IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

- -

BB SYNDICATION SERVICES, INC.,

OPINION and ORDER

Plaintiff,

10-cv-195-wmc

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant.

- -

This case concerns a dispute between a real estate lender, BB Syndication Services, Inc., and its title insurer, First American Title Insurance Company, over the scope of coverage provided by the latter's construction title insurance policy, which has already been the subject of two earlier decisions by this court (dkt. ## 83, 87). BB Syndication purchased the policy to protect its mortgage on a proposed commercial real estate development in Kansas City, Missouri. When the developer defaulted halfway through construction and filed for bankruptcy, BB Syndication called upon First American to defend and indemnify it against the priority of mechanics liens that had been filed on the property by various contractors. First American refused to defend, arguing that the liens fall outside the scope of its policy. BB Syndication then filed this lawsuit.

Both parties agree that policy coverage turns on one dispositive issue: whether certain mechanics liens filed against the construction project were "created, suffered, assumed or agreed to" by the lender. In its earlier summary judgment decisions, this court gave a legal construction to this quoted coverage exclusion (dkt. #83) and found

that First American had breached its duty to defend (dkt. #87), but lacked sufficient facts to determine which liens which required a defense and indemnification pending a final decision from the United States Bankruptcy Court for the Western District of Missouri in Adversary Proceeding No. 10-04016-dvd. (*Id.*). With the benefit of that court's ruling and additional undisputed facts, the court now holds that the plaintiff lender "created" or "suffered" all of the liens at issue, and consequently that the liens fall outside the scope of coverage. The court also holds that Missouri law governs First American's duties to defend and indemnify, which means that First American breached its duty to defend but not its duty indemnify BB Syndication.

UNDISPUTED FACTS[1]

A. The Construction Loan and the Title Insurance Policy

The title insurance policy at the center of this lawsuit was issued by defendant First American to insure the priority of the mortgage that plaintiff BB Syndication had obtained on a proposed construction project in Kansas City, Missouri, called the West Edge project. The mortgage on the underlying real estate for the project was initially

[1] These facts are drawn from the "Undisputed Facts" portion of the court's initial summary judgment decision (dkt. #83), the undisputed proposed findings of fact submitted in support of the parties' first summary judgment motions, the undisputed proposed findings of fact submitted in support of the parties' renewed motions for summary judgment, and the findings of the Federal Bankruptcy Court for the Western District of Missouri. Reference is also made to the contents of various documents whose authenticity is not disputed, such as the construction contract, the title insurance policy, and the lien filings of various subcontractors.

created in January of 2006, to secure a $6 million bridge loan from BB Syndication to the project developer, Trilogy Development Company, LLC ("Trilogy").

In March of 2006, the mortgage was used to secure a much larger construction loan. The accompanying construction loan agreement between BB Syndication and Trilogy provided that Trilogy would first invest an initial $12 million in land equity and $20 million in cash equity in the project, and BB Syndication would cover the rest of the cost to finish construction, up to the lesser of (1) $84,600,000, (2) 80% of the appraised value of the property, or (3) 75% of the total projected costs of the entire project. To protect BB Syndication from the possibility of cost overruns and to ensure that there would be enough money to complete the project, the construction loan agreement also provided that if at any point BB Syndication determined that the projected costs of completion exceeded the remaining reserve of committed capital, BB Syndication could stop further loan payouts and demand that Trilogy make additional deposits of equity to bring the project "into balance."

When Trilogy delivered the mortgage on the West Edge property to BB Syndication to secure the initial bridge loan on January 5, 2006, First American issued BB Syndication a title insurance policy on the mortgage. Among other things, First American agreed in the policy to insure BB Syndication against:

> 6. The priority of any lien or encumbrance over the lien of the insured mortgage;
>
> 7. Lack of priority of the lien of the insured mortgage over the statutory lien for services, labor or material:

> (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
> (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the Insured has advanced or is obligated to advance.

(Title Insurance Policy, dkt. #18-1, at 2.)

The policy also contained several enumerated exclusions from this general coverage. Exclusion 3(a) released First American from responsibility for "[d]efects, liens, encumbrances, adverse claims, or other matters" that were "created, suffered, assumed or agreed to by the Insured claimant." Exclusion 6 excepted:

> Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.

At BB Syndication's request, First American later agreed to strike Exclusion 6 from the policy.

In conjunction with the title insurance policy, Trilogy, BB Syndication and First American also entered into a relatively-standard construction loan disbursement agreement, which made First American the disbursing agent for the loan. The agreement envisioned a multi-step payment process: sub-contractors would submit their bills to the general contractor, J.E. Dunn ("Dunn"), for bundling into pay applications to Trilogy;

who would then translate these applications (plus additional "soft" costs not directly associated with construction) into a single monthly draw request to BB Syndication; who would then release "sufficient funds to cover the requested advance" to First American; who would obtain lien waivers for the work, provide "[w]ritten affirmative title insurance coverage insuring against any lien . . . as of the relevant advance date," and ultimately disburse the money.

Each monthly updating of title insurance by First American was done in the form of a "date-down" endorsement, insuring that there were no liens for work performed through the date of that search. Although the disbursement agreement directed First American not to disburse funds if it discovered that the loan was out of balance, BB Syndication had the ultimate authority to determine whether any particular draw request would be funded and could order First American to make disbursements even when the loan was out of balance.

B. A Shaky Start to the West Edge Project

Shortly after BB Syndication and Trilogy signed the construction loan agreement, a dispute arose between Trilogy and Dunn regarding projected increases in the cost of construction. On May 31, 2007, Dunn filed a petition for declaratory judgment and *quantum meruit* against Trilogy in the Circuit Court of Jackson County, Missouri, arguing that Trilogy had modified the project designs in a way that would increase overall costs

by $22 million and demanding that Trilogy agree to pay for these extra costs. This dispute was referred to binding arbitration.

At the time Dunn filed suit, BB Syndication had released only $5 million of its total commitment. Although the dispute with Dunn and the corresponding increase in projected construction costs meant that the loan was almost certainly out of balance, and although Trilogy refused to put up enough additional capital to completely restore the balance between available funds and projected costs, BB Syndication nevertheless elected to proceed with construction and continued to authorize First American to disburse funds for the project.[2]

On September 3, 2008, Trilogy submitted Draw Request No. 19 for $4.5 million to BB Syndication. BB Syndication authorized First American to disburse these funds; First American issued its date-down title insurance update; and Trilogy received the requested amount. Trilogy did not, however, pass the funds on to Dunn or its subcontractors, thus breaching the construction loan agreement. On or about September 24, 2008, First American and BB Syndication entered into a consent agreement acknowledging this breach. At BB Syndication's request, Trilogy returned the Draw No. 19 funds to First American. These funds were placed into escrow on October 10, 2008.

[2] At some point in the summer or fall of 2008, Robert Bernstein, Trilogy's owner/principal made an additional $16 million available for construction costs, which may have reduced the imbalance. What ultimately became of this money is unclear, however, since it was never deposited with BB Syndication.

Trilogy's failure to pay the No. 19 funds to Dunn or its subcontractors apparently derailed the West Edge project. In late September or early October of 2008, Dunn walked off the construction site and various subcontractors filed liens.

i. Mark One Electric Lien

On September 29, 2008, Mark One Electric Co. ("Mark One") filed a mechanics lien on the West Edge project in the amount of $2,483,558.51 for work it had performed as a subcontractor to Dunn. On December 31, 2008, Mark One and Trilogy engaged in negotiations that resulted in a settlement agreement to resolve the lien. Under the agreement, Mark One consented to continue performing work under a direct contract with Trilogy and to release its mechanics lien and all claims for work on the project prior to January 2, 2009, in exchange for (1) the liquidated sum of $1,700,000 (representing the amount owed from the unpaid Draw No. 19, minus a $379,262 discount), (2) an additional $320,136 (representing half of the accumulated retention for work as a subcontractor to Dunn), and (3) Trilogy's promise to pay $320,136 (the other half of the Dunn retention) in the near future.[3] On January 2, 2009, Mark One received $1,700,000 and executed a full release of the lien, also waiving any right to file future liens against the project for services and materials furnished prior to January 2, 2009, with the exception of (1) the as-yet-unpaid $640,276 retention held over from its work with Dunn and (2) one half of the $379,262 discount it had given on its original lien

[3] Retention (also known as a "reserve" or "retainage") refers to the common practice of withholding 5-10% from payment of each bill submitted by a contractor and releasing this portion at the completion of the contractor's work. This serves as a financial guarantee for proper completion of all work by the contractor.

claim. Mark One also expressly reserved the right to file future liens for materials and labor supplied after January 2, 2009.

Trilogy and BBSSI accepted Mark One's lien release and recorded it with the Jackson County Recorder of Deeds on January 5, 2009. On February 3, 2009, Trilogy paid Mark One $320,136, representing the first half of the Dunn retention.[4] Mark One executed a waiver and release of its right to file a lien for that amount on March 4, 2009. Thereafter, Mark One resumed work on the project on a time and material basis.

On March 27, 2009, Mark One filed a second mechanics lien in the amount of $551,555.58. This new claim was for the combination of $509,767, the unpaid balance due under the Settlement Agreement with Trilogy (half of the Dunn retention plus half of the discount), and $41,788.58, for the work performed between February 9 and March 5, 2009, under its contract to work directly with Trilogy.

ii. Rodriguez Mechanical Contractors Lien

On November 21, 2008, Rodriguez Mechanical Contractors ("Rodriguez") filed a Notice of Intent to File Mechanics Lien Statement in the amount of $1,280.012.13. It did not actually put a lien into place until February 11, 2009, when it filed lien claims totaling $575,006.73 for materials and labor supplied to the West Edge project through September 25, 2008.

---

[4] In its brief, First American asserts that the sum paid to Mark One on February 3 was actually the second half of the retention, but this is contradicted by its later assertion that the second half of the retention went unpaid. (*Compare* ¶ 12 of response to Df's Proposed Findings of Fact (dkt. #113) *with* ¶ 15 (both undisputed by plaintiff).) Moreover, the rest of the lien documents and proposed facts confirm that the second half of the retention went unpaid.

iii. Ceco Concrete Construction Lien

On November 26, 2008, Ceco Concrete Construction ("Ceco") filed a mechanics lien for $458,116. Trilogy objected to the size of Ceco's bill and attempted to negotiate for a reduction.

iv. Other Liens

By December 22, 2008, another contractor, A2MG, had filed a Notice of Intent to File a Mechanics Lien against the West Edge property in the amount of $1,692,125.00. By December 26, 2008, additional liens from other sub-contractors had also been filed.

C. The Project Briefly Resumes and then Fully Collapses

Not long after Dunn walked off the job, Trilogy hired a new general contractor and resumed construction. On November 21, 2008, Trilogy submitted Draw Request No. 22 to BB Syndication, asking for permission to take the $4.5 million Draw Request No. 19 out of escrow and for an additional $5 million advance for work done in August and September of 2008. In response, First American conducted a title search which revealed that liens or notices of intent to file liens had been placed on the West Edge property by Ceco Concrete, Mark One Electric and Rodriguez Mechanical Contractors. Apparently concerned about these liens and the overall state of construction, BB Syndication did not immediately respond to Trilogy's draw request.

On December 22, 2008, Trilogy, First American and BBSSI enter into a "Restated and Amended Consent Agreement," in which Trilogy acknowledged that it had defaulted

on the construction loan agreement and that the construction loan was out of balance by approximately $37 million. Trilogy was required by the restated agreement to immediately bring the project into balance by depositing sufficient additional funds with BB Syndication to cover the increased projected costs of construction. Trilogy never deposited these funds.

The restated agreement also set forth a plan for disposition of the escrowed Draw No. 19 funds: First American would release all but $572,000 of the draw money to Trilogy's attorney, who would immediately pay various subcontractors and suppliers, including Rodriguez and Mark One, but not Ceco. First American would pay the remaining $572,000, representing 125% of the $458,000 lien filed by Ceco, into a separate escrow account.[5] This amount was meant to secure adequate funding for First American to eventually discharge that lien, while Trilogy continued to negotiate with Ceco for a lower bill.

In recognition of the $572,000 in escrow and an indemnity guarantee from Trilogy's owner/principal, Robert Bernstein, First American agreed to issue a date-down

[5] At all times, BB Syndication controlled this escrow account, and never authorized or directed First American to pay any of the deposited funds to Ceco or to anyone else. In fact, on February 24, 2011, BB Syndication issued a "Notice of Instruction" to the escrow agent, Johnson Bank, directing it *not* to comply with any requests from Trilogy or First American regarding the withdrawal or disposition of the funds in the escrow account without BB Syndication's written consent. Despite this, BB Syndication maintains that it would have released the funds if Trilogy had advised that its dispute with Ceco over the proper payment amount was resolved. At any rate, the sums placed in escrow to cover the Ceco liens were not released until the court overseeing the Trilogy bankruptcy ordered the entire escrow account liquidated and most of the funds returned to BB Syndication.

insurance update on December 30, 2008, expressly insuring over the outstanding Ceco lien. BB Syndication then released the entire $4.5 million Draw No. 19, of which First American sent $3,935,000 to Trilogy's attorney and deposited $572,000 into a separate escrow account controlled entirely by BB Syndication.

On January 5, 2009, BB Syndication also authorized the advance of $5 million to pay Trilogy's Draw Request No. 23. This would turn out to be BB Syndication's final advance of funds, bringing its total loan to $61,218,293.35. That same day, First American issued a date down endorsement advancing the policy limit to $59,679,095.38, again agreeing to insure over the existing Ceco lien. On February 3, 2009, Trilogy submitted Draw Request No. 24, requesting $673,000 to pay off amounts owing to Mark One and to the new general contractor, Walton Construction, but BB Syndication never advanced funds to pay off this draw request.

