STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson, Plaintiffs, vs. Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc., Defendants.	CASE NUMBER: 2016-CP-26-4464 **ORDER ON DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS**
Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc. Third-Party Plaintiffs, vs. Great American Insurance Company, Third-Party Defendant.	

I. INTRODUCTION

This matter is before the Court on Defendants'/Third-Party Plaintiffs' Motion for Judgment on the Pleadings as to Third-Party Defendant, Great American Insurance Company's ("Great American"), duty to defend Defendants/Third-Party Plaintiffs under the First and Fourth causes of action in Defendants'/Third-Party Plaintiffs' Third-Party Complaint ("Motion"), Great American's Motion for Leave to Alter or Amend, and Defendants'/Third-Party Plaintiff Tilghman Beach's Motion to Compel. For the reasons set forth below, the Court holds that Great American had, and has, a duty to defend Defendants/Third-Party Plaintiffs against the allegations in Plaintiffs' original Complaint in this matter, and the allegations in the Complaints[1] subsequently filed by Plaintiffs. At this time, the Court is not ruling on the damages that might have been caused to Defendants/Third-Party Plaintiffs by Great American's failure to defend them in this matter. Similarly, the Court is not, in any way, ruling on whether Great American has a duty to indemnify Defendants/Third-Party Plaintiffs from any judgment that Plaintiffs might obtain in this case. Finally, the Court is not ruling on who has the right to control the defense of this matter as between Great American, the Defendants/Third-Party Plaintiffs, or the commercial general liability ("CGL") carrier, Lexington Insurance Company ("Lexington").

II. PROCEDURAL BACKGROUND

On July 7, 2016, Plaintiffs filed their original Complaint in the Horry County Court of Common Pleas against Defendants/Third-Party Plaintiffs, Tilghman Beach and Racquet Club Condominium Association, Inc. ("TBRC") and the Individual Defendants.[2] The original

[1] Plaintiffs' original Complaint, Second Amended Complaint and Third Amended Complaint are referred to herein collectively as "Complaints."

[2] James H. Austin, III; Daniel G. Coe; C. Doug Madison; George P. White; and Steele Brice Windle, III are current and former members of the Board of Directors of TBRC that were named as defendants in this action, and are referred to herein as "Individual Defendants."

Complaint alleged numerous causes of action,[3] all of which were grounded, in part, on the assertion that Defendants/Third-Party Plaintiffs failed to maintain adequate reserves for the operation, maintenance, and repair of the common elements at Tilghman Beach and Racquet Club and otherwise failed to adequately maintain the common elements of the property.[4] The original Complaint sought damages against Defendants/Third-Party Plaintiffs, including TBRC, on behalf of the individual unit owners, including alleged diminution in value of Plaintiffs' individual units. The amended Complaints subsequently filed by Plaintiffs contain essentially the same allegations regarding the condition of the property at Tilghman Beach and Racquet Club, the acts of Defendants/Third-Party Plaintiffs, and seek the same relief.

With the Court's permission, on May 2, 2017, Defendants/Third-Party Plaintiffs filed the Third-Party Complaint against Great American, alleging claims for breach of contract, attorney's fees under Section 38-59-40 of the South Carolina Code, bad faith, and declaratory judgment. Great American filed an Answer and Counterclaim to the Third-Party Complaint and Counterclaim ("Answer") on July 10, 2017. On August 30, 2017, Great American filed an Amended Answer and Counterclaims to Defendants'/Third-Party Plaintiffs' Third-Party Complaint ("Amended Answer"). With the Court's permission, on April 23, 2018, Great American filed a Second Amended Answer and Counterclaims to Defendants'/Third-Party Plaintiffs' Third-Party Complaint ("Second Amended Answer"), which varied from the Amended Answer only in two respects: (1) the addition of an "other insurance" defense to its alleged duty to defend, and (2) the removal of a counterclaim for rescission as to one Great American policy.

III. ADMITTED FACTS

[3] Plaintiffs' original Complaint alleged causes of action for: (1) Negligence/Gross Negligence, (2) Breach of Master Deed's Covenants and Restrictions, (3) Declaratory Judgment, (4) Injunctive Relief, and (5) Specific Performance.

[4] Compl. ¶¶ 26, 27, 31, 50.g., 50.k., 55, and 62.e.

1. Great American's Amended Answer admits the authenticity of the "***ExecPro*** Community Association Solution Insurance Policy," #EPP3654704-01, issued by Great American to TBRC a/k/a "Tilghman Beach & Racquet Club HOA, Inc.," for policy period February 10, 2016 to February 10, 2017, which is attached as Exhibit A to the Third-Party Complaint (hereinafter "the 2016 Great American Policy").[5]

2. Great American's coverage denial letters, whose authenticity is not disputed, specifically state that the relevant **Policy Period**[6] is the period covered by the 2016 Great American Policy.

3. Great American's Answer and Amended Answer repeatedly reference the controlling policy number as EPP3654704-01, which is the policy number for the 2016 Great American Policy.[7]

4. In its Amended Answer, Great American admits the authenticity of the Complaints filed by Plaintiffs in the underlying litigation.[8]

5. Great American's Amended Answer admits that:

(a) Defendants/Third-Party Plaintiffs are **Insureds**,[9]

(b) the Complaints in this matter allege a **Claim** during the **Policy Period** of the 2016 Great American Policy,[10] and

(c) the Complaints allege **Wrongful Acts** by the **Insureds.**[11]

---

[5] Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl. ("Am. Answer and Countercl.") ¶¶ 5 and 34.
[6] All bolded, capitalized terms are defined by the 2015 and 2016 Great American policies, and this Court adopts the meaning of the terms given to them therein.
[7] *See* Third-Party Def.'s Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl. ("Answer and Countercl. ") ¶¶ 6, 8, 9, and 27; Am. Answer and Countercl ¶¶ 6, 8, 9, 27.
[8] *See* Am. Answer and Countercl. ¶¶ 7 & 38.
[9] *Id.* at ¶¶ 5 & 37.
[10] *Id.* at ¶ 8.
[11] *Id.* at ¶ 9.

6. Great American further admits receiving the demand letters from the Defendants/Third-Party Plaintiffs attached as Exhibits E, F and G to the Third-Party Complaint, and admits that it denied coverage and a defense to its **Insureds**.[12]

7. Finally, Great American admits the authenticity of an August 1, 2016 letter in which Great American acknowledges receiving notice of the lawsuit by e-mail dated July 13, 2016.[13] Great American also admits the authenticity of a November 3, 2016 letter in which it was sent a copy of the Second Amended Complaint in this matter.[14]

IV. THE COURT'S RULINGS

A. The General Standard for the Duty to Defend.

Under South Carolina law, a liability insurer like Great American owes two (2) separate and distinct duties to its insured, one of which is that the insurer must defend any suit or claim *possibly* payable under the terms of the liability policy in question.[15] "The defense of . . . suits by the insurer is a valuable right of the insured for which [the insured] pays and to which [the insured] is entitled by the very words of the policy."[16] The insurer's duty to defend is distinct from, and broader than, the duty to indemnify—the duty to pay the judgment against the insured.[17]

The determination of whether there is a duty to defend is made by examining the allegations of the underlying complaint against the insured.[18] Both the underlying complaint and the insurance policy are construed liberally in favor of the duty of the insurance company to defend its insured,

---

[12] *Id.* at ¶ 10.
[13] *Id.* at ¶ 11.
[14] *Id.* at ¶ 10.
[15] *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 542-544, 677 S.E.2d 574, 578 (2009).
[16] *Nationwide Mutual Ins. Co. v. Simmonds*, 315 S.C. 404, 407, 434 S.E.2d 277, 278 (1993) (quoting *American Casualty Company v. Howard*, 187 F.2d 322, 327 (4th Cir.1951)).
[17] *City of Hartsville*, 382 S.C. at 544; 677 S.E.2d at 578; *Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 809 F. Supp. 2d 449, 457 (D.S.C. 2011).
[18] *City of Hartsville,* 382 S.C. at 544; 677 S.E.2d at 578.

with all doubts resolved in the insured's favor.[19] The substantive factual allegations of the underlying complaint, not the titles of the causes of action, control whether there is a duty to defend.[20]

If the underlying complaint against the insured creates "a *possibility* of coverage under the policy, the insurer is obligated to defend."[21] "[T]he duty to defend is triggered where the underlying complaint includes *any allegation* that raises the *possibility of coverage*."[22] If the underlying complaint contains an allegation or allegations that raise the possibility of coverage, the insurer cannot refuse to defend its insured even if there are other allegations in the complaint that are not covered by the policy.[23] Stated another way, an insurance company can refuse to defend its insured only if the insurance company can show, as a matter of law, that the claims in the underlying complaint do not possibly fall within any coverage provision of the policy.[24]

As will be discussed later in this Order, Great American's refusal to defend Defendants/Third-Party Plaintiffs in this case is based on exclusions which appear in the 2016 Great American Policy. Under South Carolina law, an insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded from the policy.[25] However,

---

[19] *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010); *Darwin Nat. Assur. Co. v. Matthews & Megna LLC*, 36 F.Supp.3d 636, 655 (D.S.C. 2014).
[20] *City of Hartsville*, 382 S.C. at 544-45, 677 S.E.2d at 579.
[21] *City of Hartsville*, 382 S.C. at 543, 677 S.E.2d at 578 (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980)) (emphasis added).
[22] *Auto-Owners Ins. Co. v. Newsome*, No. 4:12-cv-00447-RBH, 2013 WL 3148334, at *4 (D.S.C. June 19, 2013) (emphasis added).
[23] *Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994), *aff'd in part*, 321 S.C. 310, 468 S.E.2d 304 (1996).
[24] Vol. 3 Jeffrey E. Thomas, New Appleman on Insurance Law Library Edition, § 17.01[2][a] (LexisNexis); *see also Blackhawk-Cent. City Sanitation Dist. v. Am. Guarantee & Liab. Ins. Co.*, 214 F.3d 1183, 1188 (10th Cir. 2000) (citing references omitted).
[25] *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327 (1999).

three (3) additional legal principles bear mentioning on the question of whether exclusions in the 2016 Great American Policy excuse Great American's duty to defend in this case.

First, policy exclusions are construed very narrowly and "'most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.'"[26] Second, each exclusion in the policy must be read and applied independently of every other exclusion.[27]

Third, an insurer can refuse to defend based on a policy exclusion only if the *only* possible construction of the underlying complaint is that *all* allegations and claims fall *totally* within the express language of the cited exclusion.[28] To justify the refusal to defend the insured, all the claims in the underlying complaint must be "unambiguously excluded" by the express terms of the cited exclusion.[29]

B. A Ruling at this Time is Procedurally Appropriate.

Great American incorrectly contends that the current Motion is procedurally inappropriate. First, Rule 12(c), SCRCP, clearly contemplates that a plaintiff may move for judgment on the pleadings because it provides that, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." (emphasis added).

Great American argues that the current Motion is inappropriate because it would not grant total relief on all causes of action in the Third-Party Complaint. However, Great American ignores the provisions of the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-

---

[26] *Auto Owners Ins. Co. v. Personal Touch Med. Spa, LLC*, 763 F.Supp.2d 769, 780 (D.S.C. 2011) (citing references omitted).
[27] *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009).
[28] *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 312, 476 N.E.2d 272, 276 (1984); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204–05 (2d Cir. 1989) (citing references omitted); *Haygood v. Dies*, 174 So. 3d 1211, 1214 (La. App. 2 Cir. 2015) (quoting *Vaughn v. Franklin*, 785 So. 2d 79, 88 (La. App. 1st Cir. 2001)).
[29] *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008).

53-10 *et seq.*, which is the basis for the Fourth Cause of Action in the Third-Party Complaint. Specifically, § 15-53-20 provides that "[c]ourts of record within their respective jurisdiction shall have power to declare rights, status or other legal relations whether or not further relief is or could be claimed."[30] Further, a judgment on the Fourth Cause of Action for declaratory judgment is appropriate under Rule 54(b), SCRCP, because there is no reason for delay given that the duty to defend is determined by the allegations of the underlying Complaints and the 2016 Great American Policy, both of which are admitted by Great American.

Great American also argues that the Motion should not be granted because of Great American's pending Rescission Counterclaims. However, the law is well-settled that an insurer's present duty to defend the insured under a liability policy is unaffected by an unproven claim for rescission of that policy.[31] Additionally, the Court notes that, in its Second Amended Answer, Great American is no longer asserting a rescission counterclaim as to the 2016 Great American Policy, which is the controlling policy.

C. Coverage Provisions of the 2016 Great American Policy.

"Section I. Insuring Agreements" in the 2016 Great American Policy provides that Great American "has the right and duty to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent."[32] Great American's Amended

---

[30] S.C. Code Ann. § 15-53-20 (emphasis added).

[31] *Fed. Ins. Co. v. Tyco Int'l Ltd.*, 2 Misc. 3d 1006(A), 784 N.Y.S.2d 920 (Sup. Ct. 2004); *see also Gon v. First St. Ins. Co.*, 871 F.2d 863, 864–65 (9th Cir. 1989); *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F.Supp. 1334, 1345–46 (D.D.C. 1986), *rev'd in part on other grounds*, 944 F.2d 940 (D.C.Cir. 1991); *Natl. Union Fire Ins. Co. of Pitt. v. Brown*, 787 F.Supp. 1424, 1427 n. 8 (S.D.Fla. 1991); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F.Supp. 1139, 1151–52 (W.D.Mich. 1988); *Hoechst Celanese Corp. v. Natl. Union Fire Ins. Co. of Pitt.*, 1994 WL 721618 at *4 (Del.Super.Ct. 1994); *accord Natl. Union Fire Ins. Co. of Pitt. v. Rhone–Poulenc Basic Chems. Co.*, 1992 WL 22690 at *5–*8 (Del.Super.Ct. 1992).

[32] Defs.'/Third-Party Pls.' Third-Party Compl., Ex. A, p. 1 of 11; Am. Answer and Countercl. Ex. 2, p. 1 of 11.

Answer does not dispute that the claims in the underlying Complaints fall within the general coverage provisions of the 2016 Great American Policy and raise the "possibility of coverage" under that policy.

D. Exclusions in the 2016 Great American Policy.

In its Amended Answer, Great American asserted four (4) exclusions as the basis for its refusal to defend: (1) Exclusion D.(2) (property damage), (2) Exclusion G (water intrusion), (3) Exclusion H (for the benefit of the HOA), and (4) Exclusion C.(1) (prior claims of which HOA had notice). In their Supporting Memorandum,[33] Defendants/Third Party Plaintiffs provided specific arguments on why each of these four (4) exclusions did not apply to at least some of the allegations in Plaintiffs' Complaints. In its Opposition Memorandum,[34] Great American only asserted Exclusion D.(2) and a new "other insurance" defense, based on Exclusion B and the definition of "**Costs of Defense**" in the 2016 Great American Policy, each of which will be specifically discussed in detail below. Given that it has the burden of proving that each Exclusion applies to the claims in Plaintiffs' Complaints,[35] Great American's failure to argue or mention Exclusions C.(1), G. and H. in its Opposition Memorandum is an abandonment of those three (3) Exclusions on the question of the duty to defend. Further, Great American has failed to demonstrate that all of the allegations in Plaintiffs' Complaints fall exclusively within the unambiguous terms of Exclusions C.(1), G. and H. when these Exclusions are strictly construed

[33] Defendants'/Third-Party Plaintiffs' Memorandum in Support of Defendants'/Third-Party Plaintiffs' Motion for Judgment on the Pleadings as to Defendants'/Third-Party Plaintiffs' Third-Party Complaint is referred to herein as "Supporting Memorandum."
[34] Third-Party Defendant's Memorandum in Opposition to Defendants'/Third-Party Plaintiffs' Motion for Judgment on the Pleadings is referred to herein as "Opposition Memorandum."
[35] *Auto Owners Ins. Co.*, 763 F.Supp.2d at 780 (citing references omitted).

against Great American, and Plaintiffs' Complaints are broadly construed in favor of the duty to defend.

1. Exclusion D.(2) - The "Property Damage Exclusion."

Exclusion D.(2) provides that the 2016 Great American Policy "does not apply to any **Claim** made against any **Insured**: . . . D. based on, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: . . . (2) damage to or destruction of any tangible property or the loss of use of any tangible property . . . ."[36] Exclusion D.(2) does not excuse Great American's duty to defend because not all of the allegations in Plaintiffs' Complaints unambiguously fall within the terms of Exclusion D.(2), especially when the Complaints are construed broadly in favor of the duty to defend.

First, because the terms "damage" and "destruction" in Exclusion D.(2) are not expressly defined in the 2016 Great American Policy, the words are given their plain, ordinary, popular dictionary meaning.[37] These plain, ordinary definitions clearly demonstrate that the terms "damage" or "destruction", especially when Exclusion D.(2) is strictly and most strongly construed against Great American, require allegations of some type of specific causative action or event.[38] "Deteriorate", on the other hand, is defined as "[t]o diminish or impair in quality, character or value" or "[t]o grow worse, degenerate" as in "time and neglect have deteriorated the property" or "the nation's highways are deteriorating at a rapid pace."[39]

Construing Plaintiffs' Complaints broadly in favor of the duty to defend, Plaintiffs do not allege that there was a single event or incident causing damage to, or destruction of, tangible

---

[36] Am. Answer and Countercl., Ex. 2, p. 6 of 11.
[37] *American Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628, 663 S.E.2d. 492, 495 (2008).
[38] The American Heritage Dictionary of The English Language, 5th Ed. (2016) at 457, 493.
[39] *Id.* at 494.

property. Instead, the Complaints allege that Defendants/Third-Party Plaintiffs breached their duties by failing to maintain the property since its inception in 1982-1983, and, as a result, the property has *deteriorated* and is now in poor condition.[40] If Great American intended Exclusion D.(2) to apply to gradual deterioration, or the deterioration of tangible property over time, then it should have put the words "deterioration" or "decline or deterioration due to lack of maintenance" in Exclusion D.(2).[41]

Further, Plaintiffs' Complaints contain allegations of conditions on the property which have nothing to do with damage, destruction or even deterioration. For example, Paragraph 34.g. calls for the "[r]eplacement of all balcony sliding glass doors that have exceeded their typical life expectancy (greater than 20 years since installed)"[42]. This allegation does not allege that the sliding doors are damaged, destroyed, deteriorated, or even leaking.[43] Similarly, Plaintiffs' Complaints contain allegations that Defendants/Third-Party Plaintiffs breached their duties by failing to conduct proper reserve studies and maintain detailed repair records.[44]

Furthermore, as previously mentioned, the underlying Complaints allege that Defendants'/Third-Party Plaintiffs' failure to maintain the property resulted in deterioration of the common elements, which has caused Plaintiffs' individual units to diminish in value.[45] Diminution

---

[40] Plaintiffs' original Compl. ¶¶ 28, 30, 31, 34; Second Am. Compl. ¶¶ 30, 32, 33, 36; Third Am. Compl. ¶¶ 30, 32, 33, 36.

[41] *See e.g., Eastpointe Condo. I Ass'n v. Travelers Cas. & Sur. Co. of Am.*, 379 F. App'x 906, 907 (11th Cir. 2010) (property damage exclusion specifically included "deterioration" of tangible property).

[42] Plaintiffs' original Compl., ¶ 34.g.

[43] Plaintiffs' Second Amended Complaint and Third Amended Complaint contain identical allegations. (Second Am. Compl. ¶ 36.g.; Third Am. Compl. ¶ 36.g.).

[44] Plaintiffs' original Compl. ¶ 43.q; Second Am. Compl. ¶ 45.q.; Third Am. Compl. ¶ 46.q.

[45] *See* original Compl., ¶ 51; Second Am. Compl., ¶ 53; Third Am. Compl., ¶ 54.

in value is economic loss under South Carolina law, not damage to, or destruction of, "tangible property".[46]

Finally, the Complaints, construed broadly in favor of the duty to defend, allege that Defendants/Third-Party Plaintiffs failed to maintain adequate reserves to repair and perform maintenance on the common elements at Tilghman Beach and Racquet Club and, as a result, Plaintiffs allege that they are now, or will be, required to make up the difference in those inadequate reserves.[47] Plaintiffs' inadequate reserve claim is economic loss and does not result from physical damage to tangible property, nor is it even dependent on physical damage or destruction of tangible property.[48]

2. Great American's "Other Insurance" Defense.

Great American argues that it has no duty to defend its insureds in this matter because of an "other insurance" provision in the 2016 Great American Policy, and because a CGL policy issued by Lexington is primary and has a duty to defend.[49] First, "'[o]ther insurance' clauses become relevant *only* where several insurers *insure the same risk and same interest* at the same level of coverage . . ."[50] Under South Carolina law, "'[o]ther insurance' clauses . . . apportion an

---

[46] *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 163, 588 S.E.2d 112, 115–16 (2003).

[47] *See, e.g.*, original Compl. ¶¶ 26, 27, 31, 49, 50.g., 50.j., 50.k., 55, and 62.e.; Second Am. Comp. ¶¶ 28, 29, 33, 51, 52.g., 52.j., 52.k., 57, 64.e., and 64.f.;Third Am. Compl. ¶¶ 28, 29, 33, 52, 53.g., 53.j., 53.k., 64, 71.e., and 71.f.

[48] *Pulliam v. Travelers Indemnity Co.*, 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013); *Builders Mutual Ins. Co. v. Lacey Construction Co.*, C.A. No. 3:11-cv-400-CMC, 2012 WL 1032539 (D.S.C. entered March 27, 2012).

[49] Van Deven Aff. ¶ 4, attached to Great American's Opposition Memorandum.

[50] Requirement of Identical Risk Under "Other Insurance" Clause, 15 Couch on Ins. § 218:5 (emphasis added).

insured loss between or among insurers where two or more policies offer coverage of the *same risk and same interest* for the benefit of the same insured for the same period."[51]

The Lexington CGL Policy[52] is an "occurrence" policy that insures against occurrences during the policy period that cause bodily injury or property damage, while the 2016 Great American Policy is a "claims made" policy which protects the insureds from suits or claims based on the wrongful acts of the home owners association and its board members where a claim for those wrongful acts is made during the policy period. It is well-settled that claims-made policies and occurrence policies insure different risks. [53]

Great American contends that its 2016 Great American Policy contains an "other insurance" provision such that it places Great American in the position of being the "excess" carrier over Lexington without an obligation to defend Defendants/Third-Party Plaintiffs. However, a true reading of the 2016 Great American Policy reveals that there is no specific "other insurance" provision. Instead, Great American cobbles together (1) the definition of "**Costs of Defense**," and (2) Exclusion B. to try to create what it calls an "other insurance" provision.

---

[51] *S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc.* 327 S.C. 207, 211, 489 S.E.2d 200, 202 (1997) (emphasis added); *see also Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 82, 747 S.E.2d 436, 443 (2013).

[52] The Lexington Insurance Company's Commercial General Liability Policy (Policy Numbers 41-LX-067045193-0 and 41-LX-067045193-1) is referred to herein as the "Lexington CGL Policy."

[53] *Uhlich Children's Advantage Network v. Nat'l Union Fire Co. of Pittsburgh, PA*, 398 Ill. App. 3d 710, 715, 929 N.E.2d 531, 537 (2010); *Continental Casualty Co. v. Coregis Insurance Co.*, 316 Ill.App.3d 1052, 1062, 250 Ill.Dec. 293, 738 N.E.2d 509 (2000); *Med. Protective Co. v. Kim*, 507 F.3d 1076, 1082 (7th Cir. 2007); *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 4:12-CV-3423-RBH, 2014 WL 3687338, at *6, n. 4 (D.S.C. July 22, 2014) (citing references omitted) (acknowledging that a CGL policy which insured "an occurrence of property damage that takes place during the policy period," and a D&O policy that insured "wrongful acts that cause damages, including economic loss, but not property damage" insure different risks).

The definition of "**Costs of Defense**" is just that – a definition, which only has effect in light of where the definition is actually used in the 2016 Great American Policy. The duty to defend claim against Great American is based on a policy provision which provides that Great American "has the right and duty to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent."[54] Given that the "**Costs of Defense**" definition is not used here, Great American's reliance upon the "**Costs of Defense**" definition to create an "other insurance" provision is without merit.

As for Exclusion B., *S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc.*, 327 S.C. 207, 489 S.E.2d 200 (1997), makes clear that an "other insurance" provision in a liability policy cannot not be viewed in isolation but must be interpreted with the "other insurance" provisions in the other liability insurance policy.[55] Even if the Lexington CGL Policy's "Other Insurance" provision applies, the Lexington CGL Policy attempts to make Lexington excess coverage and, therefore, the Lexington and Great American excess provisions cancel each other out under *S.C. Ins. Co.* The Lexington CGL Policy provides: "[t]his insurance is excess over: (b) Any other primary insurance available to you ***covering liability for damages arising out of the premises or operations*** . . . ."[56] The 2016 Great American Policy provides coverage for claims made against TBRC for **Wrongful Acts** associated with the operations of Tilghman Beach and Racquet Club, *i.e.* the actions of TBRC and its Board of Directors in managing and maintaining the common elements of the property. The Lexington CGL Policy and the 2016 Great American Policy are both treated as primary with the defense fees and costs prorated among them based on their policy

[54] Am. Answer and Countercl., Ex. 2, Section I., p. 1 of 11.
[55] *S.C. Ins. Co.*, 327 S.C. at 214, 489 S.E.2d at 203.
[56] *Id.* (emphasis added).

limits.[57] The fact that Lexington has voluntarily agreed to provide Defendants/Third Party Plaintiffs with a defense does not change that result because Section 4.b.(2) of the "other insurance" provision in the Lexington CGL Policy provides that, even where Lexington is excess to other liability insurance, "[i]f no other insurer defends, [Lexington] will undertake to do so, but [Lexington] will be entitled to the insured's rights against all those other insurers."[58]

V. CONCLUSION

For the reasons set forth above, the Court holds that Great American had, and has, under its 2016 Great American Policy, a duty to defend Defendants/Third-Party Plaintiffs against the allegations in Plaintiffs' original Complaint and the allegations of the Complaints subsequently filed by Plaintiffs.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE LINE FOLLOWS ON NEXT PAGE]

[57] *Id.* Both the 2016 Great American Policy and the Lexington CGL Policy provide for $1 million limits.

[58] Lexington CGL Policy, Section IV(4), p. 12 of 16, attached as Exs. 3 and 4 to the Van Deven Aff. filed with Great American's Opposition Memorandum.

Horry Common Pleas

Case Caption: Jill Keck Humphries , plaintiff, et al VS Tilghman Beach And Racquet Club Condominium Association Inc , defendant, et al

Case Number: 2016CP2604464

Type: Order/Other

So Ordered

s/ Larry B. Hyman 2152