended Answer, C.D. 16 p. 23 et seq. The fraud claim is in light of the undisputed facts and in light of the preceding discussion.

Analysis starts with the Montana definition of the nine elements of fraud

accurately stated in Montana Civil Pattern Jury Instruction 9.29:

> (1) a representation was made;
>
> (2) the representation was false;
>
> (3) the representation was material;
>
> (4) the defendant knew the representation was false or was ignorant of whether it was true;
>
> (5) the defendant intended the plaintiff would rely upon the representation;
>
> (6) the plaintiff was ignorant of the falsity of the representation;
>
> (7) the plaintiff relied upon the representation;
>
> (8) the plaintiff had a right to rely on the representation; and
>
> (9) the plaintiff was damaged by reliance on the representation.

In this suit the "plaintiff" would be the Bank as the party asserting fraud so the Bank has the obligations of proof required of the "plaintiff" in the elements above.

The Bank itself, through the same attorney who sent the litigation summary letters in 2009 and 2010, represented that the Bank's notice came late. The admission of late notice could only be an acknowledgment that nothing he had done earlier was notice. BancInsure also said the notice was late. If that was a representation at all, rather than a statement of opinion, it simply agreed with the Bank's lawyer. Bank's fraud claim fails Elements 2,3 and 4 as a matter of uncontroverted fact. The Bank's fraud claim alleges that BI misrepresented to the Bank what the Bank's own litigation summary letters forwarded to BI said. The Bank fails at Element 6 above because the Bank cannot claim to be ignorant of what its own letters said. Neither of the letters contains any request for indemnity or attorney fees or costs associated with any Pariser litigation so the Bank lacks a sufficient factual basis on the agreed facts to meet elements 7 and 8.

Going down the list shows that this claim lacks merit. If BI's claim that notice was late was a representation at all, it was not false as a matter of law as discussed above. Notice was late. The litigation summary letters were not notice of a claim of right to insurance coverage. The Bank's attorney told BI that the notice was late. The Bank knew whether that representation was false or not because the representation related to another communication the Bank itself had sent, through the same person. The Bank has not shown any act or omission taken in reliance on BI's repetition of the Bank's own "late notice" statement and no right to rely upon BI's adoption of the Bank's admission of late notice. The Bank was not damaged in any way because the Bank had no coverage for the Pariser matter in any event because of its own late notice and because of the express substantive terms of the BI policies. The fraud claim lacks factual or legal basis and must be dismissed.

CONCLUSION

First Interstate Bank deliberately exercised what it believed were its loan and guaranty contract rights to seize money from Mr. Pariser's account and apply the seized funds to principal and interest on the loan. First Interstate Bank was not entitled to do so. It was held liable to return the money it had taken. First Interstate Bank deliberately started the first of three lawsuits all flowing directly from its decision to take Mr. Pariser's money. For well over a year all of First Interstate Bank's actions relevant here were consistent with this court's interpretation: the Pariser litigation did not trigger coverage under the BancInsure liability policies. The first litigation summary letter almost seems a summary of the exclusions under the policy. The notice was late but there was no coverage under the policy in any event. Judgment must issue for BancInsure.

ORDER

For the foregoing reasons summary judgment is granted to Plaintiff, BancInsure, Inc. The court declares that BI had no duty to defend and no duty to indemnify under the contracts of insurance at issue here, and judgment shall issue in favor of BancInsure, Inc. and against First Interstate Bank. BancInsure is awarded its costs. Each party shall bear its own fees.

DATED this 23rd day of September, 2013

Keith Strong
United States Magistrate Judge