

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 CP FOOD & BEVERAGE, INC.,

4 Plaintiff

5 v.

6 UNITED STATES FIRE INSURANCE
7 COMPANY,

8 Defendant

Case No.: 2:16-cv-02421-APG-GWF

**Order Granting Motion for Summary
Judgment**

[ECF No. 26]

9 This is a dispute over whether an insurance policy covers a theft scheme run by several
10 employees of plaintiff CP Food & Beverage, Inc. (CP). CP ran a club where patrons could buy
11 “funny money” to tip waitresses or pay topless dancers. The waitresses and dancers could turn
12 the funny money back into CP for cash. Certain CP employees overcharged customers’ credit
13 cards through various methods, including charging the credit card multiple times for the same
14 bill, charging for bottles of alcohol that the employees kept for themselves, and charging for
15 funny money that the customer never purchased and then cashing in the funny money with CP.

16 The scheme was uncovered after multiple customers complained to the police and
17 disputed the charges with their credit card companies. CP paid chargebacks to the customers’
18 credit cards in a total amount of \$768,617.91, both in response to its contractual requirements
19 with the credit card companies and also as part of an agreement with law enforcement. CP also
20 incurred hundreds of thousands of dollars in professional fees to investigate and resolve issues
21 with law enforcement and defrauded customers. However, if a customer did not dispute a charge
22 or if the customer’s dispute was not sustained, CP did not pay a chargeback.

23 ////

1 During the course of the scheme, CP was covered by a commercial crime policy issued
2 by defendant United States Fire Insurance Company (U.S. Fire). The policy covered “loss of or
3 damage to ‘money’, ‘securities’ and ‘other property’ resulting directly from ‘theft’ committed by
4 an ‘employee’, whether identified or not, acting alone or in collusion with other persons.” ECF
5 No. 26-6 at 4. The policy defines theft (which includes forgery) as “the unlawful taking of
6 property to the deprivation of the Insured.” *Id.* at 4, 15. Property covered by the policy is limited
7 to property that CP owns or leases or that CP “hold[s] for others whether or not [CP is] legally
8 liable for the loss of such property” *Id.* at 11. The policy does not cover a loss “that is an
9 indirect result of an ‘occurrence’ covered by this policy including, but not limited to, loss
10 resulting from . . . (3) Payment of costs, fees or other expenses you incur in establishing the
11 existence or the amount of loss under this policy.” *Id.* at 6.

12 CP submitted a claim to U.S. Fire to recover the credit card chargebacks and professional
13 fees, but U.S. Fire denied the claim. CP filed suit in this court against U.S. Fire, asserting claims
14 for breach of contract, breach of the covenant of good faith and fair dealing, violations of the
15 Unfair Claims Practices Act, and declaratory relief.

16 U.S. Fire moves for summary judgment on all claims, arguing the policy does not cover
17 the employees’ thefts because CP was not a direct victim of the theft. U.S. Fire contends CP
18 instead is seeking to recover for its liability to the customers, which is not a covered loss. As for
19 the bad faith claim, U.S. Fire contends it at least had a reasonable basis for denying CP’s claim,
20 and thus it did not act in bad faith as a matter of law. U.S. Fire also contends that CP has not
21 identified any damages it suffered as a result of either the alleged bad faith or unfair practices.

22 CP responds that because the employees exchanged the funny money for cash from CP
23 and because CP had to reimburse the customers for credit card charges, the employees stole from

1 CP and the loss is covered under the policy. CP argues that it will be able to show bad faith
2 because U.S. Fire did not investigate the claim and never asserted CP was not a direct victim of
3 the theft until the present motion.¹ It also contends that it will be able to show U.S. Fire engaged
4 in unfair claims practices. Finally, CP argues that it has shown damages based on the
5 chargebacks and professional fees incurred in investigating the claim.

6 I. ANALYSIS

7 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to
8 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
9 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.”
10 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if “the evidence
11 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

12 The party seeking summary judgment bears the initial burden of informing the court of
13 the basis for its motion and identifying those portions of the record that demonstrate the absence
14 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The
15 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a
16 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531
17 (9th Cir. 2000). I view the evidence and reasonable inferences in the light most favorable to the
18 non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir.
19 2008).

20 ////

21

22 ¹ This is incorrect. U.S. Fire sent a letter denying coverage on October 26, 2016, in
23 which it stated that the thefts were not covered because the employees took money from
customers, not from CP, and that CP did not suffer a loss directly from a theft. ECF No. 26-13 at
8-9.

1 **A. Breach of Contract**

2 The parties dispute whether the theft scheme is a covered loss under the policy. U.S. Fire
3 contends it is not because the scheme stole money from the customers, not CP, and CP was
4 returning that stolen property through credit card chargebacks as a form of restitution or
5 disgorgement. U.S. Fire argues the policy requires the loss to CP be directly caused by the
6 employee theft, and it was not here because the employees stole from the customers and then
7 used the stolen funds to buy alcohol or funny money from CP. CP responds that because the
8 employees obtained cash from CP using the funny money, they stole from CP so the loss is
9 covered.

10 Courts addressing similar policy language about a loss resulting directly from an
11 employee's theft have fallen into two camps. Some courts view the policy language as
12 equivalent to a proximate cause analysis. *See Tooling, Mfg. & Techs. Ass'n v. Hartford Fire Ins.*
13 *Co.*, 693 F.3d 665, 675 (6th Cir. 2012) (collecting cases). Others employ the "direct means
14 direct" rule, meaning that the employer's property must be stolen (or a third party's property
15 where the employer acts as bailee or trustee), and the employer's third-party liability to a
16 defrauded customer is not covered. *See id.* at 673, 676 (interpreting direct loss policy language to
17 mean the loss results "immediately and without any intervening space, time, agency, or
18 instrumentality" from the employee's theft); *Vons Cos., Inc. v. Fed. Ins. Co.*, 212 F.3d 489, 492-
19 93 (9th Cir. 2000) (applying California law and stating that "'direct' means 'direct' and . . . in the
20 absence of a third party claims clause, Vons's policy did not provide indemnity for vicarious
21 liability for tortious acts of its employee").²

22
23

² *See also Universal Mortg. Corp. v. Württembergische Versicherung AG*, 651 F.3d 759, 761-62 (7th Cir. 2011) (applying Wisconsin law); *Direct Mortg. Corp. v. Nat'l Union Fire Ins.*

1 “When interpreting state law, [I am] bound by the decision of the highest state court.” *In*
2 *re Kekauoha-Alisa*, 674 F.3d 1083, 1087 (9th Cir. 2012). The Supreme Court of Nevada has not
3 yet addressed with which of these two camps it would side. “Absent a controlling state court
4 decision,” I must “predict how the highest state court would decide the issue.” *Id.* at 1087-88.

5 “An insurance policy is a contract that must be enforced according to its terms to
6 accomplish the intent of the parties.” *Farmers Ins. Exch. v. Neal*, 64 P.3d 472, 473 (Nev. 2003).
7 To determine whether a loss is covered, I look to the policy’s language. *Fourth St. Place v.*
8 *Travelers Indem. Co.*, 270 P.3d 1235, 1239 (Nev. 2011), *as modified on reh’g* (May 23, 2012). I
9 must read the policy as a whole and “from the perspective of one untrained in law or in the
10 insurance business.” *Id.* (quotation omitted). I give policy terms “their plain, ordinary and
11 popular connotations.” *Id.* (quotation omitted).

12 I will not rewrite unambiguous provisions or increase the insurer’s obligation to the
13 insured that the parties intentionally and unambiguously limited. *United Nat’l Ins. Co. v.*
14 *Frontier Ins. Co.*, 99 P.3d 1153, 1157 (Nev. 2004) (en banc). However, if a term in an insurance
15 policy is ambiguous, I construe it against the insurer as the drafter of the policy. *Fourth St.*
16 *Place*, 270 P.3d at 1239. A term is ambiguous if it “creates reasonable expectations of coverage
17 as drafted.” *Id.* (quotation omitted). Thus, I “interpret an insurance policy to effectuate the
18 reasonable expectations of the insured.” *Id.* (quotation omitted).

19 In determining whether a term is ambiguous, I do not view it “standing alone, but rather
20 in conjunction with the policy as a whole . . . to give a reasonable and harmonious meaning and
21 effect to all its provisions.” *Id.* (quotation omitted). I “look to the entire contract of insurance for

22
23 *Co. of Pittsburgh, PA*, 625 F. Supp. 2d 1171, 1177-78 (D. Utah 2008); *RBC Mortg. Co. v. Nat’l*
Union Fire Ins. Co. of Pittsburgh, 812 N.E.2d 728, 733 (Ill. Ct. App. 2004).

1 a true understanding of what risks are assumed by the insurer and what risks are excluded.” *Nat’l*
2 *Union Fire Ins. Co. of State of Pa. v. Reno’s Exec. Air, Inc.*, 682 P.2d 1380, 1383 (Nev. 1984). I
3 must give every word of the policy effect if possible and avoid rendering any of its provisions
4 meaningless. *Bielar v. Washoe Health Sys., Inc.*, 306 P.3d 360, 364 (Nev. 2013).

5 I predict Nevada would follow the “direct means direct” rule and hold the policy
6 language at issue does not cover third party claims or investigation costs. Starting with the
7 policy’s plain language, it covers loss resulting “directly” from an employee’s theft. ECF No. 26-
8 6 at 4. If proximate cause were sufficient, that would render the word “directly” superfluous.
9 Additionally, the policy defines theft as “the unlawful taking of property to the deprivation of the
10 Insured.” *Id.* at 4, 15. The property covered by the policy is limited to property that CP owns or
11 leases or that it holds for others. *Id.* at 11. The policy thus contemplates a loss when the insured
12 is deprived of property (either its own or property it holds as trustee or bailee), not when a third
13 party is deprived of property and the third party later sues the insured or requires repayment
14 under a contractual provision. This is consistent with the reasonable expectations of the insured
15 because this is not a policy designed to cover CP for liability to third parties for its vicarious
16 liability due to its employees’ theft of its customers’ property. *See Vons Cos., Inc.*, 212 F.3d at
17 491 (“Under the insuring clauses, Vons is covered only for direct losses to Vons caused by its
18 employee’s dishonesty, not for vicarious liability for losses suffered by others arising from its
19 employee’s tortious conduct.”).³

20
21 ³ *See also Universal Mortg. Corp.*, 651 F.3d at 762 (stating that “when an insured incurs
22 liability to a third party—whether in contract or tort—as a result of employee misconduct,
23 financial loss resulting from that liability is not ‘directly’ caused by the employee misconduct
and therefore is not covered by fidelity bonds containing direct-loss language”); *Lynch Props.,*
Inc. v. Potomac Ins. Co. of Ill., 140 F.3d 622, 629 (5th Cir. 1998) (“Employee dishonesty
policies insure against the risk of property loss through employee dishonesty. . . . Liability
policies, by contrast, require an insurer to discharge an obligation of the insured to a third party

1 Given the policy language and keeping in mind the purpose for which CP purchased this
2 policy, CP would not expect coverage for the chargebacks or the investigation costs. The
3 employees stole customers' money through unauthorized charges to the customers' credit cards.
4 The employees then used that stolen money to purchase alcohol and funny money from CP. But
5 the theft was of the customers' (or perhaps the credit card companies') funds, not CP's. CP
6 admits that it would not be liable for a chargeback unless the customer disputed the charge. CP
7 also admits that it paid the chargebacks as part of its contractual arrangement with the credit card
8 companies and due to an agreement with law enforcement. CP's loss thus "was contingent on
9 the occurrence of a series of events that were not inevitable, . . . were not immediate or readily
10 ascertainable at the time of" its employees' thefts, and if the customers never discovered the
11 fraudulent charges or chose not to dispute them, CP "would not have suffered the loss it now
12 claims." *Direct Mortg. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 625 F. Supp.2d
13 1171, 1177-78 (D. Utah 2008). Its losses therefore did not "directly" result from the thefts.

14 Likewise, CP's investigative costs did not directly result from the employees' theft.
15 Instead, they resulted from CP attempting to investigate the thefts, to assure law enforcement that
16 the owners were not involved in the scheme, and to support CP's insurance claim. I therefore
17 grant U.S. Fire's motion for summary judgment on the breach of contract and declaratory
18 judgment claims.

19 ////

20 _____
21 for some act of the insured or its employee. Although employee dishonesty policies may cover
22 the loss of third-party property in the possession of the insured, . . . these policies do not serve as
23 liability insurance to protect employers against tortious acts committed against third-parties by
their employees." (internal citations omitted)); *RBC Mortg. Co.*, 812 N.E.2d at 733 ("If an
employee's dishonesty causes losses to a third party, which then leads to litigation concluding in
a judgment or settlement, the insured has not incurred a 'direct loss' under a fidelity bond; the
insured's loss is 'indirect' and the third party's loss is 'direct.'").

1 **B. Bad Faith**

2 To establish a claim for bad faith based on a denial of payment on all or part of a claim, a
3 plaintiff must establish that (1) the insurer denied the claim, (2) the denial was unreasonable, and
4 (3) the insurer knew it lacked a reasonable basis to deny the claim, or acted with reckless
5 disregard as to the unreasonableness of the denial. *See Schumacher v. State Farm Fire & Cas.*
6 *Co.*, 467 F. Supp. 2d 1090, 1095 (D. Nev. 2006); *Pemberton v. Farmers Ins. Exch.*, 858 P.2d
7 380, 382 (Nev. 1993) (“An insurer fails to act in good faith when it refuses ‘without proper
8 cause’ to compensate the insured for a loss covered by the policy.”). “The key to a bad faith
9 claim is whether or not denial of the coverage was reasonable.” *Sherwin v. Infinity Auto Ins. Co.*,
10 No. 2:11-cv-00043-APG-GWF, 2013 WL 5918312, at *3 (D. Nev. Oct. 31, 2013), *aff’d*, 639
11 Fed. Appx. 466 (9th Cir. 2016) (quotation omitted). Consequently, if the insurer had a
12 reasonable basis for its decision, there can be no finding of bad faith as a matter of law. *Id.*

13 Because U.S. Fire properly denied coverage, it did not act in bad faith in denying the
14 claim. Moreover, even if my prediction that Nevada would adopt the “direct means direct” rule
15 is incorrect, U.S. Fire at least had a reasonable basis for its decision to deny coverage. U.S. Fire
16 therefore is entitled to judgment as a matter of law on the bad faith claim.

17 **C. Unfair Claims Practices**

18 Nevada Revised Statutes § 686A.020 provides that an insurer “shall not engage in this
19 state in any practice which is . . . an unfair method of competition or an unfair or deceptive act or
20 practice in the business of insurance.” The statute lists identified acts which are declared to be
21 unfair practices in settling insurance claims. *See id.* § 686A.310(1). An “insurer is liable to its
22 insured for any damages sustained by the insured as a result of the commission of any act
23 [identified in § 686A.310(1)] as an unfair practice.” *Id.* § 686A.310(2).

1 CP has not pointed to evidence raising a genuine dispute that it sustained damages as a
2 result of an unfair practice. The only evidence of damages CP cites to is its own answers to
3 interrogatories. ECF No. 26-12 at 7-8. However, that damages calculation lists chargebacks and
4 professional fees. CP does not explain how any particular unfair claims practice resulted in
5 chargebacks or professional fees. In those same interrogatories, CP was asked to state the
6 amount of damages it incurred as a result of the alleged unfair practices. *Id.* at 10. CP responded
7 that it was “in the process of calculating the exact amount of damages incurred as the result of
8 Defendant’s violations of the Nevada Unfair Claims Practices Act and evaluating whether an
9 expert may be needed to assist in that task. As discovery is ongoing, [CP] will supplement its
10 Answer to this Interrogatory.” *Id.* There is no evidence CP updated this discovery response. CP
11 thus has not pointed to evidence raising a genuine dispute as to damages on the unfair practices
12 claim. Moreover, in its opposition, CP does not point to any evidence supporting the other
13 elements of this claim. I therefore grant summary judgment in U.S. Fire’s favor on the unfair
14 practices claim.

15 II. CONCLUSION

16 IT IS THEREFORE ORDERED that defendant United States Fire Insurance Company’s
17 motion for summary judgment (**ECF No. 26**) is **GRANTED**. The clerk of court is instructed to
18 enter judgment in favor of defendant United States Fire Insurance Company and against plaintiff
19 CP Food & Beverage, Inc.

20 DATED this 6th day of August, 2018.

21
22 
23 _____
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE