NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 12, 2024

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Re: ***St. Paul Fire and Marine Ins. Co. v. HITT Contracting, Inc.***
Case No. CL–2022–10895

Dear Counsel:

In this insurance coverage case between an insured, HITT Contracting, Inc. ("HITT"), and its second-layer excess insurer, St. Paul Fire and Marine Insurance Company ("St. Paul"), the Court must decide whether St. Paul breached the insurance contract when it did not indemnify HITT $24 million toward HITT's settlement of a customer claim.

The Court holds St. Paul did not breach the insurance contract. For the reasons stated herein, the Court will dismiss HITT's counterclaim and award judgment in favor of St. Paul.

I. FACTUAL OVERVIEW.

In 2014, HITT entered a construction management contract with its customer Glenstone Foundation, Inc. ("Glenstone") to construct the Glenstone Museum in Potomac, Maryland. (HITT Post Trial Br., at 3.) The Glenstone Museum opened to the public October 4, 2018. (HITT Post Trial Br., at 5.)

HITT had a three-layered insurance policy tower for work performed on the project: $2 million of primary insurance coverage issued by Hartford Fire Insurance Company ("Hartford"); a $25 million first-layer excess policy issued by XL Insurance American, Inc. ("XL Insurance"); and a $25 million second-layer excess policy issued by St. Paul. (Compl. ¶ 12-13; HITT Post Trial Br., at 3.) The St. Paul policy existed to apply only after Hartford paid $2 million and XL Insurance paid $25 million. (HITT Post Trial Br., at 1, 3.) So, the attachment point was $27 million for the St. Paul policy. The present case involves a dispute between HITT, the insured, and St. Paul, the second-layer excess insurer.

In August 2018, HITT sued Glenstone in the U.S. District Court for the District of Maryland for Glenstone's refusal to pay for all the work of HITT and HITT's subcontractors. (St. Paul Ex. 7, at 86.) On October 26, 2018, Glenstone filed its Answer and Counterclaim ("Glenstone counterclaim"). The Glenstone counterclaim alleged problems with HITT's work on the museum, including, but not limited to, (1) the shattering of multiple glass panels (of specially-imported glass from Germany), (2) over 80 roof leaks, (3) numerous curtain wall leaks, and (4) interior walls buckling and falling off. (*Id.* at 72-74.) The Glenstone counterclaim sought $35.9 million in damages. (*Id.* at 86.)

HITT did not notify St. Paul when Glenstone served HITT the October 26, 2018, counterclaim. (*See* St. Paul Post Trial Br., at 1.) Approximately five months later, on March 19, 2019, without notice to St. Paul, HITT and Glenstone engaged in unsuccessful mediation. (HITT Post Trial Br., at 5-6.) At the mediation, Glenstone offered to settle for $11 million plus HITT's $18 million waiver for unpaid work invoices. (*See* St. Paul Post Trial Br., at 4.) Approximately a week after the failed mediation and five months after Glenstone filed its counterclaim, HITT notified St. Paul's agent of the potential insurance claim March 26, 2019. (HITT Post Trial Br., at 6.)

Through discovery in the HITT-Glenstone lawsuit, from January 31, 2020, and into 2021, Glenstone produced to HITT 17 expert witness reports on the alleged property damage. (*Id.*) In light of the information gained from the initial expert reports, HITT provided a second notice of the Glenstone counterclaim, this time directly to St. Paul, March 9, 2020. (*Id.*)

Ultimately, HITT and Glenstone settled the Glenstone counterclaim the day before the scheduled June 12, 2023, District Court of Maryland bench trial.[1] (HITT Post Trial Br., at 14-15.) HITT and Glenstone reached a $51 million settlement (*i.e.*, $33 million, plus HITT forfeited $18 million of extra work and change order work). (*Id.* at 15.) Hartford, XL Insurance, and HITT paid Glenstone $2 million, $10 million, and $21 million, respectively. (*Id.*) HITT also forfeited its $18 million in outstanding invoices to Glenstone. (*Id.*) HITT now seeks $24 million from St. Paul to indemnify HITT for its contributions to the settlement amount.

The present case between St. Paul and HITT came before the Court October 21-28, 2024, for trial.[2] Because of interlocutory rulings during the trial, the only unadjudicated matter in this case is HITT's counterclaim for Breach of Contract against St. Paul after St. Paul refused to provide insurance coverage and contribute to HITT's settlement with Glenstone.[3] St. Paul raised three primary defenses to indemnification: (1) HITT gave St. Paul late notice of any likely claim, forfeiting the coverage; (2) HITT had to exhaust[4] Hartford's and XL Insurance's policies before seeking indemnification from St. Paul; and (3) HITT did not prove sufficient covered claims to trigger St. Paul's liability. (HITT Post Trial Br., at 1.) In addition, HITT alleges that St. Paul engaged in bad faith (or breached its covenant of good faith and fair dealing) by (1) failing to join the HITT-Glenstone settlement negotiations and (2) by sabotaging HITT's chances of prevailing at the HITT-Glenstone trial when St. Paul filed a Motion to Intervene. (St. Paul Post Trial Br., at 21 and argued at trial.)

In this Opinion Letter, the Court answers three questions regarding HITT's counterclaim for Breach of Contract against St. Paul.

First, did HITT timely notify St. Paul of a likely insurance claim? The Court answers no, finding that HITT did not provide St. Paul with reasonable notice. This ruling, alone, mandates judgment in favor of St. Paul.[5]

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[1] St. Paul filed a Motion to Intervene less than two weeks before the scheduled bench trial in the District Court.
[2] The Court commenced trial by jury. However, during the trial, the parties agreed to waive jury after the Court decided it would have to declare a mistrial. The Court found likely prejudice arising from HITT's then-current, highly visible construction work in the courthouse. Implicitly, the Court's selection of HITT as its contractor was an endorsement of HITT. While the Court disregards this, it concluded the jury could not, even with an appropriate cautionary instruction.
[3] The parties submitted post-trial briefs November 19, 2024.
[4] In a Motion for Summary Judgment, this Court ruled in favor of HITT, striking the exhaustion defense. (Order, Sept. 25, 2024.)
[5] The Court addresses the second two questions as rulings in the alternative.

Second, did St. Paul breach the insurance contract by failing to contribute to the HITT-Glenstone settlement? The Court holds that St. Paul did not breach the insurance contract because HITT did not sufficiently prove covered claims to implicate St. Paul's liability.

Third, did St. Paul engage in bad faith or breach its covenant of good faith and fair dealing when HITT (1) failed to join settlement negotiations with HITT, Glenstone, and the two lower layer insurers and (2) filed its Motion to Intervene in HITT's litigation with Glenstone? The Court holds that St. Paul did not breach its covenant.

For the reasons stated herein, the Court will dismiss HITT's counterclaim and award judgment in favor of St. Paul.

II. ANALYSIS.

A. HITT Failed to Timely Notify St. Paul of its Likely Claim.

St. Paul's remaining chief defense is that HITT's allegedly late notice to St. Paul of a likely claim for coverage barred its claim. HITT asserts it timely notified St. Paul and the insurance company is obligated to provide coverage. The Court must decide the following threshold question, which the Court treats as a plea in bar: did HITT timely notify St. Paul of a likely claim?

An insurer may deny a claim based on late notice only if it can meet its burden of proof that the insured substantially and materially breached the express requirements of the notice provision. *State Farm Fire & Cas. Co. v. Walton*, 244 Va. 498, 504 (1992). An insurance notice provision "is considered a condition precedent to recovery under the policy." *State Farm Mut. Auto Ins. Co. v. Porter*, 221 Va. 592, 597 (1980). An insured must give its carrier notice of a likely claim "whenever, from an objective standpoint, it should reasonably appear to the insured that the policy may be involved." *Dan River, Inc. v. Com. Union Ins. Co.*, 227 Va. 485, 489 (1984). "Failure to give timely notice will not be excused when the insured only subjectively concludes that coverage under the policy will not be implicated." *Id.*

The Loss Notification provision from the St. Paul insurance policy reads as follows:

> You . . . must tell us or our agent if an occurrence, event, accident, offense, incident, act, error, or omission happens or is committed that will likely result in damages that exceed the loss notification amount shown in the coverage Summary. [50% of the combined total of limits of coverage of your "Underlying Insurance."] (St. Paul Ex. 3, at 5.)

When an insurance notice provision in a contract lacks a set deadline, the law implies reasonable notice after the likelihood of a claim arises. *See Dabney v. Augusta Mut. Ins. Co.*, 282

Va. 78, 87-89 (2011). Reasonable notice is a factual issue decided on a case-by-case basis. *Id.* Even a contract commanding notice "as soon as practicable" means "reasonable notice." *Id.*[6]

Glenstone sued HITT via a counterclaim October 26, 2018. This counterclaim was the foundation for the settlement HITT entered with Glenstone. In the present lawsuit, HITT wants partial reimbursement from St. Paul for that settlement. HITT and Glenstone settled the Glenstone counterclaim for $33 million, plus HITT forfeited $18 million of extra work and change order work Glenstone owed HITT. Thus, the total settlement was $51 million. HITT now seeks $24 million from St. Paul.

Despite Glenstone serving HITT with its counterclaim October 26, 2018, HITT did not notify St. Paul of the likely insurance claim until March 26, 2019. During this five-month delay, HITT engaged in unsuccessful mediation with Glenstone on March 19, 2019. At that time, Glenstone's demand was "only" $11 million plus HITT's $18 million waiver of its extra work and change order work. That demand would have been a bargain compared to the ultimate HITT-Glenstone $51 million settlement, which was much higher than Glenstone's demand at mediation. Only after the mediation failed did HITT notify St. Paul of the Glenstone counterclaim. It is now impossible to know if St. Paul's involvement in the mediation—which occurred before St. Paul even knew of the potential claim—would have made a difference or not.

HITT argues that the then-potential claim only ripened to likelihood, necessitating its notice to St. Paul, long after Glenstone filed its October 26, 2018, counterclaim. When HITT first saw the Glenstone counterclaim, HITT dismissed it as a transparent ploy by Glenstone to bully HITT into waiving the $18 million in unpaid work invoices Glenstone owed. HITT's co-president, Jeremy Bardin, concluded that the counterclaim lacked merit. He avouched the quality of the construction project and believed HITT corrected all the problems in the counterclaim. HITT's lawyer, Joseph Guarino, advised HITT that the counterclaim was a routine negotiating tactic worthy of zero value. Bardin and Guarino testified that only after Glenstone provided

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[6] Most Virginia cases interpreting insurance carrier notice provisions consider contracts different than the one at bar: they contain an "as soon as practicable" provision. *See, e.g.*, *Liberty Mut. Ins. Co. v. Safeco Ins. Co.*, 223 Va. 317, 323 (1982). The St. Paul policy does not. The Court nonetheless interprets the St. Paul policy to require reasonable notice for three reasons. First, the parties agreed to a notice provision and their agreement deserves respect. If there is no implied deadline for providing notice, there is no deadline and an insured could give its carrier first notice of a claim after suffering judgment, which defeats any purpose of a notice provision. That interpretation effectively voids the notice requirement. The Court cannot interpret the contract in such a way.

Second, the parties' contract provided for notice "if an occurrence . . . *happens* . . . ." (St. Paul Ex. 3, at 5.) (emphasis added). By using the present tense "happens," the parties signal a present time action. Had they agreed to a delayed notice provision, they would have written the clause to read, "if an occurrence *happened*" to reflect a delayed reporting of a past occurrence. Effectively, the St. Paul policy is an immediate notification provision. Such provisions are governed by reasonable notice. *See Hunter v. Hollingsworth*, 165 Va. 583, 590 (1936).

Third, neither party asserted in this litigation that the notice provision was ambiguous nor offered extrinsic evidence to explain the ambiguity. The parties proceeded to trial on the assumption that the notice requirement was a "reasonable" one; the parties merely differed on whether HITT's actual notice was reasonable or not. Thus, any claim that the St. Paul policy notice provision is ambiguous was waived.

detailed expert witness reports in January 2020 and into 2021, clearly demonstrating likely liability, did HITT internalize the extent of HITT's liability and elect to notify St. Paul.

HITT also emphasizes a distinction between property damage occurring before the constructed museum opened to the public on October 4, 2018, and damage occurring later. HITT asserts the Glenstone counterclaim only alerted HITT to pre-opening damage which would not have been covered by the St. Paul policy like post-opening damage would be.

Thus, HITT's position is that it was not required to notify St. Paul until it received Glenstone's expert witness reports.

HITT's position suffers two significant problems, the first being that HITT notified St. Paul's agent of the likely claim on March 26, 2019, long *before* it received Glenstone's expert witness reports in January 2020 and into 2021. HITT did not need the expert witness reports to learn of its likely liability for two reasons. First, HITT implicitly admits it recognized its likely liability after the failed mediation on March 19, 2019. That is why it provided notice of the likely claim to St. Paul's agent seven days after the mediation and eight months before it saw Glenstone's expert witness reports. This is a concession by HITT that it understood the Glenstone claim would likely implicate the St. Paul policy as of March 26, 2019, and not in 2020 when it got Glenstone's expert witness reports. Those reports only buttressed the likelihood of the claim.

Second, HITT should have recognized its likely liability by simply reading the Glenstone counterclaim. The Court finds as fact that the counterclaim, alone, required HITT to notify St. Paul of the likely claim. The counterclaim reads like a contractor's horror movie. It alleged (1) the shattering of multiple glass panels, (2) over 80 roof leaks, (3) numerous curtain wall leaks, and (4) interior walls buckling and falling off. (St. Paul Ex. 7, at 72-74.) In the context of this construction project, these were extremely serious allegations of problems that could necessitate St. Paul insurance money to cure. The glass panels were part of a unique and massive architectural/artistic glass curtain wall using specially imported glass from Germany. The roof was a massive museum roof, and Glenstone demanded a full replacement of it. The problems alleged in the counterclaim were not punch-list items. The Glenstone counterclaim put HITT on notice of its likely liability triggering its obligation to notify St. Paul.

As to HITT's argument that the counterclaim only alerted HITT to pre-museum opening damages and not post-opening damages, the Court finds the Glenstone counterclaim did not exclusively allege damage occurring after the museum's October 4, 2018, opening. Glenstone served its counterclaim October 26, 2018, and did not classify its list of damages as occurring pre or post museum opening. The Court is unpersuaded that all the actual damage alleged in the counterclaim occurred before the museum opened. However, even if it did, the counterclaim clearly depicts a construction project falling apart in real time. For example, Glenstone complained that multiple glass panels shattered because of misaligned bolts between the glass curtainwall and the concrete foundation and defectively installed shims upon which the curtainwall panels sit. (St. Paul Ex. 7, at 72.) Glenstone concocted a temporary solution to

prevent further breakage, but since the solution was temporary it expected further breakage. (*Id.*) Thus, by this counterclaim, HITT was aware of a likely ongoing cascade of damage.

HITT argues that, until the cascading damage happened, there was no covered claim to report to St. Paul. However, once HITT knew its construction was allegedly causing damage, that damage was enough for it to notify its insurance company of a potential claim because the counterclaim alleged the damage would continue absent expensive intervention. Had HITT constructed a concrete dam, learned of damage in the form of structural cracking, and been told that a temporary fix was in place but that the dam would fail, could HITT wait for the dam to burst before notifying its insurance carrier? If the answer is "yes," it would be an odd reading of the insurance contract. In the present case there was an occurrence—the shattering of multiple glass panels in a massive curtainwall. There was damage—the shattered glass panels. And, there was information that more panels would shatter because of improper construction. Thus, HITT knew of an occurrence, damage, and likely future damage triggering its duty to notify St. Paul of the likely claim.[7]

The Glenstone counterclaim so clearly alerted HITT of a likely claim HITT ultimately settled on it without Glenstone amending it. If HITT really needed the evolving litigation for it to objectively appreciate its potential liability, one would have expected Glenstone to have amended its counterclaim to add all the new allegations. Glenstone did not do so. Because HITT necessarily claims its settlement with Glenstone implicated the St. Paul policy because the settlement included covered claims, it implicitly concedes that some items in the unamended counterclaim were post-opening damages. (It expressly states that, in fact, the claimed damage occurred after the museum opened). (HITT Post Trial Br., at 23.) ("There is no dispute that the damage claimed occurred after the Museum opened.") An amended Glenstone counterclaim would have made HITT's position more persuasive; HITT's settlement on the unamended counterclaim is telling. Glenstone did not amend the counterclaim because it already contained the allegations supporting the ultimate HITT-Glenstone settlement of post-opening damages. The Glenstone counterclaim, alone, necessitated HITT's notice to St. Paul of the likely claim.

HITT's position that it was not required to notify St. Paul until it received Glenstone's expert witness reports suffers from a second significant problem: the Court finds neither Bardin nor Guarino credible witnesses as to the likelihood of a potential claim because they engaged in the extremely difficult task of judging their own work.[8] In making this determination the Court considered all the usual credibility factors. VIRGINIA MODEL JURY INSTRUCTIONS—Civil Instruction No. 2.020 (LexisNexis Matthew Bender). The Court weighed the factors of "interest in the outcome of the case" and "bias" heavily. It is not surprising that the co-president of the company who managed the Glenstone project felt his company did a good job. Nor is it surprising that the lawyer who gave HITT the advice that the Glenstone counterclaim was specious approves of his opinion. When one opines on one's own work one is naturally biased

[7] The Court uses the glass panels merely as one example of one occurrence. There are other categories of damages.
[8] The Court believes these witnesses believe their testimony and obeyed their oaths. However, it finds their interest in the outcome of this case and situational bias to unintentionally color their testimony to the degree the Court found them unpersuasive in *this* case.

toward approval. HITT needed to present more objective testimony at the trial if it wanted to persuasively demonstrate that it was not reasonably aware of a likely claim sufficient for it to notify its insurance company. HITT's failure to timely notify St. Paul of the likely claim was due to its subjective conclusion that it would not need St. Paul's coverage. However, the Court looks at HITT's reporting requirement on an objective, not subjective, basis. *See Dan River, Inc.*, 227 Va. at 489. The Court finds that, objectively, HITT had a duty to report the likely claim once it received the Glenstone counterclaim.

HITT's five-month delay in reporting the claim severely prejudiced St. Paul. HITT attended the fateful Glenstone mediation before alerting St. Paul. So, St. Paul had no opportunity to participate. If it had notice, St. Paul may have provided a more objective evaluation of the Glenstone counterclaim that HITT was minimizing. The St. Paul policy was to pay out only after Hartford paid $2 million and XL Insurance paid $25 million. At the time of the mediation, Glenstone's counterclaim sought $35.9 million in damages. However, at the mediation, Glenstone offered to settle for $11 million—far below the amount triggering St. Paul's policy. Had St. Paul been in the mediation room, it may have helped HITT internalize the risk and persuade it to forgo its quest for its unpaid invoices from Glenstone. Constance Melkus, St. Paul's Complex Claim Specialist, testified to St. Paul's preparation actions for every mediation, including conducting discovery, retaining experts, and interviewing subcontractors. By failing to notify St. Paul of the likely liability before HITT's failed mediation with Glenstone, HITT guaranteed that St. Paul could not help secure a settlement at that mediation. HITT waiting until after the Glenstone mediation to give notice of the likely claim to St. Paul is the equivalent of closing the barnyard gate after most of the herd escaped. It is the functional equivalent of no notice. The parties' insurance contract mandated notice, which HITT did not timely provide. Thus, HITT breached the express requirements of the notice provision in its contract in a substantial, material way. HITT may not now hold St. Paul to an obligation to pay on the insurance policy.

B. HITT Failed to Quantify Covered Claims.

HITT alleges St. Paul breached the parties' insurance contract by failing to contribute to the HITT-Glenstone settlement. St. Paul responds that the HITT-Glenstone settlement included both covered and uncovered claims and that HITT did not prove the amount of the covered claims to determine St. Paul's liability. The Court agrees with St. Paul.

When suing an insurance carrier, an insured initially has the burden to prove its claim is covered. *General Acci., Fire & Life Assurance Corp. v. Murray*, 120 Va. 115, 126 (1916); *Erie Ins. Exch. v. Meeks*, 223 Va. 287, 290-91 (1982) ("It is elemental that a plaintiff must prove a prima facie case." Only then does the burden shift to the defendant insurance company to prove its affirmative defense.). This is so even though courts construe insurance contracts "most strongly" in favor of the insured. *Murray*, 120 Va. at 126. When covered and uncovered claims are mixed, the insured logically must prove the covered claims to recover from its carrier. *Id.* ("[I]f the injury might have resulted from one of two causes, for one of which the plaintiff was

responsible, but not for the other, the plaintiff could not recover; neither could he recover if it was just as probable that the damage was caused by the one as by the other."); *RML Corp. v. Assurance Co. of Am.*, 60 Va. Cir. 269, 269-72 (Norfolk, Oct. 25, 2002).

In the present case, St. Paul was an excess insurance carrier, obligated to pay claims against its insured, HITT, after HITT suffered $27 million in damages. Two lower layer carriers were obligated to pay the first $2 million and $25 million, respectively, before St. Paul was to pay on its policy with HITT. The HITT-Glenstone settlement included both covered and uncovered claims. Thus, HITT bore the burden of proving covered claims above $27 million to recover from the St. Paul policy.

The Court finds as fact HITT failed to carry its burden of proof. HITT primarily relies on a spreadsheet its outside lawyer, Joseph Guarino, prepared in 2021 summarizing the damage values claimed by Glenstone. It lists Glenstone's damage calculations *vis-a-vis* HITT's own calculations. Both Guarino and HITT's co-president, Jeremy Bardin, testified the Glenstone valuation was too high and HITT's valuation was too low. The Court accepts the obvious strategic rationale for each side to exaggerate. However, neither calculation breaks down the claims by covered and uncovered damages. Many items are clearly not damages covered by insurance. For example, $13,520,000 sought by Glenstone for liquidated damages are clearly not covered by St. Paul. Other items are a mix of covered and uncovered claims. For example, the curtainwall remediation was valued by Glenstone to cost $21,995,000; HITT valued the remediation to be $3,100,000. However, St. Paul covered only remediation of damage, such as broken glass, not remediation of bad work performed by HITT's subcontractors. HITT insufficiently persuaded the Court it teased out the broken glass-type damages from the poor construction-type damages.

