

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**AMERILODGE GROUP, LLC,  
Plaintiff,**

v.

**Case No. 15-148935-CB  
Hon. James M. Alexander**

**HOME-OWNERS INSURANCE COMPANY,  
Defendant.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on cross motions for summary disposition. This is an insurance coverage dispute. Plaintiff is a hospitality management company that, in part, operates a hotel in Bay City. On July 1, 2012, Defendant issued a comprehensive commercial Insurance Policy to Plaintiff that was subsequently renewed through July 1, 2014.

During the Policy's term, Plaintiff learned that an employee was stealing money from cash deposits between 2009 and 2013. Plaintiff terminated said employee on August 23, 2013 and a subsequent October 2013 audit revealed a total theft of some \$80,578.62.<sup>1</sup> On November 5, 2013, Plaintiff filed a claim for coverage.<sup>2</sup> Defendant then assigned a Claim Representative, who recommended that Defendant cover all of Plaintiff's claimed losses.

On January 30, 2015, however, Defendant only provided coverage for \$16,203.19 of the claim. This amount represented only the losses that occurred when Defendant's policy was in

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<sup>1</sup> An initial audit placed the theft losses at \$88,655.39, but this was later amended to \$80,578.62.

<sup>2</sup> The parties do not dispute that an occurrence of employee theft is covered under "Employee Theft" or "Employee Dishonesty" provisions of the policy.

place. But Plaintiff claims that Defendant's policy provided coverage for losses due to employee theft that predated the issuance of Defendant's policy.

For this reason, Plaintiff filed the present suit on breach of contract and declaratory judgment claims – seeking the balance of its loss due to its employee's theft (or \$64,375.43). Defendant, on the other hand, believes that it has paid Plaintiff the full amount that it is entitled to under the policy.

To their respective ends, Plaintiff now moves for summary disposition under MCR 2.116(C)(10) and Defendant under (C)(7) or (C)(10).

A motion under (C)(7) determines whether a claim is barred, among other grounds, by a limitations period. And a (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

These motions present essentially two issues. First, is Plaintiff's claim for the allegedly uncovered portion of its claim time-barred? Second, does Defendant's policy cover for Plaintiff's alleged losses predating July 1, 2012?

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

An insurance policy is construed in the same manner as any other type of contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Insurance contracts, however, are to be construed in favor of coverage. See *Rory v Continental Ins Co*, 473 Mich 457, 517; 703 NW2d 23 (2005); *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982); and *Shumake v Travelers Ins Co*, 147 Mich App 600, 608; 383 NW2d 259 (1985) (finding “A policy should not be construed to defeat coverage unless the language so requires since the purpose of insurance is to insure.”).

“Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage.” *Auto Owners v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997).

## **I. Time-barred?**

It makes sense to first address Defendant’s argument that Plaintiff’s claim as to the “uncovered” amounts is time barred. Defendant bases its argument on a provision found in the General Conditions section of the Employee Dishonesty endorsement:

- 5. Legal Action Against Us:** You may not bring any legal action against us involving loss:
- a. Unless you have complied with all the terms of this insurance;
  - b. Until 90 days after you have filed proof of loss with us; and
  - c. Unless brought within 2 years from the date you discover the loss.

Based on this two-year limitation provision, Defendant argues that Plaintiff discovered the theft on August 23, 2013, yet didn’t file the present lawsuit until September 15, 2015 – more than two years after Plaintiff’s discovery of the loss.

In support of the enforceability of contractual limitations periods, Defendant cites *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 126; 301 NW2d 275 (1981) (holding “Absent any statute to the contrary, the general rule followed by most courts has been to uphold provisions in private contracts limiting the time to bring suit where the limitation is reasonable, even though the period specified is less than the applicable statute of limitations.”).

Our Supreme Court again revisited the issue in *Rory v Contl Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005), holding “an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy.”

In response, Plaintiff makes two arguments. First, it claims that it did not actually “discover” the existence of its theft claim until an audit was concluded in October 2013 – less than two years before its September 3, 2015 Complaint. Second, assuming arguendo that it did “discover” its theft claim when it fired the employee on August 23, 2013, then the statutory tolling period found in MCL 500.2833(1)(q) acts to toll the limitations period for the time between Plaintiff’s notice of loss and Defendant’s decision to deny coverage.

The Court initially rejects Plaintiff’s argument that it did not “discover” its theft claim until October 2013 because Plaintiff actually terminated the employee and noted “possible theft” on August 23, 2013. Although Plaintiff was not aware of the precise amount of said theft on that date, it cannot reasonably dispute that it knew that there was some theft on August 23, 2013. As a result, the Court finds that this is the date considered to be the discovery date for purposes of the insurance policy.

Next, Plaintiff argues that, because Defendant’s comprehensive policy includes coverage for fire loss, then the statutory tolling period found in MCL 500.2833(1)(q) acts to toll the limitations period for the time between Plaintiff’s notice of loss and Defendant’s decision to deny coverage.

In this case, Plaintiff claims that it notified Defendant of the claim on November 5, 2013, and Defendant did not deny coverage until January 30, 2015. As a result, Plaintiff argues (assuming arguendo an August 23, 2013 discovery date) when accounting for the tolling period, it filed suit only 302 days after its alleged “discovery” of the theft.

The cited statute, MCL 500.2833, provides (emphasis added):

(1) Each fire insurance policy issued or delivered in this state shall contain the following provisions:

...

(q) That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. **The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.**

Plaintiff claims that, although the policy at issue provides coverage beyond just fire loss (and the present claim is one for theft), numerous courts have applied the cited statute to non-fire losses, citing (amongst others) *Smitham v State Farm Fire & Cas Co*, 297 Mich App 537, 543 n 6; 824 NW2d 601 (2012) (applying MCL 500.2833(1)(q) to a theft loss); *Johnson v Parker & Sons Roofing & Chimney, Inc*, unpublished opinion per curiam of the Court of Appeals, decided Feb 22, 2007 (Docket No. 271779) (applying MCL 500.2833(1)(1) to a mold loss); *Brown v AAA*

*Michigan Ins*, unpublished opinion per curiam of the Court of Appeals, decided Dec 18, 2012 (Docket No. 308478) (applying MCL 500.2833(1)(q) to a theft loss).<sup>3</sup>

In its attempt to avoid application of MCL 500.2833 to the current policy, Defendant simply argues that the “Employee Dishonesty” endorsement of the policy is, somehow, a separate policy. But the Court rejects this argument. And Defendant offers no caselaw that refused to apply said statute to a broader policy that included fire loss coverage.

It cannot be disputed that the very comprehensive policy issued by Defendant to Plaintiff included fire loss coverage. As such, the Court finds that the tolling provision of MCL 500.2833(1)(q) applies and tolls Plaintiff’s claim between November 5, 2013 and January 30, 2015. As a result, Plaintiff’s claim is not time barred, and Defendant’s motion on this ground is DENIED.

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<sup>3</sup> In 2011, in *No Limit Clothing, Inc v Allstate Ins Co*, unreported order of the Eastern District of Michigan, decided August 18, 2011 (Docket No. 09–13574) noted that Michigan courts were applying MCL 500.2833(1)(q) to insurance policies that do not exclusively cover losses arising from fire:

Section 500.2833(1)(q) applies to insurance policies that do not exclusively cover losses arising from fire. Prior to the amendment of the statute in 1990, Michigan case law had held that a general insurance policy which contains a fire insurance provision, even though not considered to be a “fire insurance policy,” is still limited by the twelve-month statute of limitations as stated in § 500.2832 (repealed 1990). See *Aldalali v. Underwriters at Lloyd's, London*, 435 N.W.2d 498 (Mich.Ct.App.1989). In *Aldalali*, the plaintiff argued that since his insurance contract with the defendant was not exclusively a fire insurance policy, and the events which led to the alleged breach of the policy were unrelated to fire, the twelve-month statutory limitation was not applicable. The Michigan Court of Appeals rejected this argument, reasoning that “fire insurance contracts may include riders or endorsements which are subject to the standard policy provisions, including the twelve-month limitation period.” *Id.* at 399. Since the amendments, Michigan courts have held § 500.2833 to be binding on general insurance contracts which contain provisions for fire insurance. See, e.g., *Johnson v. Parker & Sons Roofing & Chimney, Inc.*, No. 271779, 2007 WL 549232 (Mich.Ct.App. Feb. 22, 2007) (§ 500.2833(1)(q) applies to breach of insurance policy claim resulting from loss due to mold); *Dillard v. Farm Bureau Ins. Co.*, No. 288134, 2010 WL 866150 (Mich.Ct.App. Mar. 11, 2010) (§ 500.2833 applies to a breach of insurance policy claim arising from vandalism and theft). As is evident, Michigan courts are not hesitant to apply § 500.2833 to cases where the insurance policy is not strictly a “fire insurance policy” and the loss was not caused by fire.

## **II. Coverage for the alleged loss?**

Next, the Court must determine if Plaintiff's claimed losses are covered under the policy. As stated, Defendant admits that employee thefts are generally covered events under the policy. Further, Defendant actually paid for the losses incurred during the term of its policy in the amount of \$16,203.19. But the parties dispute whether Defendant must also pay for the alleged thefts that occurred between 2009 and the effective date of Defendant's policy.

In support of its argument that coverage is appropriate, Plaintiff cites to a provision found in the General Conditions section of the Employee Dishonesty endorsement. It provides:

### **7. Loss Sustained During Prior Insurance**

**a.** If you . . . sustained loss during the period of any prior insurance that you or the predecessor in interest could have recovered under that insurance except that the time within which to discover loss had expired, we will pay for it under this insurance, provided:

- (1)** This insurance became effective at the time of cancellation or termination of the prior insurance; and
- (2)** The loss would have been covered by this insurance had it been in effect when the acts or events causing the loss were committed or occurred.

Plaintiff claims, with evidentiary support, that it had an insurance policy with Selective Insurance that was effective from July 1, 2009 until July 1, 2010. This insurance provided up to \$100,000 in coverage for employee theft.

On July 1, 2010, Plaintiff claims, with evidentiary support, that it switched insurance carriers to Westfield Insurance, which continued until July 1, 2012 (when Defendant issued its policy). Plaintiff's insurance policy with Westfield also provided up to \$100,000 "employee dishonesty" coverage for employee theft.

Significantly, Plaintiff's Westfield Insurance policy also provided that it would cover any loss sustained during prior insurance – much like Defendant's policy.<sup>4</sup> As a result, the Westfield Policy covered any employee theft loss that occurred during the time covered by it and the Selective Insurance Policy. But the time within which to discover said loss has expired under the Westfield Policy.<sup>5</sup>

Because the Westfield Policy covered losses due to employee theft during its and Selective's coverage period (or from July 1, 2009 through July 1, 2012), Defendant's policy also covers this timeframe based on the "Loss Sustained During Prior Insurance" coverage provision. In other words, Defendant's policy covers the timeframe of Westfield's policy, which covers the timeframe for Selective's policy.

Finally, Defendant appears to argue that a General Condition found in the Employee Dishonesty endorsement somehow precludes Plaintiff's claim. Said provision states:

**2. Discovery Period for Loss:** We will pay only for covered loss discovered no later than one year from the end of the policy period.

But Plaintiff submitted its claim in November 2013, and Defendant issued a policy to Plaintiff on July 1, 2012 that was renewed through July 1, 2014. As stated, Plaintiff discovered its covered loss on August 23, 2013 – within one year of the end of both the initial July 1, 2012 and the renewal policy. As a result, this provision does not defeat Plaintiff's claim.

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<sup>4</sup> The Westfield Policy provided, for "Employee Dishonesty" under "Optional Coverages," the following:

**h.** If you . . . sustained loss or damage during the policy period of any prior insurance that you could have recovered under that insurance except that the time within which to discover loss or damage had expired, we will pay for it under this Optional Coverage, provided:

**(1)** This Optional Coverage became effective at the time of cancellation or termination of the prior insurance; and

**(2)** The loss or damage would have been covered by this Optional Coverage had it been in effect when the acts or events causing the loss were committed or occurred.

<sup>5</sup> Like Defendant's Policy, the Westfield Policy only covered for said loss "sustained during the policy period and discovered no later than one year from the end of the policy period" – or on or before July 1, 2013. But it is undisputed that the alleged theft was discovered after said date.

### **III. Conclusion**

For all of the foregoing reasons and viewing all evidence in the light most favorable to the nonmovant, the Court finds that there are no material questions of fact in dispute such that Plaintiff is entitled to judgment as a matter of law.

Plaintiff's motion for summary disposition is GRANTED, and Defendant's motion is DENIED.

Defendant is required to cover Plaintiff's employee-theft losses that occurred from the July 1, 2009 (the effective date of Plaintiff's Selective Insurance Policy) through July 1, 2012 (the effective date of Defendant's Policy). It is unclear if the \$64,375.43 sought by Plaintiff were losses that occurred entirely within said timeframe, so the Court will GRANT summary only as to liability, with damages to be determined.

**IT IS SO ORDERED.**

June 29, 2016  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge