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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0959

Northstar Education Finance, Inc.,
Appellant,

vs.

St. Paul Mercury Insurance Company,
Respondent,

Philadelphia Indemnity Insurance Company,
Respondent.

Filed January 14, 2013
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Ramsey County District Court
File No. 62-CV-10-9949

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Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

We are asked to decide whether an insurance policy that expressly excludes coverage for claims arising from an alleged contract breach by the insured should also be construed to exclude coverage for other statutory claims related to the alleged breach. We are not persuaded that appellant is entitled to coverage under the policy, and we conclude that it is indebted for interest on the defense costs advanced by its insurer to cover the period between the time of judgment and the entry of the judgment. We therefore affirm in part, reverse in part, and remand for further proceedings.

FACTS

Appellant Northstar Education Finance, Inc. is a Minnesota-based nonprofit corporation in the business of providing student loans to college and graduate students. Between March 2008 and March 2009, respondent St. Paul Mercury Insurance Company insured Northstar under a director and officer (D&O) claims-made policy for up to $5 million in claims during the policy year. The policy provides entity coverage to Northstar itself. Respondent Philadelphia Indemnity Insurance Company provided an excess policy, covering an additional $5 million in claims on essentially the same terms governing the underlying policy provided by St. Paul.

The policy provides that "the Insurer shall pay on behalf of the Company Loss for which the Company becomes legally obligated to pay on account of any Claim first made against the Company during the Policy Period." Under the policy, claims are defined as civil proceedings arising from a "wrongful act," which includes "any error, misstatement,

[or] misleading statement" by the insured. The policy places on Northstar the duty to defend any claims, but it contemplates that St. Paul and Philadelphia may advance defense costs subject to the costs being repaid by Northstar if it is finally established that the costs are not covered under the policy. The policy also contains a contract exclusion, which excludes from coverage any loss "based upon, arising out of, or attributable to liability of the Company under any contract or agreement."

Beginning in 2001, Northstar began offering a bonus program to its customers. Under the program, borrowers who were less than 59 days delinquent on their student loan payments were eligible for a credit on their loans equivalent to an annualized interest rate reduction of 0.75%. In February 2008, Northstar notified its customers that it was suspending the bonus program because of "ongoing disruption in the global markets."

Between July and December of 2008, four putative class actions were filed in federal court against Northstar claiming, in essence, that Northstar had violated its obligations under the loans by shutting down the bonus program. *Staul v. Northstar Educ. Fin., Inc.*, No. 08-CV-6375 (D. Minn. filed Dec. 15, 2008); *Pintar v. Northstar Educ. Fin., Inc.*, No. 08-CV-13895 (E.D. Mich., filed Sept. 10, 2008); *Guidos v. Northstar Educ. Fin., Inc.*, No. 08-CV-4837 (D. Minn. filed Aug. 5, 2008); *So v. Northstar Educ. Fin., Inc.*, No. 08-CV-04580 (C.D. Cal., filed July 14, 2008). Two of the cases—the *Guidos* and *Staul* actions—were filed in the District of Minnesota claiming between them breach of contract, violation of the Minnesota Uniform Deceptive Trade Practices Act (DTPA), Minn. Stat. §§ 325D.43-.48 (2012), violation of the Minnesota Prevention of Consumer Fraud Act (CFA), Minn. Stat. §§ 325F.68-.70 (2012), and seeking equitable relief. Another action—the *So* action—was filed in the Central District of California claiming breach of contract and seeking equitable relief. And the *Pintar* action was filed in the Eastern District of Michigan, also claiming breach of contract and seeking equitable relief.

The four actions were consolidated by the U.S. Judicial Panel on Multidistrict Litigation and referred to the District of Minnesota for pretrial proceedings in a case captioned *In re Northstar Education Finance, Inc., Contract Litigation*, No. 08-MD-01990-DWF-JJK. 588 F. Supp. 2d 1370 (J.P.M.L. 2008) (underlying litigation).

In late 2008 and early 2009, St. Paul sent four letters to Northstar. The letters advised that, as regards the *So* and *Pintar* actions, there was no possibility of coverage under the policy because of its contract exclusion. As regards the *Guidos* and *Staul* actions, St. Paul advised that there was no possibility of coverage for those parts of the actions seeking to recover for a breach of contract, or seeking declaratory or injunctive relief. St. Paul advised that it would pay for Northstar's defense costs for the Minnesota statutory claims, but reserved its right to deny coverage in the future. St. Paul began paying the defense costs and, during the course of the underlying litigation, spent nearly $270,000.

By the end of 2009, Northstar and the class-action plaintiffs entered into a settlement agreement. The agreement reinstated the bonus program as a guaranteed benefit by establishing a trust account funded annually by Northstar. Northstar was required under the settlement to make five annual payments of at least $1.25 million to the trust account on top of an initial payment of $3.5 million. The settlement provided that even more may be due from Northstar, depending on the performance of certain funds that secured Northstar's obligations. The settlement also called for Northstar to make payments to the class representatives and to pay class counsel at least $1 million initially and an additional $250,000 annually for another four years. Prior to Northstar accepting the settlement, St. Paul notified Northstar that the settlement costs were not covered under the policy because the settlement reflected an attempt by Northstar to satisfy its contractual obligations to its customers, a loss that St. Paul claimed was expressly excluded under the policy.

In October 2010, Northstar sued St. Paul and Philadelphia, claiming the insurers breached their contractual obligations under the policy and that Northstar was entitled to a declaratory judgment that it was owed defense and settlement costs. St. Paul counterclaimed, seeking the return of defense costs it already paid to Northstar.

All three parties moved for summary judgment and the district court entered judgment against Northstar. The court ordered the return of nearly $270,000 in defense costs that had been advanced to Northstar by St. Paul and concluded that Northstar is not entitled to coverage for its settlement costs, which are expected to exceed the $10 million in combined coverage limits. St. Paul then brought a motion to amend the judgment nunc pro tunc to include prejudgment interest on the approximately $270,000 in defense costs it had supplied to Northstar. The district court denied the motion.

This appeal by Northstar follows. St. Paul has filed a notice of related appeal.

D E C I S I O N

Summary judgment is awarded if there is no genuine issue as to any material fact and either party is entitled to judgment as a matter of law. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). This court's review of an appeal from summary judgment includes determining "whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). Where, as here, the parties have filed cross-motions for summary judgment, this court may conclude that the parties have "tacitly agreed that there exist no genuine issues of material fact." *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993).

The construction of a contract is a question of law, unless the contract is ambiguous. *Allen v. Burnet Realty, LLC*, 801 N.W.2d 153, 157 (Minn. 2011). If the contract is ambiguous, its interpretation is a question of fact. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). "[T]he interpretation of insurance contract language is a question of law as applied to the facts presented." *Meister v. W. Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992). Where, as here, there is no material fact in dispute, this court independently reviews the district court's interpretation of the insurance contract. *Id.*

"A duty to defend an insured arises if any part of the claim is *arguably* within the scope of the policy's coverage, and the burden is on the insurer to prove that a claim clearly falls outside the coverage." *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 529 (Minn. 2003). "[T]he insurer must assume the duty to defend and the concomitant duty to reasonably settle. When there is no dispute as to coverage, liability, policy limits, and the duty to defend, the insurer owes the insured a fiduciary duty to settle claims in good faith." *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 407 (Minn. App. 2007), *review denied* (Minn. Dec. 11, 2007). A D&O policy is unique in that the duty to defend may be imposed upon the insured. *See generally* Michael R. Davisson et al., Am. Bar Ass'n, *Directors & Officers Liability Insurance Deskbook* 85 (3d. ed. 2011). The insurer, pursuant to the terms of the policy, often advances the defense costs to the insured, subject to a right to recover the funds if it is later determined that the claims are not covered under the policy. *Id.*

When addressing a dispute between an insurer and insured, "[t]he initial burden of demonstrating coverage rests with the insured; the burden of establishing the applicability of exclusions rests with the insurer." *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 736 (Minn. 1997). Consequently, we proceed using a two-step analysis, asking first whether Northstar has shown it is entitled to coverage and then asking second whether—if coverage is available—St. Paul and Philadelphia have shown that an exclusion applies.

I. The underlying litigation triggered coverage under the policies.

We turn first to the threshold question of whether Northstar made a prima facie showing that it was entitled to coverage under the policies. According to Northstar, the district court erred when it concluded that the bonus program was a contractual term between Northstar and the class-action plaintiffs and, therefore, squarely fell outside of the policy's coverage. Northstar also argues that the district court was improperly influenced by the arguments of both insurers that the settlement payments were really payments of contract obligations. St. Paul argues that coverage was never triggered because, regardless of whether the bonus program suspension was a tort or a breach of contract, the resulting settlement did not involve a "Loss" resulting from a "Wrongful Act" as defined by the policy. St. Paul also argues that restitutionary losses are not covered by the policy because such losses represent the ill-gotten gains of the policyholder, gains that would not have been realized were it not for the improper behavior of the insured.

The policy covers against losses, including "the amount which [Northstar] become[s] legally obligated to pay" because of a claim, if the claim arises from a covered wrongful act, which includes "any error, misstatement, [or] misleading statement." Given the close confluence of wrongs prohibited by the CFA and covered by the policy, and the Minnesota Supreme Court's holding that coverage arises when any part of the claim is *arguably* within the scope of the policy, *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986), we conclude that Northstar has met its threshold duty of showing that coverage applies.

A. Any common-law prohibition on coverage for breach-of-contract claims is inapplicable here because a statutory claim was also brought.

Each of the complaints in the underlying litigation sought recovery for a breach of contract, and the *Guidos* and *Staul* actions also sought to recover for statutory violations under the CFA and DTPA. Both parties appear to agree that the DTPA claims are not at issue here because the DTPA provides no private right of action for damages. *See Dennis Simmons D.D.S., P.A. v. Modern Aero, Inc.*, 603 N.W.2d 336, 339 (Minn. App. 1999). Putting aside—for now—the CFA claim, the central dispute between the parties that we address here relates to whether coverage even exists since the underlying litigation seeks recovery for a breach of contract. Before addressing the merits of the coverage issue under the policy, we first address the other argument raised by St. Paul and Philadelphia that coverage does not exist because of certain common-law principles.

St. Paul and Philadelphia point to cases from other jurisdictions in which liability coverage was held not to protect against breach-of-contract claims. The general thrust of these cases is that an insured's liability for its decision to breach a contract does not arise from the type of wrongful act or lead to the type of loss that is properly covered by D&O insurance. *See, e.g.*, *Waste Corp. of Am., Inc. v. Genesis Ins. Co.*, 382 F. Supp. 2d 1349, 1355 (S.D. Fla. 2005) (holding that public policy militates against coverage for contract breach because it "places the insured in the unique posture of voluntarily choosing to do some act for which he knows an insurance company will compensate him even if he chooses wrongly"); *August Entm't, Inc. v. Philadelphia Indem. Ins. Co.*, 52 Cal. Rptr. 3d 908, 919 (Cal. Ct. App. 2007) ("Performance of a contractual obligation . . . is a debt the corporation voluntarily accepted. It is not a loss resulting from a wrongful act within the meaning of the policy.").

What these cases do not address is the circumstance here, where the underlying litigation includes claims for *both* contract breach *and* statutory violations sounding in tort. The CFA claims also raised in the underlying litigation introduce another theory of Northstar's liability. Northstar points to *Cincinnati Ins. Co. v. Metro. Props., Inc.*, 806 F.2d 1541 (11th Cir. 1986), where the underlying litigation included both contract and fraud claims. The court denied coverage on all the claims, but the fraud claim was denied because of a fraud exclusion in the policy. *Cincinnati*, 806 F.2d at 1544. The court went on to observe, however, that it was at least conceivable that a fraudulent misrepresentation perpetrated innocently or by mistake (in other words, something akin to negligent misrepresentation) might be covered. *Id.* *Cincinnati* provides only tenuous support for Northstar's position, but it is instructive that the case recognizes a distinction between a claim for insurance coverage only for a contract breach and coverage for other claims raised along with the contract breach.

Here, it is likewise conceivable that the CFA claim could survive independent of the breach-of-contract claim. The CFA bans "fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice." Minn. Stat. § 325F.69, subd. 1 (2012). We note that the statute does not require the existence of a contract, although we explore later how a contract must be present under the specific facts of the CFA claims raised in this case. Intentional wrongdoing is not a prerequisite for a violation of the CFA; negligent or unintentional misrepresentations are also prohibited. *Church of the Nativity of Our Lord v. WatPro, Inc.*, 474 N.W.2d 605, 612 (Minn. App. 1991), *review granted* (1 pet.) (Minn. Oct. 11, 1991), *review denied* (1 pet.) (Minn. Nov. 26, 1991), *aff'd on other grounds*, 491 N.W.2d 1, 8 (Minn. 1992).

B. Any common-law prohibition on coverage for restitutionary damages is inapplicable here because the damages are not clearly restitutionary.

St. Paul argues that this court should rely on a rule found in other jurisdictions that liability insurance does not cover claims paid that are restitutionary in nature. *See, e.g.*, *Level 3 Commc'ns, Inc. v. Fed. Ins. Co.*, 272 F.3d 908 (7th Cir. 2001) (holding that where plaintiffs sold shares in their corporation to Level 3 because of fraudulent representations that Level 3 had made, Level 3's settlement of the resulting lawsuit was not a loss that was covered by the policy); *Am. Med. Sec., Inc. v. Exec. Risk Specialty Ins. Co.*, 393 F. Supp. 2d 693 (E.D. Wis. 2005) (holding that the costs of complying with injunctive and declaratory relief in the underlying lawsuits was not covered by the insurance policy where plaintiffs alleged they had purchased group health insurance policies from defendant, and that throughout the life of those policies, defendant had individually re-underwritten each insured on the basis of claim experience/health status).

The settlement here is distinguishable from the payouts in the cases that St. Paul cites because Northstar's settlement is not restitutionary in the same sense as that addressed in those cases: the bonus program represented a discount derived from a standardized student-loan interest rate that Northstar is entitled to receive, a program that Northstar cancelled when it hit hard times. These actions do not constitute wrongs in the same nature of the wrongs found in the line of cases St. Paul cites. Northstar's discount was a voluntary incentive, where Northstar offered a discount on a debt to which it was originally entitled, not an attempt to acquire a benefit to which it was never entitled in the first place.

C. The insurance policy provides coverage for claims like those brought here.

Since the threshold question of coverage is not disposed of by the rule against liability insurance coverage for contract-breach claims or for restitutionary settlements, what remains is to determine whether the claims in the underlying litigation allege acts eligible for coverage under the terms of the policy. The policy affords coverage against "Loss . . . on account of any Claim . . . for a Management Practices Act." A "Loss" is defined as "the amount which the Insureds become legally obligated to pay on account of each Claim . . . for Wrongful Acts for which coverage applies, including . . . settlements and Defense Costs." A "Management Practices Act" is included within the definition of a covered wrongful act, and is defined to include "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty." Several exclusions apply to this grant of coverage, at least one of which—related to claims arising from a breach of contract—is relevant here. However, before determining whether the exclusion applies, we must first decide whether Northstar has carried its initial burden of showing it is entitled to coverage. *See Domtar*, 563 N.W.2d at 736.

The *Guidos* complaint alleged that Northstar, "[b]y representing that the interest rates on the student loans . . . would be reduced by the T.H.E. Repayment Bonus, and then unilaterally revoking [the bonus] . . . violated the [CFA]." The *Staul* complaint makes substantially the same allegations. As discussed earlier, the CFA bans "fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice." Minn. Stat. § 325F.69, subd. 1. And compensatory damages, costs, and attorney fees are available for CFA claims. *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 474 (Minn. App. 1999). Because of the similarities between the claims in the underlying litigation and the coverage afforded by the policy, we conclude that the CFA claims are arguably within the scope of the policy. Northstar has met its threshold duty of showing that coverage exists.

II. Even if the underlying litigation triggered coverage under the policies, exclusions enumerated in the policies do not cover the claims brought here.

Although Northstar meets the initial burden of demonstrating coverage under the policy, we must still address whether the insurer carried its "burden of establishing the applicability of exclusions." *Domtar*, 563 N.W.2d at 736. The parties dispute the following exclusionary terms of the policy:

> The Insurer shall not be liable under the Company Liability Coverage for Loss on account of any Claim made against the Company:
>
> 1. based upon, arising out of, or attributable to liability of the Company under any contract or agreement, either oral or written; provided that this exclusion shall not apply to the extent that the Company:
>   (a) would have been liable for such Loss in the absence of the contract or agreement.

Northstar argues that the policy's exclusion of coverage for liability "based upon, arising out of, or attributable to" a contract or agreement does not exclude coverage for the CFA claims because CFA liability does not necessarily arise out of contractual liability, but instead was an alleged misrepresentation that misled potential customers as to whether the bonus program was terminable at will. Northstar also claims that its representations about the bonus program did not necessarily create an independent contractual obligation, and it contends that the CFA claim was an alternative theory of liability as opposed to one reliant on the breach-of-contract claim. St. Paul argues that the phrase "arising out of" contained in the contractual exclusion plainly reaches the CFA claims here because they stem directly from the student-loan contracts between Northstar and the class-action plaintiffs. St. Paul also argues that the terms of the settlement itself provide further evidence that all the causes of action arise from the contract because all class members are treated equally, despite some being out-of-state plaintiffs without a Minnesota CFA claim.

A. The CFA claim arises out of a contract.

To determine the applicability of this contract exclusion, we must first examine the connection between the contract and the CFA claim. The breach-of-contract claim in the underlying litigation is vague insofar as it fails to identify the contract that Northstar has allegedly breached. However, Northstar acknowledges that the alleged breach could have been either a breach of an implied agreement between Northstar and the class-action plaintiffs, where Northstar promised to provide the bonus program continuously, or a breach of the interest terms contained in the individual notes on the student loans issued to the class-action plaintiffs. Northstar denies that the first putative contract even exists and it argues that, even if the breach was a breach of the notes, this does not dispose of the CFA claim, since that claim could persist whether or not a contract exists.

It is undisputed that some form of contractual relationship existed between Northstar and the class-action plaintiffs. At a minimum, the terms of the contract are embodied in the notes on the student loans. And undoubtedly the interest rates recited in the notes constitute a material term of those agreements. What we must address here is whether the CFA claims arise from those contracts.

When Northstar cancelled the bonus program, it affected the payments borrowers made under those notes. Northstar even acknowledged this relationship between the bonus program and the interest rate under the notes in its oral argument to the district court: "[The bonus program] was not part of the note that was signed in—by the borrowers. It was—the note set up a particular interest rate, and then this promotion said, You get a discount if you stay current." By cancelling the bonus program, thereby affecting the interest rates the class-action plaintiffs paid under their notes, Northstar sparked a CFA claim that "aris[es] out of" a contract or agreement.

The phrase "arising out of" when recited as a contractual exclusion in an insurance policy has been interpreted to mean "'originating from,' 'having its origins in,' 'growing out of,' or 'flowing from'" a contract. *Callas Enters., Inc. v. Travelers Indem. Co. of Am.*, 193 F.3d 952, 955-56 (8th Cir. 1999) (quoting *Associated Indep. Dealers, Inc. v. Mut. Serv. Ins. Co.*, 304 Minn. 179, 182, 229 N.W.2d 516, 518 (1975)). Northstar attempts to downplay *Callas* by contending that it has been criticized by other courts and that the Minnesota Supreme Court failed to extend its holdings in *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572 (Minn. 2009). In *Wozniak*, our supreme court rejected a holding in *Callas* related to whether trademark infringement falls under advertising-injury definitions in a disputed policy. 762 N.W.2d at 578. However, it noted that the *Callas* court "did not have to reach the advertising-injury issue because the claims were excluded from coverage [by the policy's contractual exclusion]." *Id.* Moreover, elsewhere in the *Wozniak* opinion, the supreme court actually noted that it has defined "arising out of" broadly to mean "originating from, growing out of, or flowing from." *Id.* at 576 (quoting *Dougherty v. State Farm Mut. Ins. Co.*, 699 N.W.2d 741, 744 (Minn. 2005)) (quotation marks omitted). Thus, the supreme court has actually embraced the same broad-based definition of "arising out of" as the one used in *Callas* and *Associated Independent Dealers*.

"Arising out of" has also been interpreted to mean "causally connected with." *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 419 (Minn. 1997) (quotation omitted). The gravamen of the underlying complaints by the class-action plaintiffs is that they were bamboozled into taking out a student loan with Northstar by the promise of a discount. They signed a promissory note with Northstar, and when Northstar cancelled the bonus program, the class-action plaintiffs had to pay more on their student loans. None of Northstar's actions pose a problem for people who have no contractual relationship with the company. The class-action plaintiffs are only plaintiffs because they have a contract with Northstar. Their complaints all arise from and are causally connected with their contracts.[1]

Northstar contends that part of the district court's error was that it concluded that the bonus program constituted a contractual term, and whether the bonus program was a contract term goes to the very heart of the dispute between the parties. But Northstar's

[1] Northstar asks us to adopt the reasoning in *Exec. Risk Indem., Inc. v. Cigna Corp.*, 976 A.2d 1170 (Pa. Super. Ct. 2009), where Cigna faced claims both for a breach of contract and under the civil Racketeer Influenced and Corrupt Organization Act (RICO) for colluding with other medical insurers to systematically underpay medical providers. The court determined that Executive Risk was on the hook for coverage because, although the RICO claim had its genesis in the contracts between Cigna and the medical providers, the claim itself had its roots in the agreements with other medical insurers to systematically underpay claims. *Exec. Risk*, 976 A.2d at 1173-74. The RICO claims that Cigna faced are distinguishable from the CFA claims here, which do not have their roots in Northstar's collusion with other alleged wrongdoers, but in wrongs that, if true, require no third-party involvement to perfect the wrong, but instead start and end with the interest rate on the underlying student loans.

approach misconstrues the "arising out of" analysis. The answer to this dispute does not require the court to make a post facto determination as to whether the bonus program was a contract. Instead, we simply observe that the very existence of the bonus program—and by extension, the dispute as to whether it was a contractual obligation—can only occur because there exists an underlying contract that establishes the student-loan interest rate and payment arrangements that the bonus program purported to affect. Without that underlying contract (from which the bonus program arises), there would be no dispute.

Finally, we address Northstar's caution against a broad reading of "arising out of." Northstar suggests that a broad reading risks eviscerating insurance coverage provided by policies like the one here, since many of the transactions for which insureds seek coverage arise from some form of contract. Other courts have found similar provisions ambiguous and refused to enforce them because the exclusion would eviscerate coverage. *See, e.g.*, *Cincinnati Ins. Co. v. Stonebridge Fin. Corp.*, 797 F. Supp. 2d 534, 540-41 (E.D. Pa. 2011); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 398 (D. Del. 2002). But coverage is not eviscerated here: St. Paul's policy extends coverage to management practices, employment practices, fiduciary acts, and third-party discrimination acts. Each of these types of covered acts conceivably includes errors, misstatements, and misleading statements made outside the context of a contractual relationship. For example, employment practices acts are defined in the policy to extend to wrongful acts in prospective employment activities, which require no contract at all for a wrong to form. Thus, we cannot conclude that the contract exclusion is so far reaching as to render the policy useless to Northstar.

We also observe that some policies employing a contractual exclusion sensibly limit the exclusion only to express contracts. *See, e.g.*, *Julio & Sons Co. v. Travelers Cas. & Sur. Co. of Am.*, 591 F. Supp. 2d 651, 655 (S.D.N.Y. 2008). Since the underlying promissory notes here are an express contract between Northstar and its customers, overtly recognized by both parties to be a contractual relationship, we do not need to delve into whether the exclusion here would be so broad as to be ambiguous in the context of other, less formal contractual relationships.

B. Because the CFA claimants seek damages, a contract is at the root of their claim.

Northstar hints at the possibility that the CFA claim arises from alleged misrepresentations to "prospective customers," and that the CFA claim will benefit claimants who have no loans with Northstar. But a close reading of the complaints reveals that the individual plaintiffs were all Northstar customers, not prospective customers. And they sought to represent a class of Northstar customers who hold its T.H.E. loans as of February 18, 2008, not prospective customers without promissory notes.

Northstar admits that the class-action plaintiffs sought damages for the CFA claims. And the complaints reveal that the class-action plaintiffs base their claim for damages on Northstar's unilateral revocation of the bonus program and the correlated increase in interest rate incurred by those borrowers. Under the CFA, recovery may be sought for damages, but there must be a causal nexus between the misrepresentation and the damages. *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn.

2001). The damages that the class-action plaintiffs claim to suffer come as a direct consequence of changes in how much interest they paid under their promissory notes. Under the facts presented here, there could be no claim for damages under the CFA unless a contract existed between Northstar and the class-action plaintiffs.

C. Northstar's liability arises under a contract.

Northstar argues that, even if "arising out of" is broadly construed, the exclusion includes a saving exception because it requires that the loss arise from "liability . . . under any contract or agreement," and that coverage applies if Northstar would still have been liable for such loss "in the absence of the contract or agreement." The underlying litigation, argues Northstar, only alleges contractual liability, which is insufficient to deny coverage. Northstar also reprises the argument that the CFA is an independent claim that it would have been responsible for even in the absence of a contract or agreement.

We have already concluded that Northstar's liability is wrapped up in the existence of promissory notes with the class-action plaintiffs and that it could not be liable in the absence of a contract. What remains is to address whether that liability is *under* a contract or agreement. Northstar bears the burden of proving the applicability of any exception to a policy exclusion. *See Smith v. State Farm Fire & Cas. Co.*, 656 N.W.2d 432, 436 (Minn. App. 2003).

Northstar maintains that the contractual exclusion only reaches claims arising from a *breach* of contract. But this is not the language of the exclusion and, although we must strictly construe the exclusion, *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989), we cannot ignore its plain meaning—which reaches liability to Northstar on account of a claim based upon "liability . . . *under* any contract or agreement." (Emphasis added.)

Liability *under* the contract expands the scope of the exclusion beyond liability arising from a mere *breach* of the contract. "Under" is defined, in relevant part, by *The American Heritage Dictionary of the English Language* 1945 (3d. ed. 1992), as being "[s]ubject to the restraint or obligation of." Consequently, the exclusionary clause does not just exclude liability for mere *breach* of the contract, but also excludes liability through the more broadly phrased concept of liability *under* the contract. The CFA claim raised in the underlying litigation complains of the unilateral modification of the interest rates on the loans brought by the cancellation of the bonus program. Thus, the crux of the complaint is that the restraint or obligation of the contractually established interest rate was affected by Northstar's cancellation of the bonus program. We are mindful that we must narrowly construe the exclusion, but we are nevertheless compelled to conclude that, given how inextricably linked the CFA claim is to the breach-of-contract claim, the district court correctly concluded that the contract exclusion of the policy also excluded the CFA claim.

III. Northstar is not entitled to retain the defense costs paid by St. Paul.

The district court ordered Northstar to return nearly $270,000 in defense costs that had been paid by St. Paul under the D&O insurance policy. Northstar contends the district court erred because (1) when St. Paul provided the funds, it indicated that the funds were reimbursements and not advances subject to recovery; (2) recovery of advanced defense costs are not allowed under Minnesota law; and (3) even if recovery of the advanced costs were permissible, it only becomes available when the facts thought to underpin coverage are proven to have changed to show that the insured is no longer eligible to be covered. Northstar contends that, since no facts were found here, recovery is unavailable. St. Paul argues that this court need only refer to the language of the policy to learn that defense costs were advances subject to recapture and that Minnesota law defers to the intention of the parties as reflected in their insurance contract.

A. The policy unambiguously provides for repayment of the defense costs.

We begin by again noting the unique nature of D&O policies, which often provide for the return of advanced defense costs. The issue of insurers seeking to recover advanced defense costs was addressed in *Westchester Fire Ins. Co. v. Wallerich*, 563 F.3d 707, 714-19 (8th Cir. 2009), where the Eighth Circuit Court of Appeals surveyed insurance reimbursement disputes in other jurisdictions in order to predict whether Minnesota courts were likely to recognize a right of insurers to seek recovery for defense costs. The court noted a split of opinion on the topic, with some jurisdictions recognizing a quasi-contractual right, even if the right was not spelled out in the policy, and other jurisdictions refusing to recognize the right absent an express provision. *Westchester*, 563 F.3d at 714-19.

The policy here expressly provides that "to the extent that it is finally established that any such Defense Costs are not covered under this Policy, the Insureds . . . agree to repay the Insurer such Defense Costs." "In interpreting insurance contracts, we must ascertain and give effect to the intentions of the parties as reflected in the terms of the insuring contract." *Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). The policy unambiguously provides that the defense costs are subject to recovery by St. Paul.

B. St. Paul notified Northstar that the reimbursements were advances subject to repayment.

Northstar also argues that the letters it received from St. Paul denying coverage on some claims but agreeing to pay for defense costs on others were misleading because they referred to St. Paul's "duty to defend the Lawsuit" and its "obligation under the Policy to reimburse [] Northstar for reasonable defense costs and expenses incurred in the defense of covered claims, [but] this obligation is subject to the $50,000 retention set forth in the Policy." Northstar contends that, because St. Paul referred to its payments as reimbursements instead of advances, Northstar was deprived of its opportunity to reject the money and strike out on its own. What Northstar ignores is that, in the very next sentence of the letter, St. Paul indicates that Northstar must first exhaust the $50,000 retention before St. Paul "is required to *advance* defense costs." (Emphasis added.) Moreover, the letters contain numerous references to the preliminary nature of St. Paul's determination and the preeminence of the policy's terms.

Finally, Northstar relies on out-of-jurisdiction cases for the proposition that a claim to recovery of defense costs is barred unless a factual scenario is established in the litigation that would trigger the insurer's reservation of rights. The policy plainly allows St. Paul to establish that defense costs are not covered by the policy and to seek recoupment, and it is a common practice for an insurer to initially extend coverage under a reservation of rights. Under Northstar's approach such reservations of rights would have little meaning where, as here, the settlement proceeds without establishing any facts that would allow an insurer to determine that the claim is not covered. The district court did not err by ordering Northstar to return the defense costs it received.

IV. St. Paul is entitled to interest accrued between judgment and entry of judgment.

St. Paul cross-appeals the district court's denial of prejudgment interest. After the district court granted St. Paul summary judgment, St. Paul applied for taxation of costs, disbursements, and interest. The district court administrator denied the request, advising St. Paul it had seven days to appeal the denial to the district court. St. Paul did not appeal and final judgment was docketed without prejudgment interest. Northstar later filed a notice of appeal to this court. Meanwhile, St. Paul moved the district court to amend the judgment nunc pro tunc to include prejudgment interest and filed a notice of related appeal with this court, challenging the denial of prejudgment interest at the district court. This court ordered the parties to submit briefs addressing whether the appeal was premature in light of the pending nunc pro tunc motion before the district court. This court subsequently dismissed both the appeal and related appeal without prejudice upon a finding that they were brought prematurely. The district court denied the motion to amend the judgment nunc pro tunc, declining to exercise its jurisdiction to modify the judgment because it reasoned it lacked jurisdiction on account of the pending appeal and because the prejudgment interest "is not independent of, supplemental to, or collateral to the judgment appealed from by Northstar. Rather, it is part and parcel of that judgment."

The district court also noted that, even if it had jurisdiction, a nunc pro tunc modification of the judgment would be an abuse of the court's discretion.

On appeal, St. Paul maintains that it is entitled to preaward and postaward interest pursuant to Minn. Stat. § 549.09 (2012), as well as prejudgment interest under common-law principles for the period between the time it disbursed payments to Northstar for defense costs and the commencement of the present lawsuit. St. Paul argues that Minn. Stat. § 549.09 mandates prejudgment interest and that nothing in the policy bars it. Northstar contends that prejudgment interest is barred under the policy and, alternatively, would not begin to accrue until the district court granted summary judgment because only then is the obligation to reimburse St. Paul established under the policy. While the district court did not address the merits of these arguments, we "may decide an issue not determined by a [district] court where that question is decisive of the entire controversy and where there is no possible advantage or disadvantage to either party in not having a prior ruling on the question." *Harms v. Indep. Sch. Dist. No. 300, LaCrescent*, 450 N.W.2d 571, 577 (Minn. 1990). This court reviews interest awards under Minn. Stat. § 549.09 de novo. *S.B. Foot Tanning Co. v. Piotrowski*, 554 N.W.2d 413, 420 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996).

A. Cases from other jurisdictions reach mixed results.

Minnesota courts have not addressed whether an insurer is entitled to prejudgment interest for defense costs it has advanced. While St. Paul maintains that Minnesota cases require prejudgment interest on liquidated damages, none of those cases specifically contemplate defense costs that were advanced by an insurer pursuant to the terms of a

D&O policy. *See, e.g.*, *Regents of the Univ. of Minn. v. Med. Inc.*, 382 N.W.2d 201 (Minn. App. 1986), *review denied* (Minn. Apr. 18, 1986). Northstar points to two cases—offering little explanation as to their relevance—that appear to stand for the proposition that St. Paul cannot seek prejudgment interest without expressly reserving the right to do so. *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602 (Minn. 2012); *Westchester*, 563 F.3d 707. However, neither case addresses prejudgment interest, but instead applies estoppel concepts to reservations of rights by insurers.

St. Paul argues that a number of other jurisdictions have expressly recognized that an insurer is entitled to prejudgment interest on advanced defense costs. *See, e.g.*, *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 920-21 (9th Cir. 2009) (awarding insurer statutory prejudgment interest under California law). However, other jurisdictions have held exactly the opposite. *See, e.g., Valley Forge Ins. Co. v. Health Care Mgmt. Partners Ltd.*, 616 F.3d 1086, 1098 (10th Cir. 2010) (denying insurer statutory prejudgment interest under Colorado law). We do not need to reconcile these competing results because the language of the policy guides our decision.

B. The policy does not provide for preaward interest on advanced defense costs.

Under Minn. Stat. § 549.09, prejudgment interest is owed "[e]xcept as otherwise provided by contract." *Id.*, subd. 1(b). The policy makes no provision for repayment of interest that accrued on the money while it was in Northstar's possession, and the law requires that a promise to pay interest be "express." *Soderbeck v. Ctr. for Diagnostic Imaging, Inc.*, 793 N.W.2d 437, 440 (Minn. App. 2010). Instead, the policy provides that

St. Paul will advance defense costs in connection with the claims, "provided that to the extent that it is finally established that any such Defense Costs are not covered under this Policy, the Insureds . . . agree to repay the Insurer *such Defense Costs*." (Emphasis added.) The policy does not call for the return of defense costs plus interest; it only contemplates the return of the money already advanced.

We also note that Northstar argued to the district court on summary judgment that the defense costs were covered by the policy. Until the district court granted St. Paul summary judgment, it had not yet been "finally established" that the defense costs were not covered. During this time title to advanced defense costs was an open question and the money was rightfully in the possession of Northstar, as provided under the terms of the policy.

C. Minnesota common law does not provide for interest on the amounts advanced before the claim was brought.

Moreover, we are not persuaded that existing law provides for interest on the defense costs that St. Paul advanced to Northstar before the present lawsuit was commenced. "A plaintiff is entitled to prejudgment interest on a final judgment where the damages claim is liquidated . . . ." *Summit Court, Inc. v. N. States Power Co.*, 354 N.W.2d 13, 16 (Minn. 1984). The purpose of such an award is to compensate for the plaintiff's lost use of the money. *See id.* An insurer's advancement of defense costs under a contractual reservation of rights may be easily liquidated. But those costs do not constitute "damage." The advancement of defense costs before it can be determined if the insured is due the costs under the policy is a risk contractually allocated to the insurer.

St. Paul handed over the money because it suspected that it was contractually obligated to do so. However, the same contract also contemplates the uncertainty that the money was actually owed under the policy. Given that such uncertainty is acknowledged and built into the policy, we conclude that the premiums paid by Northstar under the policy take into account St. Paul's costs of doing business in light of that uncertainty. In other words, Northstar, by paying its premium, has already compensated St. Paul for the risk it took in advancing the defense costs.

D. St. Paul is entitled to interest accrued between judgment and entry of judgment.

St. Paul also argues that, under Minn. Stat. § 549.09, subd. 1(a), it is entitled to interest on the advanced defense costs between the time of the award and the entry of judgment. We agree.

Unlike subdivision 1(b), which allows for contractual modification of prejudgment interest, subdivision 1(a) contains no such provision. Minn. Stat. § 549.09, subd. 1(a), (b). Instead, it requires that "interest from the time of the verdict, award, or report until judgment is finally entered shall be . . . added to the judgment or award." *Id.*, subd. 1(a). On September 2, 2011, the district court concluded that St. Paul was entitled to the return of $269,077.11. Judgment was entered on December 13, 2011. Under Minn. Stat. § 549.09, subd. 1(c)(2), St. Paul is entitled to interest calculated at ten percent per annum on the judgment. We reverse and remand to the district court to calculate the interest due to St. Paul under this decision.

Affirmed in part, reversed in part, and remanded.