The parties offered expert testimony from Guarino, Bardin, and Randall Gamache.[9] Since Guarino is HITT's outside counsel and Bardin HITT's co-president, the Court did not find them credible as to the adequacy of their attempt to separate covered damages from uncovered damages. Their relationship with HITT and their interest in the outcome of this trial diminished their testimony. HITT claims St. Paul's expert conceded that all the damages claimed by Glenstone were property damage. (HITT Post Trial Br., at 6, *citing* Trial Tr. Day 2, 39:22-40:3.) However, this is wrong for two reasons. First, Gamache clarified his testimony to emphasize that covered damage was a small fraction of Glenstone's claim. (Trial Tr. Day 2, 50:11-51:16.) In the context of the glass curtain wall, he only saw 13 damaged glass panels. However, Glenstone complained HITT improperly installed the curtain wall and did not merely want the 13 panels repaired; it wanted HITT to rebuild the entire wall. (*Id.*) Second, HITT's interpretation of Gamache's testimony conflicts with its own evidence. HITT agrees that not all the damages alleged by Glenstone against HITT were property damage. For example, HITT is not claiming

[9] HITT called Guarino and Bardin to testify as its experts; St. Paul called Gamache to testify as its expert.

items Glenstone calls damages, such as liquidated damages ($13,520,000 claimed by Glenstone) or an incomplete building information model ($3,150,000 claimed by Glenstone).

The Court reviewed the admitted exhibits carefully and tried to independently unscramble the covered and uncovered claims. It seems, based only on the Glenstone counterclaim, that there should be enough covered damages to trigger St. Paul's policy. The Glenstone expert witness reports add significant heft but are unhelpful because they conflate the covered and uncovered claims. Possibly, different experts could have directly categorized the covered and uncovered claims. However, the Court could not separate them to its satisfaction using the current record, even after trying to give all inferences to the benefit of HITT as the insured. To rule in favor of HITT would require the Court to engage in impermissible guesswork and speculation. Of course, it may not do this. Perhaps this is why the insurance tower's first-layer excess carrier, XL Insurance, which provided $25 million in coverage below St. Paul's $25 million, refused to indemnify HITT for $15 million of this coverage. No one told the Court why XL Insurance refused to pay a massive $15 million of its $25 million coverage. St. Paul's Complex Claims Representative, Melkus, suggested XL Insurance could not enumerate $15 million of covered claims, which duplicates the Court's challenge to do so.[10]

This does not mean the Court finds the HITT-Glenstone settlement unreasonable. HITT won a general release and settled significant *uncovered* claims. However, the Court's mandate to pass on the reasonableness of a settlement relates to the settlement of likely covered claims, not covered claims *vis-a-vis* uncovered claims. For example, if an insured faced likely liability of $1,000 of mixed covered and uncovered claims and settled for $50, that settlement could be objectively reasonable. However, if the covered claims were only worth $5 and the uncovered claims $45, the fact that the overall settlement is reasonable does not justify the insurance company paying on uncovered claims.

In the present case, HITT failed to prove sufficient covered damages to trigger payment by St. Paul, and the Court could not unscramble the covered and uncovered claims. Therefore, even if HITT did not forfeit its St. Paul coverage by not timely notifying St. Paul of its potential claim, see section II (A), *supra*, the Court would alternatively dismiss HITT's counterclaim and award judgment in favor of St. Paul because of lack of proof of sufficient covered claims.

C. St. Paul Did Not Engage in Bad Faith or Breach the Covenant of Good Faith and Fair Dealing.

HITT alleges that St. Paul engaged in bad faith or breached its covenant of good faith and fair dealing by failing to join the negotiations with HITT, Glenstone, and the two lower layer

[10] The Court would have reached its same conclusion in this Opinion Letter even if XL Insurance tendered its full policy. It mentions XL Insurance's decision to withhold $15 million from its policy simply to show that XL Insurance may have independently reached the same conclusion as did the Court: that HITT did not prove it was liable for sufficient covered damages.

insurers. HITT also alleges St. Paul engaged in bad faith by filing a Motion to Intervene in HITT's litigation with Glenstone.[11]

The Court finds as fact that St. Paul did not engage in bad faith toward HITT when St. Paul did not join settlement negotiations in the HITT-Glenstone lawsuit. First, St. Paul reasonably relied on its primary affirmative defense of exhaustion. St. Paul's policy applied only after Hartford paid out its $2 million primary layer coverage and XL Insurance paid out its $25 million first-layer excess coverage. Because XL never paid out its full $25 million, St. Paul did not believe it had to pay its $25 million second-layer excess coverage.

This Court, by a different judge, previously ruled in a Motion for Summary Judgment that HITT's out-of-pocket contribution to XL Insurance's policy limits legally exhausted XL Insurance's policy, triggering the St. Paul policy. (Order, Sept. 25, 2024) (Blanch, J.). Judge Patrick M. Blanch's exhaustion ruling in favor of HITT on behalf of this Court was on a matter of first impression in the Commonwealth. Judge Blanch apparently found persuasive *Maximus, Inc. v. Twin City Fire Ins. Co.* for the holding that an insured may voluntarily contribute to an insurance company policy's limit to exhaust that policy so it could seek coverage from a secondary insurance policy. 856 F. Supp 2d 797, 802 (E.D. Va. 2012). Of course, *Maximus* is not controlling legal authority and Judge Blanch could be wrong. Judge Blanch could have found persuasive *Martin Res. Mgmt. Corp. v. Axis Ins. Co.*, in which the U.S. Court of Appeals for the 5th Circuit rejected *Maximus*, noting *Maximus* relied on and *misapplied* 5th Circuit precedent in the process. 803 F.3d 766, 770-71 (5th Cir. 2015). It is unfair to find St. Paul acted in bad faith by failing to accurately predict how the Circuit Court of Fairfax would rule on an issue of first impression such as this. The Court does not find bad faith on this basis.

Second, the Court further finds St. Paul did not act in bad faith by filing its Motion to Intervene in the HITT-Glenstone lawsuit less than two weeks before the scheduled bench trial in the U.S. District Court for the District of Maryland. HITT argues St. Paul's motion deeply prejudiced HITT because it disclosed to the District Court various levels of HITT's insurance coverage and requested the District Court to categorize the damages against HITT. HITT's argument is unpersuasive. Judges routinely disregard irrelevant material they learn in a case, no matter how prejudicial. At the extreme end, judges adjudicate criminal cases where the judge knows he or she suppressed from evidence the defendant's confession. Despite this knowledge, the judge decides the case unprejudiced because that is what judges do. (Judges who cannot do this are ethically bound to recuse. *See* VA. SUP. CT. R. pt. 6, sec. III, Canon 1(D)(1)(a)). The St. Paul motion would be exactly the sort of material a judge would disregard in adjudicating the HITT-Glenstone trial. It was not relevant to the disposition of the case; it would not have been considered. The Court finds HITT's fear that St. Paul's motion prejudiced it is unpersuasive.

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[11] The Court considers "bad faith" and "breaching the implied covenant of good faith and fair dealing" to be the same concept. *See Manu v. GEICO Cas. Co.*, 293 Va. 371, 386 (2017).

III. CONCLUSION & ENTRY OF ORDER.

For the reasons stated in this Opinion Letter, the Court will dismiss HITT's counterclaim and award judgment in favor of St. Paul.

Counsel for St. Paul will please prepare a sketch order consistent with the ruling in this Opinion Letter and the interlocutory rulings during the trial, endorse it with any objections, and send it to counsel for HITT. Counsel for HITT will please endorse the sketch order with any objections and return it to counsel for St. Paul for submission to the Court. If there is a dispute as to the faithfulness of the sketch order to this ruling, any party, with notice to the other, may schedule an entry of order hearing, in consultation with law clerk # 7 (Peggy Brozi), on a Friday civil motions day.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia