IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TOPMOST CHEMICAL AND PAPER CORPORATION,	)	
Plaintiff,	)	
vs.	)	No. 01-2588V
NATIONWIDE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING SUMMARY JUDGMENT IN PART IN FAVOR OF THE PLAINTIFF

This diversity action is an insurance coverage dispute. Plaintiff Topmost Chemical and Paper Corporation filed a complaint on June 20, 2001, against its insurance carrier, defendant Nationwide Insurance Company, seeking declaratory relief, damages for breach of the insurance contract, and a penalty for Nationwide's bad faith refusal to pay a claim in violation of Tenn. Code Ann. § 56-7-105. Topmost alleged that Nationwide had wrongfully refused to defend Topmost in a state court lawsuit filed by Tammy Kennedy, a former employee of Topmost, and her husband and further refused to indemnify Topmost for any subsequent losses it might suffer as a result of the lawsuit.

Now before the court is the motion of Nationwide pursuant to

Rule 12 and Rule 56 of the Federal Rules of Civil Procedure for partial dismissal and/or summary judgment. The motion seeks partial dismissal and/or summary judgment on three grounds, namely: (1) the intentional acts by Topmost employees which allegedly caused injury to Ms. Kennedy are excluded by the provisions of the policy, and hence it has no duty to defend or indemnify Topmost; (2) Topmost's demand letter was ineffective under Tenn. Code Ann. § 56-7-105 because it failed to put Nationwide on notice that it was seeking the bad faith penalty; and (3) Topmost's demand letter was not effective to evoke the bad faith penalty under Tenn. Code Ann. § 56-7-105 because it and the bad faith lawsuit were premature.

UNDISPUTED FACTS

The following facts are undisputed. Tammy Kennedy, an employee of Topmost, filed suit against Topmost in Tennessee Circuit Court on January 6, 2001, alleging that on November 30, 2000, she was assaulted and injured by two other Topmost employees, Lynn Proffer, the President of Topmost, and Charles Osborne, a purchasing agent with Topmost, for whose conduct she alleged Topmost was vicariously liable. In her complaint, Kennedy claims that during the incident on November 30th Proffer and Osborne terminated her employment, forcibly restrained her from leaving, and searched her car without permission, subjecting her to physical

and emotional injuries. Kennedy and her husband asserted claims of false imprisonment, assault, battery, outrageous conduct and loss of consortium against Topmost, Proffer and Osborne. (Def.'s Mot. for Summ. J., Ex. 2.)

Kennedy's complaint alleges that Proffer called her into his office and tried to force her to sign a document regarding her termination. When she refused, he yelled at her, pushed her down on the floor and called for Osborne to come in to the office. (Kennedy Compl. ¶¶ 16, 17.) Osborne allegedly refused to let her out of the office. According to Kennedy, Proffer then pushed her into a filing cabinet and twisted her arm when she tried to call 911. (Kennedy Compl. ¶ 22.) The complaint further states that Proffer then pulled Kennedy's keys off of a rope around her neck and forced her to walk to the parking lot; once there, Proffer held Kennedy while Osborne removed items from her vehicle, some of which were Topmost corporate documents and Kennedy's personal computer. (Kennedy Compl. ¶¶ 25, 27, 28, 29). Kennedy alleges that her injuries include a sprained wrist, bruises and cuts as well as psychological and emotional injuries. Her husband claims that he has suffered loss of consortium due to Osborne and Proffer's actions. (Kennedy Compl. ¶¶ 33-36.)

On January 5, 2001, the day before Kennedy filed her lawsuit, Topmost sued Kennedy in Shelby County Chancery Court, seeking

declaratory judgment and injunctive relief. (Pl.'s Mem. in Opp. of Def.'s Mot. for Summ. J. Ex. C.) In its chancery court complaint, Topmost alleged that Kennedy possessed some of Topmost's equipment, supplies, customer lists and other proprietary information in contravention to the employment non-competition agreement Kennedy signed when she began working for Topmost. Further, Topmost alleged that Kennedy and her husband intended to use Topmost's equipment and trade secrets to compete against it. (Pl.'s Mem. in Opp. of Def.'s Mot. for Summ. J. Ex. C., p. 3.) Topmost asked the court for a temporary restraining order preventing Kennedy from contacting Topmost customers and ordering her to comply with the terms of the non-competition agreement, the return of all of Topmost's property and a declaratory judgment against Kennedy. (Pl.'s Mem. in Opp. of Def.'s Mot. for Summ. J. Ex. C, p. 4.) Kennedy's attorney sent Topmost a letter confirming that she has possession of Topmost's property. On February 20, 2001, the chancery court ordered Kennedy to return all Topmost property in her possession. (*See* Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. Ex. E.) Kennedy failed to comply with the court order and on June 25, 2001, Topmost filed a motion asking the court to find Kennedy in contempt. (*Id.*)

Nationwide had insured Topmost for many years. On October 26, 2000, Nationwide renewed Topmost's Commercial Property Coverage and

Commercial General Liability Coverage ("CGL") insurance policy, Policy No. 63PR104203-5000. (Def.'s Mot. for Summ. J. Ex. 1.) The policy period ran from the issuance date of October 26, 2000, to October 26, 2001. (*Id.*) On December 6, 2000, after being contacted by Topmost about the incident, Joe Booth, a Nationwide agent, wrote a letter to Topmost, stating that, in his opinion, any liability arising out of the events surrounding Kennedy's termination was not covered by the CGL policy. (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. Ex. B.) On January 11, 2001, upon being served with the Kennedy complaint, Topmost sent a letter to Nationwide demanding that it defend the company and "provide coverage" for the Kennedy lawsuit. (Def.'s Mot. for Summ. J. Ex. 4). In a letter dated May 9, 2001, Nationwide denied coverage to Topmost and its employees due to the nature of the injuries and intentional conduct alleged in the Kennedys' complaint. (Def.'s Mtn. for Summ. J. Ex. 3.) On June 20, 2001, Topmost filed the present lawsuit against Nationwide.

ANALYSIS

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *see also Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party moving for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by demonstrating to the court that the nonmoving party lacks evidence to support an essential element of its case. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

In response, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993). When a summary judgment motion has been properly made and supported, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue

of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

In deciding a motion for summary judgment, "this court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251-52). The evidence, all facts, and any inferences that permissibly may be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for plaintiff." *Anderson*, 477 U.S. at 252.

Only with great caution may a court grant summary judgment to a nonmoving party. *K.E. Resources, Ltd. v. BFO Fin. Inc.*, 119 F.3d 409, 412 (6th Cir. 1997). The absence of a cross-motion, however, "does not preclude the entry of summary judgment if otherwise appropriate," *i.e.*, if there is no genuine issue as to any material fact. *K.E. Resources, Ltd.*, 119 F.3d at 412.

B. Choice of Law

As this court's jurisdiction is based on diversity, the court

must first determine which state's substantive law applies. To reach this decision, this court applies the choice of law rules of the forum state. In insurance coverage cases, Tennessee courts apply the substantive law of the state in which the insurance policy was issued and delivered if there is no choice of law clause in the policy. *Standard Fire Ins. Co. v. Chester-O'Donley & Associates, Inc.,* 972 S.W.2d 1 (Tenn. Ct. App. 1998)(citing *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 467 (Tenn. 1973)). Neither Topmost nor Nationwide has pointed to any choice of law clause in the policy and both parties have cited almost exclusively to Tennessee state court decisions or federal court decisions interpreting Tennessee law. In the absence of any information to the contrary, the court will therefore apply the substantive law of Tennessee.

C. Policy Coverage and Nationwide's Duty to Defend

Nationwide maintains that Osborne and Proffer's conduct is not covered by the policy it issued to Topmost. It argues that Osborne and Proffer's actions on the day in question are specifically excluded from coverage by the intentional acts exclusion, the employment-related practices exclusion, and by the exclusion for personal and advertising injury inflicted at the direction of the insured with knowledge that it would violate the rights of others. Hence, Nationwide insists, it has no duty to defend or indemnify

Topmost in the Kennedy lawsuit. Topmost, on the other hand, asserts that Osborne and Proffer were protecting Topmost's property and that the Nationwide policy specifically provides coverage against liability for bodily injury incurred as a result of reasonable force by the insured to protect its property.

An insurance policy is always construed "liberally" in favor of the insured and "strictly" against the insurance company. *Elsner v. Walker*, 879 S.W.2d 852, 854-55 (M.D. Tenn. 1994)(citing *Alvis v. Mutual Benefit Health & Accident Ass'n,* 297 S.W.2d 643, 646 (Tenn. 1956)). The insurer's duty to defend its insured and the scope of coverage in the insurance policy are legal issues. *Chester-O'Donley*, 972 S.W.2d at 5-6. If the relevant facts are not in dispute, these legal issues can be determined by the court on a motion for summary judgment. *Id.* (citing *St. Paul Fire & Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 834 (Tenn. 1994)). The broader duty to defend an insured is a distinct and independent duty from the duty of an insurer to indemnify its insured. *Drexel Chem. Co. v. Bituminious Ins. Co.*, 933 S.W.2d 471, 480 (Tenn. App. 1996).

To determine whether the actions of the insured are covered by the policy, the court must look to the allegations in the complaint. *St. Paul Fire & Marine*, 879 S.W.2d at 835. Even if only one allegation in an entire complaint is covered by the

policy, the insurer has a duty to defend, regardless of how many of the other allegations are excluded from policy coverage. *Drexel*, 933 S.W.2d at 480. No insurer may refuse to defend an insured unless the facts as alleged in the complaint cannot "bring the case within or potentially within the policy's coverage." *Id.* (quoting *Glens Falls Ins. Co. v. Happy Day Laundry, Inc.*, No. 19784, 1989 WL 91082 (Tenn. Ct. App. August 14, 1989)).

The pertinent provisions of the policy issued to Topmost by Nationwide provide as follows:

> **COVERAGE A: BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> **a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .**
>
> **2. Exclusions**
>
> **This insurance does not apply to:**
>
> **a. Expected or Intended Injury**
> **"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. *This exclusion does not apply to reasonable force to protect persons or property.***

*** * ***

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of Paragraph (1) above.

In addition, by an endorsement, the following employment-related practices exclusion was added to the policy:

> **A. The following Exclusion is added to Paragraph 2, Exclusions of Section 1 - Coverage A - Bodily Injury and Property Damage Liability:**
>
> **This insurance does not apply to:**
>
> **"Bodily injury" to:**
>
> **(1) A person arising out of any:**
>
> **(a) Refusal to employ that person;**
>
> **(b) Termination of that person's employment; or**
>
> **(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or**
>
> **(2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b) or (c) above is directed.**

(Emphasis added.) The same provisions and exclusions apply with respect to "personal and advertising injury" in addition to bodily injury:

> **2. Exclusions**

This insurance does not apply to:

> **a. "Personal and advertising injury":**
> **(1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury;"**

"Personal and advertising injury" is defined in the policy as:

> **injury, including consequential "bodily injury," arising out of one or more of the following offenses:**
> **a. False arrest, detention or imprisonment**
> *** * ***
> **c. the wrongful eviction from, wrongful entry into, or invasion of the right to private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; . . . .**

Pursuant to the decision in *St. Paul Fire & Marine*, the court looks only to the complaint filed by the Kennedys against Topmost to determine if any allegations in the complaint are covered or potentially covered by the policy. The court cannot consider the pleadings or court orders in the chancery court lawsuit filed by Topmost against the Kennnedys. Nor can the court consider the letter from the Kennedys' attorney admitting that Ms. Kennedy had Topmost property in her possession or the affidavit from Proffer in which he avers that he briefly restrained Ms. Kennedy in an effort to keep her from leaving the Topmost premises with Topmost property.

Topmost points to three paragraphs in the Kennedy complaint in support of its position that Ms. Kennedy had Topmost property in her possession - paragraphs 20, 28, and 29. (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. at 2, 5.) Nationwide mistakenly insists that Topmost relies on only two paragraphs in the complaint; it overlooks Topmost's reference to paragraph 28. Neither paragraphs 20 or 29 refer to Topmost property; instead both these paragraphs refer to property as Ms. Kennedy's - "her computer" and "her personal computer." Paragraph 28, however, refers to Topmost property being in Ms. Kennedy's car. It states, "Once they arrived at Kennedy's car, Proffer proceeded to grab and restrain Kennedy while Osborne unlawfully entered Kennedy's vehicle and removed various Topmost corporate documents." (Kennedy Compl. ¶ 28.) This factual allegation in the complaint is incorporated into Kennedy's claims for assault and battery, false imprisonment, and intentional infliction of emotional distress.

While the policy clearly excludes intentional acts causing injury to others, it simultaneously excepts from the exclusion reasonable measures its insured takes to protect its property. Paragraph 28 makes clear that Kennedy was in possession of Topmost corporate property, and from this allegation in the complaint it can be inferred that Proffer's purpose in restraining Kennedy was to permit Osborne to retrieve Topmost property from Kennedy's car,

namely corporate documents and information. (*See* Kennedy Compl. ¶¶ 20, 28). If Osborne and Proffer had not restrained Kennedy, she presumably could have destroyed the documents or used them for her own benefit. Reasonable force to protect property is excepted from the exclusion in the policy for intentional acts and is *potentially* within the policy's coverage.

Nationwide also argues that the actions of Proffer and Osborne were incident to Kennedy's termination of employment and are specifically excluded by the exclusion for bodily injury arising out of employment-related practices that was added to the policy by endorsement. As discussed above, the events that transpired at Kennedy's car, however, pertained to her possession of Topmost property. Some of Osborne and Proffer's alleged actions may be excluded by the employment-related practices exclusion, but to the extent their actions at the car were for the protection of Topmost property, they would fall within the policy's coverage. The same is true for the "personal and advertising injury" exclusions. At her car in the parking lot, Osborne removed Topmost documents while Proffer restrained her so that she would not leave with the property. Any "consequential bodily injury" that occurred there remained covered by the exception to the exclusion allowing Proffer and Osborne to use reasonable force to protect corporate property.

Based on the allegations in the complaint, Nationwide has a duty to defend Topmost. Nationwide's motion for summary judgment on this ground is therefore denied. The Sixth Circuit has decided that a court may grant summary judgment *sua sponte* to a non-moving party if no genuine issue of material fact exists and the issue has been fully briefed by both sides. (*See* Order, p. 7.) Neither Nationwide nor Topmost disputes that the allegations in Kennedy's complaint form the basis for the court's decision of whether there was a duty to defend. Neither party disputes that the court must also look to the insurance policy to determine Nationwide's duty. Whether the insurance company has a duty to defend is a legal issue, and no genuine issue of material fact exists. This court has decided that Nationwide has a duty to defend Topmost in Kennedy's lawsuit against it and therefore grants, *sua sponte*, summary judgment on this issue in favor of Topmost.

D. <u>Nationwide's Duty to Indemnify</u>

As previously stated, the duty to defend is broader than the duty to indemnify. *Drexel Chem. Co.*, 933 S.W.2d at 480. An insurer's duty to indemnify is an improper issue for summary judgment; it is a question for the trier of fact alone. *St. Paul Fire & Marine*, 879 S.W.2d at 834-35. To determine whether there is a duty to indemnify, the true facts, rather than the facts as they are alleged in the complaint, must be ascertained. *Id.* (quoting

American Policyholders' Ins. Co. v. Cumberland Cold Storage Co., 373 A.2d 247 (Me. 1977)). The duty to indemnify, therefore, presents genuine issues of material fact and cannot be decided on a motion for summary judgment. ***St. Paul Fire & Marine***, 879 S.W.2d at 834-35.

The record does not indicate if the underlying Kennedy lawsuit has been resolved. At this stage, only the facts as alleged in the complaint are known. An insured's duty to indemnify is dependent on the outcome of the case. Before the case is resolved, declaratory relief as to indemnity is premature. Accordingly, to the extent Nationwide's motion seeks summary judgment on the issue of its duty to indemnify, it is denied.

E. <u>Topmost's Bad Faith Claim</u>

Nationwide also argues in its motion that Topmost did not fulfill the demand requirement of Tennessee's bad faith penalty statute, Tenn. Code Ann. § 56-7-105, which provides, in pertinent part, as follows:

> (a) The insurance companies of this state, and foreign insurance companies and other corporations doing an insurance or fidelity or bonding business in the state, in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest thereon, a sum not exceeding

> twenty-five percent (25%) on the liability for the loss. . . .

Tenn. Code Ann. § 56-7-105(a). Tennessee courts have repeatedly held that a plaintiff may not recover a bad faith penalty as set forth in the statute unless the plaintiff shows: (1) the policy of insurance, by its terms, has become due and payable, (2) a formal demand for payment was made, (3) the insured waited sixty (60) days after making his demand before filing suit, unless there was a refusal to pay prior to the expiration of the sixty (60) days, and (4) the refusal to pay was not in good faith. *Palmer v. Nationwide Mut. Fire Ins. Co.*, 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986)(citations omitted). Because this is a penalty statute, the requirements must be "strictly construed." *Walker v. Tennessee Farmer's Mut. Ins.* Co., 568 S.W.2d 103, 106 (Tenn. Ct. App. 1977) (citing St. *Paul Marine & Fire Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 72 (1914)).

First, Nationwide argues that Topmost failed to put it on notice that Topmost would seek the bad-faith penalty if it did not pay the claim. Nationwide asserts that a formal demand under the statute mandates that the insured must explicitly state that failure to pay the claim may result in a pursuit of the bad-faith penalty in court.

Tennessee courts, however, have failed to define the exact

nature of a "formal demand" for the purposes of seeking the bad-faith penalty. *Hampton v. Allstate Ins. Co.*, 48 F. Supp. 2d 739 (M.D. Tenn. 1999). In Tennessee, it is not necessary for the demand to be written; repeated verbal demands are enough. *Hampton*, 48 F. Supp.2d at 746. *See also* Lex A. Coleman, *Just How Formal Does an Insured's "Demand" Have to be Under Tennessee's Insurer Bad-Faith Statute Anyway? An Argument for Why Written Formal Demand Should be Required Under Section 56-7-105(a) of the Tennessee Code*, 30 U. MEM. L. REV. 239, 270, 272 (2000)(advocating the requirement of a written demand and opining that under Tennessee law a "formal demand" must provide notice to the insurance carrier regarding the insured's intent to seek the bad-faith penalty). While the demand is not required to be in writing, it must be specific enough so that "the insurance company is aware or has notice from the insured of the insured's intent to assert a bad faith claim, if the disputed claim is not paid." *Id.* at 746-47. The purpose of a formal demand is to "allow the insurance company an opportunity to investigate the insured's claim of loss, to give the insurance company notice of the insured's intent to assert a bad faith claim if the disputed claim is not paid and to memorialize the fact that 60 days have expired after the insured gave such notice before filing suit." *Id.* at 739.

Georgia has a remarkably similar bad-faith statute[1] to Tennessee's and there the courts squarely confronted this issue when an insured submitted a demand letter to its insurance company but made no mention of the insured's intent to assert bad faith: "Clearly, the purpose of the statute's demand requirement is to adequately notify an insurer that it is facing a bad faith claim so that it may make a decision about whether to pay, deny or further investigate the claim within the sixty day deadline. While Georgia law recognizes that no particular language is required to assert a demand, the language must be sufficient to alert the insurer that bad faith is being asserted." *Primerica Life Ins. Co. v. Humfleet*, 458 S.E.2d 908, 910 (Ga. Ct. App. 1995)(cited by *Hampton v. Allstate Ins. Co.,* 48 F. Supp.2d 739, 745 n.1 (M.D. Tenn. 1999)). In *Primerica*, the insured's decedent called the insurance company

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[1] Ga. Code Ann. § 33-4-6 provides:

> (a) in the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to oay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. . . .

after her husband's death, asking that the claim be processed and paid as soon as possible. *Primerica*, 458 S.E.2d at 909. She did not threaten to sue and claim the bad-faith penalty. *Id.* at 910.

In *Hampton*, the insureds called Allstate, their insurance carrier, on numerous occasions, telling them with each call that if Allstate did not pay the claim within sixty days, they would sue and seek the bad-faith penalty. Even though the demand was not written, it put Allstate on notice that their insureds would sue and claim bad faith. *Hampton*, 48 F. Supp. 2d at 746.

In contrast, the insureds in *Walker* filled out all required paperwork and cooperated with the insurance company after their truck was stolen and had numerous conversations with the insurer regarding the whereabouts of the truck, but never mentioned a lawsuit or what penalties or damages they might seek. These actions were insufficient to meet the demand requirement of the bad-faith statute. *Walker*, 568 S.W.2d at 107. *But see Solomon v. Hager*, 2001 WL 1657214 at 11 (Tn. App. Dec. 27, 2001) (holding that Solomon's actions in contacting her insurer five to six times gave her insurer adequate notice and time to contemplate the possibility of a bad faith lawsuit).

In the case at bar, Topmost's letter to Nationwide on January 11, 2001, stated simply, "[l]et this letter serve as demand by Mr. Proffer that Nationwide fulfill its obligation to defend this

matter on his behalf and to provide coverage for this incident." (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. Ex. I.) Notably missing from this letter is a threat of litigation or any mention of the bad-faith penalty, as was present in *Hampton* but also missing from *Walker*.

While Tennessee law is not completely clear on this issue, the court finds that Topmost's letter was not effective as a formal demand; it did not put Nationwide on notice that if Nationwide did not pay the claim, then suit would be brought and Topmost would seek the bad-faith penalty. In the absence of any language in the demand regarding the bad-faith penalty, the court grants Nationwide's motion for summary judgment on this issue. Topmost will not be allowed to seek the bad-faith penalty in this lawsuit.

Nationwide also insists that Topmost filed its suit and made its demand prematurely, *i.e.*, before the claim was due and payable. Because the court has determined that Topmost's demand was insufficient to invoke the bad-faith penalty, it is not necessary for purposes of this motion for the court to decide this issue. Nevertheless, the court will briefly consider it.

Nationwide avers that the claim was not "due and payable" until a full investigation was conducted by Nationwide regarding the incident and payment officially denied. (Def's Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. p.6). Topmost relies on the

fact that it sent a letter to Nationwide on January 11, 2001, four months before this lawsuit was commenced, demanding that "Nationwide fulfill its obligation to defend [the Kennedy lawsuit]," (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J., Ex. I), and no response was received for over four months.

According to *Palmer*, a policy must be due and payable "*by its terms*." *Palmer*, 723 S.W.2d at 126. Neither side has cited to a provision in the policy that governs when the policy becomes due and payable in the face of a demand for a defense, nor has either side cited to any case law that might give the court direction in this matter. Keeping in mind the standard for summary judgment, the court finds that there are factual disputes and it is not clear as a matter of law as to when the policy became due and payable.

CONCLUSION

For the foregoing reasons, Nationwide's motion for summary judgment as to Topmost's claim for the bad-faith penalty is granted. Nationwide's motion for summary judgment as to its duty to defend and to indemnify is denied. Furthermore, the court grants summary judgment *sua sponte* to Topmost as to Nationwide's duty to defend.

IT IS SO ORDERED April 23, 2002.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

Date: _____