By February 5, 2009, Ceco had filed a second lien for an additional $80,000 worth of work. The interested parties agreed that this second lien should be treated the same as the first. As a result, $108,484 (125% of the second lien amount) was placed in escrow alongside the existing funds covering Ceco's first lien; Mr. Bernstein executed another indemnification guarantee; and on February 9, 2009, First American issued a date-down endorsement expressly insuring over both Ceco liens and advancing the limit of the title policy to $60,352,336.09. This was the last date-down endorsement First American issued.

On or about March 9, 2009, Dunn filed a lien against the project in the amount of $12,445,963.46. On March 27, 2009, Trilogy's construction loan with BB Syndication matured with a final payment of $61,090,521.63 due, which Trilogy failed to pay. On April 6, 2009, the arbitration panel awarded Dunn $12,483,971.00 on its *quantum meruit* claim for work performed on the West Edge project, plus interest, attorney fees and arbitration costs, for a total award of $13,874,135.98. On April 15, 2009, BB Syndication sent Trilogy a notice of maturity and demand for payment on the construction loan note. Trilogy made no payment.

D. Trilogy's Bankruptcy

On May 15, 2009, Trilogy filed for protection from creditors in the United States Bankruptcy Court for the Western District of Missouri. (*In Re: Trilogy Development Company, LLC*, Case No: 09-42219.) Early in the bankruptcy proceedings, Trilogy sold the unfinished West Edge project by judicially-authorized auction. The auction realized $9,500,000, plus an additional $900,000 deposit forfeited by a prospective buyer that withdrew its bid. After deductions, net sale proceeds of $7,310,863.72 became available to Trilogy's creditors. The bankruptcy court also ordered release of the $697,783.43 waiting in escrow as security for the Ceco liens.

Uncertain which of its creditors and lien-holders had priority to these funds, Trilogy commenced an adversary proceeding on January 24, 2010, to resolve the validity, perfection and priority of the various liens. (*In Re: Trilogy Development Company, LLC, BB*

Syndication Services, Inc v. A.T. Switzer Company, et al., Case No: 09-42219-drd11.) In that proceeding, the bankruptcy judge disallowed Ceco's lien, but recognized the Rodriguez and the Mark One liens, finding that both took priority over BB Syndication's mortgage lien. The Mark One lien was allowed in the amount of $551,555.58 and the Rodriguez lien was allowed in the amount of $575,006.73. The bankruptcy judge also found that these "priming liens" overlapped with the $12 million J.E. Dunn lien.

The various creditors ultimately reached a series of settlements in which BB Syndication received $150,000 from the proceeds of the West Edge project sale and $597,783.43 of the escrowed Ceco funds.[6] In total, this was still substantially less than BB Syndication would have received if its mortgage lien was superior to all other liens on the property.

E. Denial of Coverage

On April 22, 2009, BB Syndication tendered to First American its legal defense of a foreclosure lawsuit filed by Mark One claiming priority over the mortgage lien. Under a reservation of rights, First American initially retained defense counsel for BB Syndication in connection with that lawsuit. After performing an investigation, however, First American withdrew coverage, citing Exclusion 3(a) of the title policy and asserting that BB Syndication had "created" or "suffered" Mark One's lien by not paying off its work. On the same grounds, First American also refused to defend BB Syndication in the

[6] The settlement apportioned $224,218.37 to Mark One and $233,751.73 to Rodriguez.

Trilogy adversary proceeding. BB Syndication incurred significant legal fees and other expenses as a result of these lawsuits, all of which First American has consistently refused to reimburse.

PROCEDURAL HISTORY

A. Background

In early December of 2010, First American filed a motion for summary judgment seeking dismissal of this action on grounds that all of the liens at issue in the Mark One foreclosure and the Trilogy bankruptcy were outside the scope of its insurance policy. BB Syndication filed a cross motion for partial summary judgment, requesting a declaration that the liens were, in fact, covered by the policy and that First American had breached its duty to defend. In a decision issued on September 30, 2011, this court decided the parties' legal arguments but denied both motions for lack of an adequate factual record. After an October 19, 2011, status conference, the court made supplemental factual findings, determining that (1) the liens put in place by Ceco were not "created" or "suffered" by BB Syndication; (2) these liens were, therefore, covered by the insurance policy; and (3) First American had breached its duty to defend BB Syndication in connection with the Trilogy bankruptcy adversary proceeding. Based on these findings, on November 1, 2011, the court *sua sponte* granted partial summary judgment to BB Syndication and stayed the remainder of the case pending disposition of potentially-

related actions then before the United States Bankruptcy Court for the Western District of Missouri.

In August, 2012, the portion of the bankruptcy proceedings pertaining to construction liens concluded with a series of settlements described above. On August 31, 2012, the court held a status conference and set briefing on the issues remaining in this case, including a determination of: (1) which liens required a defense in the bankruptcy and the Mark One foreclosure action; (2) which liens required indemnification by First American; (3) the amount of damages suffered by BB Syndication; and (4) the proper disposition of BB Syndication's bad faith claims. Both sides have since filed renewed motions for summary judgment and First American also filed a motion for reconsideration of the court's November 1, 2011, order granting partial summary judgment in favor of BB Syndication.

B. The Court's Opinion on the Parties' First Cross-Motions for Summary Judgment

This court opened its first summary judgment decision by resolving the parties' choice of law dispute in favor of Wisconsin law – but only as to the particular issue of contract interpretation then before it. As explained then, while Missouri and Wisconsin law may differ with respect to the insurance duty to defend and bad faith, the coverage issue before it involved nothing more than interpreting the language of the title policy and applying that language to the facts of the case. *See Cerabio LLC v. Wright Medical Technology, Inc.*, 410 F.3d 981, 987 (7th Cir. 2005) (if the laws of the competing states

are the same, a court must apply the state law in which it sits). Since First American had identified no conflict between Wisconsin and Missouri contract law, Wisconsin law controlled by default. While the court ultimately turned to the persuasive decisions of other jurisdictions for guidance, this was only because Wisconsin had no law on point and there was no helpful Seventh Circuit precedent at that time.[7]

Next, the court addressed the central question: whether the title insurance policy between First American and BB Syndication covered the disputed liens. Absent the exclusion in paragraph 3(a) of the policy, First American did not dispute that the liens would be covered, but maintained that BB Syndication had "created" or "suffered" all of the liens, relieving it of both a duty to defend and indemnify under Exclusion 3(a). Adopting a narrow definition of the terms "created" and "suffered" set forth in *American Savings & Loan Association v. Lawyers Title Insurance Corp.*, 793 F.2d 780 (6th Cir. 1986), and *Brown v. St. Paul Title Insurance Co.*, 634 F.2d 1103 (8th Cir. 1980), this court held that (1) the term "created" implies a deliberate act intended to bring about a lien; and (2) the term "suffered" implies consent to allow a lien to exist. *American*, 793 F.2d at 784; *Brown*, 634 F.2d at 1108, n. 8. Comparing the facts of this case with decisions from courts across the country, the court concluded on the facts then before it that the instant situation was most analogous to *Brown* and to *Bankers Trust Co. v. Transamerica Title Insurance Co.*, 594 F.2d 231 (10th Cir. 1979), and distinguishable from *American Savings*

[7] After the court's opinion issued, the Seventh Circuit published *Home Federal Savings Bank v. Ticor Title Insurance Co.*, 695 F.3d 725 (7th Cir. 2012), which deals with Indiana law and, while not on all fours with the facts of this case, comes to a result consistent with this court's reasoning.

& *Loan*, 793 F.2d 780, *Chicago Title Insurance Co. v. Resolution Trust Corp.*, 53 F.3d 899 (8th Cir. 1995), and *Mid-South Title Insurance Corp. v. Resolution Trust Corp.*, 840 F. Supp. 522 (W.D. Tenn. 1993).

In *Brown* and *Bankers*, the courts were confronted with liens arising from work for which the insured lenders had no duty to pay under the terms of their respective construction loan contracts. In *Bankers*, the lender was responsible under the loan contract for paying a fixed sum after each stage of construction regardless of the actual cost; liens were filed when the developer, who was responsible for the remainder up to the actual cost, and did not keep up with its co-funding obligations. 594 F.2d at 236-37. In *Brown*, the lender was responsible for fully funding construction costs, but when the developer formally defaulted it was relieved of its obligation under the loan contract to advance further funds, even if those funds were to pay for work that had been performed before default. 634 F.2d at 1105-06. Despite the lack of any contractual obligation on the part of either lender to their respective borrowers -- or to the project sub-contractors -- the appellate courts of the Eighth and Tenth Circuits found that the lenders nevertheless had a duty to pay the outstanding subcontractor bills and to discharge the mechanics liens associated with those bills.

The circuit courts explained that this duty arose not from the construction loan contracts, but from disbursement agreements between each lender and its title insurer, in which the title insurer was required to obtain lien waivers and issue a date-down policy update prior to disbursing loan funds. The courts reasoned that the disbursement

agreements "clearly contemplated that adequate funds were to be made available" to the insurer to at least meet the cost of work covered by the insurer's date-down endorsement. *Brown*, 634 F.2d at 1109-10. A contrary holding "would place the title insurer in the untenable position of guaranteeing payment of work for which loan funds were never advanced."[8] *Id.* (quoting *Bankers*, 594 F.2d at 233). Both courts concluded that where the disbursement agreements gave rise to this type of duty and "payment was not made up to the amount of the lender's loan commitment, the resulting mechanics liens must be considered to have been created or suffered by the insured claimant." *Id.* at 1109 (quoting *Bankers*, 594 at 234).

Applying *Bankers* and *Brown* to the instant facts, this court noted the existence of a similar disbursement agreement between BB Syndication and First American which expressly required, as a "condition[] precedent to each disbursement," that First American provide "written affirmative title insurance coverage insuring against any lien . . . including, but not limited to, affirmative mechanics lien coverage as to all mechanics liens, as of the relevant advance date." (Dkt. #49-41 at 2-3.) This court also determined that BB Syndication had not exhausted all of the loan funds it had committed to Trilogy under their construction loan agreement (some $25 million still remained), and that BB Syndication had refused to advance any funds after January 5, 2009.

---

[8] This statement does not appear to have been articulated as a strict rule of title insurance policy interpretation, and would likely not apply if the insurer has -- implicitly or explicitly -- agreed to cover liens for which loan funds were not advanced. *See, e.g.*, *Home Fed. Sav. Bank v. Ticor Title Ins. Co.*, 695 F.3d 725 (7th Cir. 2012); *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F. Supp. 522 (W.D. Tenn. 1993)

On these limited facts, the court held that:

> In the final analysis, the record shows that BB Syndication likely "created" the liens filed against it by refusing to advance available funds it had committed to pay for work performed before its declaration of default. If so, First American is correct that Exclusion No. 3(a) applies in this case and there is no coverage. Still, having undertaken to disburse funds and obtain lien waivers for work funded out of loan proceeds advanced by BB Syndication, First American insured against liens filed for that work, as well as other liens filed through February 9, 2009, unless due to be funded out of loan proceeds not yet advanced by BB Syndication.
>
> Unfortunately, the court lacks sufficient information on this record to determine definitively the source and timing of the liens in dispute in bankruptcy.

(Summ. J. Decision, dkt. #83, at 25.)

C. October 19, 2011 Ruling on Duty to Defend

On October 19, 2011, this court held a status and scheduling conference at which it attempted to clarify its holding for the parties. The parties provided additional argument and the court made further factual findings, and ultimately held that First American had breached its duty to defend. (Dkt. #85.) The court's holding was premised on two grounds: (1) that First American's title insurance policy covered Ceco Concrete's lien against the West Edge property, and (2) that because there was legal and factual uncertainty about whether coverage existed at the time First American was tendered the defense, it had a duty to defend until it had obtained a formal determination of coverage. First American latched onto the first reason, addressing it in

a subsequent motion for reconsideration, but apparently neither party recognized the court's second reason, which has not substantially been addressed by either side.

OPINION

I. Coverage Under the Policy

A. Corrections to the Court's Earlier Holding

Before determining whether First American's insurance policy covered any of the liens filed against the West Edge project, the court makes two, non-dispositive corrections to its initial holding interpreting the insurance policy language. First, when the court stated that First American had "insured against . . . liens filed through February 9, 2009," it should have said that First American had insured against liens on work *performed* through February 9, 2009, not simply liens *filed* on or before February 9, 2009. This comes from the insurance policy itself, which excludes from coverage any lien "attaching or created subsequent to Date of Policy (*except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material*)." (*See* Title Policy Exclusion (3)(d), dkt. #18-1.) By statute, mechanics liens for improvements on new construction have priority over earlier liens and mortgages in Missouri, where the West Edge project was constructed. *See* Mo. Rev. Stat. § 429.050. Such liens are considered to relate back in time to the date when any person began the work on the improvement, regardless of when the liens were filed. *In re Bridge Info. Sys., Inc.*, 288 B.R. 548, 553 (Bankr. E.D. Mo. 2001). By issuing each date-down

endorsement, First American was agreeing to cover liens for services, labor or materials performed prior to that endorsement that relate back by statute.

Second, to be consistent with the rationale of *Bankers* and *Brown*, the first sentence of the court's holding should not have suggested that the date on which BB Syndication formally declared its loan in default was a factor in determining whether it "created" or "suffered" the liens at issue in this case. Any event that cancels or suspends duties owed by the lender to the borrower under a loan contract -- such as the borrower's default or the advent of a loan imbalance -- is potentially relevant to the question of whether the lender has breached a duty under the loan contract and has thus "created" or "suffered" a lien.

In this case, First American does not contend that BB Syndication breached a duty imposed by the loan contract. Instead, citing *Bankers* and *Brown*, BB Syndication maintains that liens were "created" by the lender's breach of duties owed to the insurer under their disbursement agreement. With those duties in mind, the date of default is not relevant and the court's proper focus is -- and was -- on whether the lender provided funds to cover the cost of all work performed before the last policy endorsement date. *See Brown*, 634 F.2d at 1105, 1110 (although lender had funded all draw requests prior to default and was not required under the loan contract to advance any money after borrower's default, disbursement agreement gave rise to a duty to fully fund all work performed through the insurer's last date-down endorsement).[9]

[9] In *Brown*, the Eighth Circuit mentioned that "the parties contemplated that [the lender] would provide adequate funds to pay for work completed prior to the default."

While these two changes alter the court's earlier formal holding to some degree, neither substantially affects the basis or reasoning of the court's decision, and neither impacts the outcome of this case in any dispositive way. (In other words, the court would come to the same conclusion under the literal terms of its earlier holding as it would under this more accurate, revised holding.) Nevertheless, for the sake of accuracy, the court's holding is revised to read:

> In the final analysis, the record shows that BB Syndication likely "created" all liens filed against it by refusing to advance available funds it had committed to pay for work performed before the final disbursement and associated date-down endorsement executed by First American. If so, First American is correct that Exclusion No. 3(a) applies in this case and there is no coverage. Still, having undertaken to disburse funds and obtain lien waivers for work funded out of loan proceeds advanced by BB Syndication, First American insured against liens filed for that work, as well as other liens based on work performed through February 9, 2009, unless due to be funded out of loan proceeds not yet advanced by BB Syndication.

B. Motion to Reconsider Ruling on the Ceco Concrete Lien

On October 19, 2011, this court held a status and scheduling conference, made additional factual findings, and concluded that First American's title insurance policy covered Ceco Concrete's lien against the West Edge property. (Dkt. #85.) In its motion for reconsideration of that decision, First American suggests that the parties did not come

---

634 F.2d at 1110. Given its placement near the end of the *Brown* opinion, this statement may *appear* to be a part of that court's holding, but ultimately is dicta, and potentially misleading dicta at that, since the court ultimately held that the lender had only created liens for work performed through the date of the last disbursement/policy endorsement (July 29, 1974), not through the date of default (August 2, 1974). *Id.*

to the scheduling and status conference prepared to address substantive issues and further contends that the court's decision, made without the benefit of a full factual record or of specific briefing, was in error. The point is well taken.

Contrary to BB Syndication's assertion, First American's motion for reconsideration is procedurally proper. "Federal Rule of Civil Procedure 54(b) provides that non-final orders 'may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.'" *Galvan v. Norberg*, 678 F.3d 581, 587 (7th Cir. 2012) (holding that a district court had the "discretionary authority" to reconsider its interlocutory order); Fed. R. Civ. P. 54(b). Motions to reconsider an existing non-final order are seldom granted and are to be used only "to correct manifest errors of law or fact or to present newly discovered evidence." *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987). This is a high bar, but not an inflexible one, particularly where, as here, the movant is correct on the merits and is relying on facts it did not previously have a full opportunity to present. In such a situation, the "only sensible thing for a trial court to do is to set itself right as soon as possible when convinced that the law of the case is erroneous." *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc.*, 632 F.2d 680, 683 (7th Cir. 1980).

First American's title insurance policy covers all liens filed for work performed through February 9, 2009, except for work that BB Syndication has not tried to pay for with available loan funds. By this standard, First American argues, the policy does not cover the Ceco liens, which arise from work left unpaid by BB Syndication. The first

Ceco lien was filed to cover work performed in July of 2008 for which payment had been requested in Trilogy's Draw Request No. 19. While BB Syndication initially released funds to meet that draw request, it ultimately demanded the money back and took pains to then maintain the Ceco payment in escrow, although it later released the rest of the Draw No. 19 funds. The second Ceco lien was filed on or before February 5, 2009, for which additional funds were placed in escrow and never released. BB Syndication initially held these funds in escrow because Trilogy was not willing to pass them on to Ceco -- Trilogy was then in negotiations with Ceco over the size of the bill. When Trilogy defaulted, however, BB Syndication still refused to release the funds for First American to discharge the Ceco liens. By this action, First American argues, BB Syndication "suffered" the Ceco liens to exist.

BB Syndication advances three arguments in response. First, it argues that when First American issued date-down endorsements expressly insuring over the Ceco liens on December 30, 2008, January 5, 2009, and February 9, 2009, it assumed unconditional responsibility for those liens. This argument mischaracterizes the import of the date-down endorsements, which were always issued subject to the same conditions and restrictions found in the original insurance contract. First American can, therefore, still avail itself of the Exclusion 3(a) defense that the insured-over liens were "created" or "suffered" by BB Syndication.[10] Equitable considerations also militate against BB

[10] Despite these limitations, First American's agreement to expressly insure over the two liens did provide value to BB Syndication -- First American was effectively covenanting that if BB Syndication released the funds from escrow, those funds would be adequate to fully discharge and/or defend against both of Ceco's lien claims.

Syndication's argument, it being undisputed that First American only agreed to insure over the liens because funds sufficient to cover the cost of work had been placed in escrow. The three date-down endorsements were each made in recognition of a total amount "advanced on the loan," and that amount apparently included the sum of money that was being held in escrow for Ceco. (*See* dkt. ##49-14, 49-16, 49-19.) When BB Syndication failed to use the escrowed funds to pay off the liens after Trilogy defaulted, it inequitably and unilaterally wiped out all of the protection the escrow account was plainly contemplated to provide to First American.

Second, BB Syndication argues that First American's interpretation of Exclusion 3(a) would have unreasonably required it to choose between (1) forfeiting insurance coverage because of the "created" or "suffered" defense, and (2) forfeiting its ability to withhold payment to a subcontractor during negotiations over a disputed claim. (Here, Trilogy was negotiating with Ceco over its liens.) This is at least partly a false dichotomy. In practice, BB Syndication was free to gain bargaining leverage against Ceco by withholding payment for as long as it liked -- which might have been indefinitely or at least up until the point of foreclosure, bankruptcy, or some other time when there was a pressing need to cure the lien -- provided the escrowed funds were ultimately released to pay Ceco for its work covered by a statutorily-senior lien. But the more fundamental problem with this argument is that ultimately the blame lies with BB Syndication for putting itself in this difficult position, having impliedly undertaken to provide sufficient funds to cover the bills for all outstanding work when it asked First American to insure

over all outstanding work prior to issuing each loan disbursement. Having agreed to Exclusion 3(a) as a sophisticated developer, BB Syndication took the risk that escrowing the funds available for payment of Ceco's work may backfire by destroying a later claim to coverage under the title insurance policy on Ceco's liens.[11]

Third, the court also disagrees with BB Syndication's assertion that this interpretation eviscerates the value of its title insurance. BB Syndication obtained insurance against one of the risks -- if not the primary risk -- that construction title insurance is meant to cover: defects in the payout process. *See* Michael F. Jones & Rebecca R. Messal, *Mechanics Lien Title Insurance Coverage for Construction Projects: Lenders and Insurers Beware*, 16 Real Est. L.J. 291, 311 ("[T]he purpose [of mechanics lien insurance] is to cover liens for work or materials *furnished and paid for*" [by the lender] . . . *not* cover loan shortfalls." (emphasis in original)).

C. Mark One and Rodriguez Liens

After considering the undisputed facts, the court also finds that a portion of the Mark One lien and the entire Rodriguez lien were "suffered" by BB Syndication. As will also be explained, the remainder of the Mark One lien was not covered by the title insurance policy in the first instance.

---

[11] Neither *Bankers* nor *Brown* -- upon which this court relied in determining the scope of the insurance policy's coverage -- had occasion to consider the arguable dilemma that BB Syndication has identified, but nothing in those two opinions suggests that a lender in BB Syndication's position does not "create" or "suffer" a lien simply because paying for the work conflicts with its ability to pursue a genuine, good-faith dispute with a subcontractor.

BB Syndication contends that it did not "create" or "suffer" these liens because "the claims of Mark One and Rodriguez were included in the last two draw requests that were funded by BB [Syndication] prior to cessation of funding." (Pl.'s Reply Br., dkt. #123, at 3.) "The last two draw requests" is a reference to Trilogy's Draw Requests 22 and 23, both of which asked for additional loan funds to reimburse Mark One and Rodriguez for improvements to the West Edge project. Assuming that BB Syndication fully funded both draw requests does not, however, lead to the conclusion that BB Syndication advanced funds to pay for *all* work performed by the two sub-contractors before February 9, 2009. Indeed, the undisputed facts show that BB Syndication did *not* provide sufficient funding to fully cover Mark One's and Rodriguez's claims for work done before First American's last date-down endorsement.

The bankruptcy court found, and the parties do not dispute, that the Rodriguez lien was filed because of non-payment for work performed before September 25, 2008. In support of its lien, Rodriguez demonstrated that as of December 11, 2008, it was owed $1,366,984.25, but that on December 19, 2008, it received only $788,620.67 from Trilogy (for which Trilogy was apparently later reimbursed by BB Syndication in Draw Requests 22 and 23), leaving a remainder of $578,363.58 in unpaid work completed before the last endorsement. (*See* dkt. ##129-1 at 8; 56-1; 56-2; 56-5.) Thus, even *after* funding Draw Requests 22 and 23, BB Syndication was obligated to advance an additional $578,363.58 unless Trilogy or some other party to the project was willing to put up the money. And in the end, no one came through with these funds. Since Draw

Request 23 was the last payment BB Syndication made regarding the Rodriguez work, it did not fully fund Rodriguez's outstanding construction costs and the Rodriguez lien was, therefore, "suffered" by BB Syndication.

As for the $551,555.58 subject to the Mark One lien, the majority of this amount, $509,767, was for work done while J.E. Dunn was the general contractor, and thus was work completed before First American's last date-down endorsement. Like the Rodriguez lien, BB Syndication never advanced funds to pay for this work. The December 31, 2008, settlement agreement between Trilogy and Mark One, the terms and accuracy of which are also undisputed by either side, provides all the material information. As previously described, this settlement agreement was designed to resolve Mark One's outstanding bill for work done under the direction of the first general contractor, J.E. Dunn. The agreement called for Trilogy to promptly pay Mark One $2,020,136; Trilogy did so; and BB Syndication apparently reimbursed Trilogy for $1.7 million of this amount in Draw Request 22. (*See* dkt. #56-1.) But the agreement also explicitly recognized that after the $2 million payment, Mark One would still be owed half of the retention held over from its work for J.E. Dunn, as well as half of the discount it gave Trilogy on the after-retention value of its work performed under J.E. Dunn -- in total, $509,767. This money remained still unpaid in March of 2009, well after BB Syndication, by its own admission, "ceased funding." Thus, BB Syndication does not, and cannot, claim that it ever advanced loan funds to pay Mark One the remainder due under the Trilogy settlement agreement.

The other part of the Mark One lien, $41,788.58, represents work performed between February 9, 2009 and March 5, 2009. BB Syndication probably did not "create" or "suffer" this portion because it never required First American to insure over the relevant work. However, it is irrelevant whether BB Syndication "created" or "suffered" this part of the lien, because First American never issued a date-down endorsement during or after this period. Thus, this portion of the lien would appear to fall outside the scope of the insurance coverage.

D. Other Liens

As previously noted, First American's insurance policy covers work performed before the last date-down endorsement on February 9, 2009, and that BB Syndication has actually advanced loan funds to cover. In addition to the Ceco, Mark One and Rodriguez liens discussed above, sub-contractor A2MG and some twenty other sub-contractors also filed liens against the West Edge property for work done before that date. Unfortunately for BB Syndication, there is no evidence contradicting First American's assertion that it never advanced funds to pay off the work underlying these liens. The court, therefore, concludes that all of these liens were "created" or "suffered" by BB Syndication and are also excluded from the coverage of the insurance policy.

II. Duty to Indemnify and Duty to Defend

A. Choice of Law

In its initial summary judgment opinion, the court made a limited ruling on choice of law matters, deciding only that Wisconsin law controlled for purposes of interpreting Exclusion 3(a) of the parties' insurance policy. Now that it is necessary to issue a comprehensive ruling on First American's duties to defend, indemnify and deal in good faith -- matters where Wisconsin and Missouri law materially diverge -- a formal choice of law analysis is in order.

In a diversity case, a federal court must "appl[y] the choice-of-law rules of the forum state to determine which state's substantive law applies." *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 547 (7th Cir. 2009) (citation omitted). Wisconsin's choice of law rule for contract disputes is as follows:

> The "first rule" in the choice-of-law analysis is that the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance. In a close contracts case, if it is not clear that the nonforum contacts are of greater significance, then the court typically analyzes as a tie-breaker the five choice-influencing factors developed in *Heath v. Zellmer*, 35 Wis.2d 578, 151 N.W.2d 664, 672 (1967). However, if it is clear that the nonforum contacts are of greater significance in a contracts case, then Wisconsin courts will apply the law of the nonforum state without analyzing the *Heath* factors. Relevant contacts include: (a) the place of the contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter; and (e) the respective domiciles, places of incorporation and places of business of the parties.

In re Jafari, 569 F.3d 644, 649-50 (7th Cir. 2009) (internal quotation and citations omitted).

Applying the initial grouping-of-contacts test to the instant facts, it becomes clear that, as between Wisconsin and Missouri, the latter enjoys the stronger contacts with the insurance policy. On the one hand, the parties to the insurance policy are both domiciled in Wisconsin, and the policy was formally negotiated, issued and received in Wisconsin.[12] Moreover, all loan disbursements were performed by First American representatives in Madison, Wisconsin, pursuant to the parties' disbursement agreement. On the other hand, prior to actually issuing the insurance policy, First American prepared a Commitment for Title Insurance which was drafted, searched and examined by First American employees located in Missouri and then electronically transmitted to First American's offices in Wisconsin. Missouri was also the place of performance for First American's actual or asserted contractual obligation to defend BB Syndication's mortgage against other lien holders. Finally, the insured risk was located entirely in Missouri: First American agreed to insure for damages caused by liens created by operation of Missouri law, associated with Missouri real property, arising out of events and transactions occurring in Missouri.

This last consideration is particularly significant because under Wisconsin law the location of the insured risk "is given greater weight than any other contact." *Bradley Corp. v. Zurich Ins. Co.*, 984 F. Supp. 1193, 1197-98 (E.D. Wis. 1997) (citing *Utica Mut. Ins. Co. v. Klein & Son, Inc.*, 157 Wis.2d 552, 559, 460 N.W.2d 763 (Wis. Ct. App.

[12] The weight of this fact is lessened somewhat by the fact that BB Syndication appears to have been largely a clearinghouse for the project -- the loans themselves were owned by "participant banks" around the country. Bankers Bank of Kansas, for example, bought 50% of the Trilogy loan and then resold it. (*See* dkt. #41 at 20-24.)

1990)). Given Missouri's stronger claim to the subject matter of the contract, the court believes that Missouri law appropriately governs the insurance dispute in this case. Assuming for the sake of argument that the analysis does not end at the balancing-of-contacts stage, the court also finds that Missouri's is the proper body of law under the *Heath* choice-influencing factors. In title insurance cases such as this, applying the law of the state where the covered property is located makes the best sense because it enhances predictability for the parties. It also generally simplifies the judicial task because the property law of the state where the risk is located is often bound up closely in the case. Moreover, this rule would not significantly disadvantage Wisconsin's governmental interests because Wisconsin's interest is presumably strongest with respect to insured property *within* its borders, and weaker with respect to title insurance claims relating to property located elsewhere.

B. Duty to Indemnify

Under Missouri law, an insurer's right to contest indemnity coverage is not tied to its duty to defend -- that is, even if the court finds that First American breached its duty to defend, First American is entitled to a separate determination of its duty to indemnify. *See Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966, 971 (8th Cir. 1999) ("[T]he Court held that the insurer had breached its duty to defend and turned to the question of damages: 'That leaves the question of whether or not the evidence showed that the loss was within the coverage.'" (quoting *Butters v. City of Independence*, 513 S.W.2d 418, 425

(Mo. 1974)); *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 562 (Mo. Ct. App. 1965) ("[F]ailure to defend where there was in fact coverage constituted a breach of contract for which the company would be held for all damages reasonably flowing from such breach so as to put the insured in as good a position as he would have been in if the company had performed its contract.").

Unlike the duty to defend, which "arises when the insured is first sued and thus is understandably broader," the duty to indemnify is perfectly coextensive with the scope of policy coverage, considered in light of all relevant facts. *Esicorp*, 193 F.3d at 969. Having considered all of the facts and determined, above, that none of the liens asserted against the West Edge property in the Mark One foreclosure action or the Trilogy bankruptcy were covered by the title insurance policy, First American necessarily had no duty to indemnify BB Syndication for any losses suffered because of those liens.

C. Duty to Defend

The question of whether First American breached its duty to defend against these same lien claims is much closer. It is an axiom of insurance law that the initial duty to defend is broader than the scope of policy coverage. In fact, it is broader in multiple respects. Under Missouri law, "[t]he presence of some insured claims in the underlying suit gives rise to a duty to defend, even though uninsured claims or claims beyond the coverage may also be present." *Lampert v. State Farm Fire & Cas. Co.*, 85 S.W.3d 90, 93 (Mo. Ct. App. 2002). Moreover, the initial duty to defend must be determined based on

the allegations of the complaint and "the actual facts known to the insurer or which should have been reasonably known to the insurer . . . at the time the [underlying] action is commenced," rather than based on all facts that may later come to light. *Hawkeye-Sec. Ins. Co. v. Iowa Nat' Mut. Ins. Co.*, 567 S.W.2d 719, 720-21 (Mo. Ct. App. 1978). Finally, for purposes of the duty to defend a claim is covered even if it is only "potentially or arguably within the policy's coverage." *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 624-25 (8th Cir. 1981).

These principles – particularly the last two – provided an alternative and still valid basis for this court's October 19, 2011, holding that First American had breached its duty to defend. At that time, it seemed apparent to the court that when BB Syndication first tendered its defense, First American's case for a coverage exception did not rest on solid factual or legal grounds. Notably, the court had already determined in its first summary judgment decision that it did not have enough facts to decide whether each of the disputed liens was subject to coverage -- given the absence of the necessary facts even at that late date, it seemed very unlikely that they were available for First American's consideration when BB Syndication initially tendered its defense. Moreover, although First American plainly believed it had enough information to act when it denied coverage, it has not shown the court what information it based its decision on. *See Hawkeye-Sec. Ins. Co.*, 567 S.W.2d at 720-21 (insurer's duty to defend is judged based on the allegations of the complaint in the tendered litigation, and "the actual facts known to the insurer or which should have been reasonably known to the insurer . . . at the time the

[underlying] action is commenced"); *Lampert v. State Farm Fire and Cas. Co.*, 85 S.W.3d 90, 93 (Mo. Ct. App. 2002) ("The insurer's duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case.").

Even now, in light of all available facts, it still is at least debatable from a legal standpoint whether BB Syndication had "created" or "suffered" the disputed liens, although the court has held that First American has the better of that debate. This in itself creates a duty to defend, because as long as a claim "is potentially or arguably within the policy's coverage" at the outset, the duty to defend exists. *Russell Stover Candies*, 649 F.2d at 624-25.

Having reaffirmed its earlier holding that First American breached its duty to defend, and having cited fairly well-defined principles of Missouri insurance law in support of its holding, the court acknowledges that a good argument can be made as to why these principles should not apply in this case. When Wisconsin developed its common law rules broadening the scope of the duty to defend and fixing it as of the date of tender by the insured, it apparently did so in response to a concern that without such rules an "insurance company could refuse to defend in the hope that the facts as they emerged in the litigation that its insured had asked it to defend would reveal that there was no coverage." *Guaranty Bank v. Chubb Corp.*, 538 F.3d 587, 593 (7th Cir. 2008) (discussing Wisconsin law). Presumably, Missouri's law (which is somewhat less strict than Wisconsin's) was created to address similar policy considerations. Thus, in developing the rules that this court relies upon for its holding, Missouri courts were

probably not thinking about cases such as this one, where the question of coverage was -- although unsettled at the time the defense was tendered -- unrelated to the facts or theories at issue in the dispute the insurer was being asked to defend. Still, it is not for this court to carve out exceptions to Missouri's common law without exceedingly compelling justifications, which are absent here. The court therefore abides by its earlier holding.

III. Bad Faith and Vexatious Refusal to Pay Claims

The Wisconsin tort of insurance bad faith requires "the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 92, 271 N.W.2d 368, 377 (Wis. 1978). Missouri has no comparable common law tort for bad faith refusal to honor a first-party insurance claim, *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 67-68 (Mo. 2000) (en banc), but it does offer a statutory remedy for an insurer's vexatious refusal to pay a claim, *see* Mo. Rev. Stat. § 375.420. Since First American plainly had at least a reasonable basis for denying BB Syndication's tender of its litigation defense, no claim for bad faith or vexatious refusal can lie under either Wisconsin or Missouri law. After all, this court has since found that the litigation claims are not covered under First American's insurance policy.

IV. Damages

BB Syndication has asked for an award of $247,763.25, representing "all the fees and expenses which BB [Syndication] paid to defend its deed of trust against priming construction liens in the Missouri litigation up to the [Bankruptcy] Court Order dated December 29, 2011, where the coverage of the possible liens was finally decided." (Dkt. # 105 at 7.)[13] In response, First American points out that although BB Syndication has established the amount of its total requested attorneys' fee bill, it has not filed any affidavits, invoices, statements, summaries, explanation of rates and hours, or any other itemized breakdown that would establish the *reasonableness* of the fees and expenses charged. First American seems to suggest that BB Syndication should be treated the same as a litigant who moves for reasonable attorneys' fees pursuant to a fee-shifting statute.

But the situation here is different -- the requested fees represent BB Syndication's damages for breach of contract, so the court need not engage in the type of exacting reasonableness analysis usually given to a fee-shifting request. This reasoning does not appear to run afoul of the Missouri law principle that "where . . . the natural and proximate result of a wrong or breach of duty is to involve the wronged party in collateral litigation, reasonable attorneys' fees necessarily and in good faith incurred in protecting

---

[13] BB Syndication seeks an additional $624,355,023 in attorneys' fees and expenses it claims to have paid in connection with this action, as damages either under its Wisconsin law bad faith claim or under its Missouri law vexatious refusal to pay claim. (Doc. # 105 at pp. 15-17.) Because those claims fail at the liability stage, an award of damages on that basis is not appropriate. Moreover, under "Missouri law, an insurer that breaches its duty to defend is [not] liable . . . for those attorneys' fees incurred in a subsequent suit to establish that the insurer breached its duty to defend." *Fleishour v. Stewart Title Guar. Co.*, 743 F. Supp. 2d 1060, 1072 (E.D. Mo. 2010).

himself from the injurious consequence thereof are proper items of damages," *Johnson v. Mercantile Trust Company National Association*, 510 S.W.2d 33, 40 (Mo. 1974), because the breach of the duty to defend did not "involve" BB Syndication in any collateral action, it simply made BB Syndication pay for its own counsel in an existing action. Given the nature of the damages award, the fees that BB Syndication actually paid are presumptively appropriate, subject only to the court's review for evidence of bad faith price gouging or unreasonable failure to mitigate, which First American has wholly failed to establish.

First American also argues that BB Syndication must submit detailed fee records so that the court can isolate the work done on the limited number of liens for which First American owed a duty to defend. This argument is rejected because First American is liable for the costs of defending against *all* of the liens at issue in the underlying Missouri lawsuits. First American's refusal to defend hinged entirely on the theory that BB Syndication's failure to pay off the liens triggered a sweeping coverage exclusion. Had the defense failed, First American's policy would have been found to cover all of the liens filed against the West Edge property. As previously noted, the defense was uncertain from a legal and factual standpoint at the time BB Syndication tendered its defense. Therefore, First American breached its the duty to defend with respect to all of the liens disputed by BB Syndication in the Trilogy adversary action, as well as the single lien at issue in the Mark One foreclosure action. No parsing of causes of action is necessary.

First American also argues that BB Syndication must submit detailed billing records to allow the court to identify and exclude claims for work done before and after litigation efforts related to the relevant liens. This is a valid argument as a general proposition, but unconvincing as to some of the specific points proposed by First American. For example, First American criticizes BB Syndication for seeking reimbursement for attorneys' fees charged for through December 29, 2011, when the Ceco lien was disposed of by the bankruptcy court on March 16, 2011. First American believes that the duty to defend applies -- if at all -- only to the Ceco lien, but this is not the case. The duty to defend applies to all of the disputed liens and except for the Ceco lien the rest of the disputed liens were conclusively addressed by the bankruptcy court on December 29. Therefore, BB Syndication is correct and December 29, 2011, is an appropriate date to stop calculating fees.

First American further notes that BB Syndication has not shown when it began recording the charges included in its fee reimbursement claim, arguing that BB Syndication has no right to reimbursement for work done before January 24, 2010, the date on which the Trilogy adversary action was filed. This argument is a little too rigid, in the court's opinion, because work performed in immediate preparation for anticipated litigation can be lumped in with reasonable litigation costs. But to reiterate, First American's basic point -- that some review of the fees is necessary -- is a valid one, and will be required in order to ensure that all of the claimed work was done to defend BB Syndication against the disputed liens.

In summary, the court will not issue a damages award for breach of the duty to defend until it has reviewed the timing, hours, and rate charged by BB Syndication's counsel in the underlying foreclosure and adversary actions. The court's review will not impose any stringent standard for reasonableness, but will simply confirm that the hours and rates billed were paid by the client, and that billed hours correspond to work performed in defending against the priority of the liens filed against the West Edge property. If BB Syndication is concerned about the confidentiality of this information it may file the billing records under seal.

ORDER

IT IS ORDERED that:

(1) defendant First American Title Insurance Company's motion for reconsideration (dkt. #93) and motion for summary judgment (dkt. #107) are GRANTED IN PART AND DENIED IN PART;

(2) plaintiff BB Syndication Services, Inc.'s motion for partial summary judgment (dkt. #102) is GRANTED IN PART AND DENIED IN PART;

(3) plaintiff must submit detailed copies of the billing records used to establish its request for damages (including the timing and amount of hours billed), along with any desired briefing in support of its fee request, by February 15, 2013;

(4) defendant will have until February 28, 2013, to submit a brief in opposition to the attorneys' fees; and

(5) the trial and the final pretrial conference, scheduled for Tuesday, January 22 and Thursday, January 17, respectively, are cancelled in light of this order.

Entered this 11th day of January, 2013.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge