

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NATIONAL UNION FIRE INSURANCE	)	
COMPANY OF PITTSBURGH, PA.,	)	
	)	
Plaintiff,	)	Case No. _____
	)	
v.	)	<b>COMPLAINT</b>
	)	
ZILLOW, INC.,	)	
	)	
Defendant.	)	
	)	
_____	)	

Plaintiff National Union Fire Insurance Company of Pittsburgh, Pa. (referred to herein as “National Union”), for its complaint against defendant Zillow, Inc. (referred to herein as “Zillow”), alleges as follows:

**I. PARTIES**

1. National Union is a foreign insurer authorized to do business within the state of Washington. National Union is qualified to bring this action. National Union is a Pennsylvania corporation, with its principal place of business in New York, New York.

2. Zillow is a Washington corporation, with its principal place of business in Seattle, Washington.

**II. JURISDICTION AND VENUE**

3. This is an action for a declaratory judgment pursuant to the Declaratory Judgments Act, 28 U.S.C. § 2201, *et seq.* to resolve an actual case or controversy that exists

1 between the parties.

2 4. This Court has jurisdiction under 28 U.S.C. § 1332(a). The amount in  
3 controversy exceeds \$75,000, exclusive of interest and costs. Venue is proper pursuant to 28  
4 U.S.C. § 1391.

5 **III. FACTUAL ALLEGATIONS**

6 **A. The Policy**

7 5. National Union issued Specialty Risk Protector Policy Number 01-420-63-50  
8 (“the Policy”), effective July 19, 2014 through July 19, 2015, to Zillow.

9 **B. The Underlying Matter**

10 6. On July 10, 2014, VHT, Inc. (“VHT”) sent Zillow a “Takedown Notification”  
11 letter, referred to herein as “the Demand Letter.” The Demand Letter asserted that Zillow’s  
12 website was misusing certain digital images licensed to Zillow by VHT, and demanded that  
13 Zillow remove the offending images from its website. However, Zillow did not notify National  
14 Union of the Demand Letter until over one year later, on August 14, 2015.

15 7. When Zillow refused to remove the images, VHT filed suit against Zillow in the  
16 Western District of Washington on July 8, 2015 under Cause No. 2:15-cv-01906. This lawsuit  
17 will be referred to herein as “the VHT Action.”

18 **C. The Insurance Claim**

19 8. Zillow notified National Union of the VHT action on or about July 10, 2015.

20 9. By letter dated July 20, 2015, National Union agreed to provide Zillow with a  
21 defense in the VHT action pursuant to a reservation of rights, and requested additional  
22 information from Zillow regarding the VHT action. The letter advised that the defense provided  
23 by National Union to Zillow was subject to agreed-upon hourly rates and National Union’s  
24 Litigation Management Guidelines, and requested that Zillow contact National Union to  
25 discuss Zillow’s selection of defense counsel from National Union’s list of pre-approved panel  
26 firms.

27 10. Zillow did not contact National Union to discuss selection of defense counsel.

1 Instead, without consulting National Union, Zillow unilaterally selected the New York, New  
2 York office of DLA Piper to represent Zillow in the VHA action. DLA Piper is not on National  
3 Union's list of pre-approved panel firms.

4 11. On August 14, 2015, Zillow provided some information responsive to National  
5 Union's requests, including the Demand Letter. This was the first notice Zillow provided to  
6 National Union of the **Claim**<sup>1</sup> that VHT had first asserted against Zillow over one year earlier.  
7 Upon receipt of the Demand Letter, National Union learned that VHT had first asserted its  
8 **Claim** against Zillow on July 10, 2014, i.e. nine days before the Policy incepted on July 19,  
9 2014.

10 12. Accordingly, National Union sent Zillow a supplemental reservation of rights  
11 letter dated September 15, 2015. That letter explained that the VHT action is not covered by the  
12 Policy because VHT first asserted its **Claim** against Zillow before the Policy incepted.

13 13. When Zillow did not respond, National Union sent subsequent letters to Zillow  
14 requesting that Zillow respond to National Union's position letter and explaining that National  
15 Union was prepared to attempt to resolve the coverage dispute using the Policy's dispute  
16 resolution procedures. These letters were dated November 23, 2015 and January 28, 2016.  
17 When Zillow ignored these letters, National Union's outside counsel sent Zillow a letter dated  
18 April 1, 2016 specifically invoking the Policy's dispute resolution procedure.

19 14. A June 17, 2016 mediation failed to resolve the parties' coverage dispute. In  
20 connection with the mediation, National Union learned that Zillow had purportedly incurred  
21 substantial defense costs with respect to the VHT action. National Union also learned that,  
22 without consulting National Union, VHT had hired Susman Godfrey to replace DLA Piper as  
23 defense counsel. Susman Godfrey is not on National Union's list of pre-approved panel firms.

24 15. By letter dated July 8, 2016, National Union reiterated its commitment to  
25 providing Zillow with a defense to the VHT Action, but asserted additional reservations of

---

26 <sup>1</sup> Bolded terms used in the body of this Complaint are defined by the Policy, and are used in  
27 accordance with the definition provided by the Policy.

1 rights based on Zillow’s breach of its duty to cooperate with National Union in the defense of  
2 the VHT action. The letter also requested that Zillow provide National Union with defense cost  
3 invoices, budgets, liability and damages analyses and status reports prepared by defense  
4 counsel. National Union requested that information in order to enable National Union to  
5 meaningfully participate in the defense of the VHT action.

6 16. By letter dated July 21, 2016, Zillow forward copies of defense costs invoices to  
7 National Union, but declined to provide a budget or any analysis of the VHT action unless  
8 National Union first agreed to execute an unnecessary confidentiality agreement.

9 **D. Insurance Coverage**

10 17. The terms of the Policy expressly preclude coverage for the VHT action.

11 18. The Policy’s pertinent insuring agreement states, in relevant part:

12 With respect to the **MEDIA CONTENT INSURING AGREEMENT**, the  
13 **DEFENSE** provisions and the **SETTLEMENT** provisions of this Clause 1.,  
14 solely with respect to **Claims** first made against an **Insured** during the **Policy**  
15 **Period** or **Discovery Period** (if applicable) and reported to the **Insurer** pursuant  
16 to the terms of this policy, this **Media Content Coverage Section** affords the  
17 following coverage...

18 19. In accordance with the insuring agreement, the Policy only provides coverage  
19 for a **Claim** that is first made against Zillow during the **Policy Period** of July 19, 2014 through  
20 July 19, 2015.

21 20. VHT’s **Claim** was first made against Zillow by way of the July 10, 2014  
22 Demand Letter.

23 21. Because VHT’s **Claim** was first made against Zillow prior to the **Policy Period**,  
24 it is outside the scope of the insuring agreement and therefore not covered by the Policy.

25 22. Because Zillow was aware of VHT’s **Claim** before the Policy incepted,  
26 coverage is also precluded by Washington’s common law known loss doctrine.

27 23. The Policy’s notice provision provides, in relevant part, that: “The **Insureds**  
shall, as a condition precedent to the obligations of the **Insurer** under this policy, give written  
notice to the **Insurer** of any **Claim** made against an **Insured**...as soon as practicable” but no

1 later than “forty-five (45) days after the end of the **Policy Period.**”

2 24. Zillow learned of VHT’s **Claim** on or around July 10, 2014, but did not notify  
3 National Union of VHT’s **Claim** until July 10, 2015. Zillow’s untimely notice of the VHT  
4 **Claim** breached the Policy’s notice provision because Zillow’s notice of the VHT **Claim** was  
5 provided neither “as soon as practicable.”

6 25. The Policy further provides as follows:

7 **7. INSURED'S OBLIGATIONS**

8 In connection with all **Claims** and **First Party Events** under this policy, each  
9 **Insured** agrees to the following:

10 (a) such **Insured** shall send the **Insurer** copies of all demands, suit papers, other  
11 related legal documents and invoices for **Defense Costs** received by such  
**Insured**, as soon as practicable;

\*\*\*

12 (c) such **Insured** shall cooperate with and help the **Insurer** and/or any counsel  
13 appointed pursuant to the terms of this policy...

14 26. Zillow has breached the foregoing Policy provision by failing to send National  
15 Union a copy of the Demand Letter and other pertinent documents, including defense cost  
16 invoices, as soon as practicable, and by otherwise failing to cooperate with National Union in  
17 the defense of the VHT action.

18 27. Endorsement #5 to the Policy, entitled Choice of Panel Counsel Endorsement,  
19 provides in relevant part as follows:

20 With regard to any **Claim** for which an Insured seeks coverage, the initial choice  
of counsel ("Chosen Counsel") shall be made by such **Insured** from the  
**Insurer's** list of panel firms

\*\*\*

21 With regard to any **Claim** for which an **Insured** seeks coverage, such **Insured**  
22 agrees that as a condition precedent to coverage for **Defense Costs**...such  
23 Insured and **Chosen Counsel** must comply with the **Insurer's** Litigation  
24 Management Guidelines (the "**Guidelines**") ...The **Insured** understands and  
25 agrees that the **Guidelines** contain reasonable and necessary reporting and  
26 billing procedures to be followed by **Chosen Counsel**...The **Guidelines** also  
require that **Chosen Counsel** work closely and communicate regularly with the  
Insurer's assigned claims professional in coordinating defense efforts and that  
**Chosen Counsel** apprise the **Insurer** on a regular and timely basis as to  
significant case developments.

\*\*\*

27 In the event **Insured(s)** cannot select legal counsel from the list of **Chosen  
Counsel**...the **Insurer** and the **Insured(s)** shall jointly agree upon counsel who

1 will defend the **Insured(s)** in such matter. If the **Insurer** and the **Insured(s)** are  
2 unable to agree upon selection of defense counsel, the **Insurer** shall select  
defense counsel.

\* \* \*

3 Fees, costs, charges, billings and any other expense incurred through any law  
4 firm or other service provider, other than **Chosen Counsel** or a firm chosen  
pursuant to paragraph C above, shall not be recoverable under this policy as  
5 **Defense Costs** or otherwise.

6 28. Zillow has breached the Choice of Panel Counsel Endorsement by failing to  
7 select defense counsel in accordance with the endorsement, by selecting defense counsel who  
8 are not on National Union’s list of pre-approved panel firms, by failing to ensure that defense  
9 counsel follows the **Guidelines** and by completely failing to coordinate and communicate with  
National Union regarding the defense of the VHT action.

10 29. Zillow’s multiple breaches of the Policy have prejudiced National Union in  
11 many ways, including, but not limited to, the following: preventing National Union from  
12 considering the **Claim** when the Policy was renewed; preventing National Union from timely  
13 investigating and potentially resolving the **Claim** without the need for litigation; preventing  
14 National Union from defending the **Claim** utilizing appropriately experienced and cost  
15 effective defense counsel; and preventing National Union from exploring reasonable  
16 opportunities to settle the VHT action.

17 30. Other terms, conditions, and exclusions contained within the Policy may also  
18 limit and/or preclude coverage for the VHT action. These other terms, conditions and  
19 exclusions are identified in National Union’s reservation of rights letter dated July 20, 2015.  
20 Such other terms, conditions and exclusions provide additional bases for a declaratory  
21 judgment that the Policy does not provide coverage for the VHT action, and include the  
22 following:

23 a. The Policy’s definition of **Loss** provides in relevant part that: “‘Loss’  
24 means compensatory damages, judgments, settlements, pre-judgment and post-judgment  
25 interest and **Defense Costs**, including punitive, exemplary and multiple damages where  
26 insurable by the applicable law which most favors coverage for such punitive, exemplary and  
27

1 multiple damages.” Coverage is not available for some or all of the **Claim**, because the VHT  
2 action seeks relief outside the scope of the Policy’s definition of **Loss**.

3 b. Exclusion 3(a) provides the Policy does not cover **Loss** arising from a  
4 **Claim**, “alleging, arising out of, based upon or attributable to a dishonest, fraudulent, criminal  
5 or malicious act, error or omission, or any intentional or knowing violation of the law;  
6 provided, however, the **Insurer** will defend **Suits** that allege any of the foregoing conduct, and  
7 that are not otherwise excluded, until there is a final judgment or final adjudication against an  
8 **Insured** in a **Suit**, adverse finding of fact against an **Insured** in a binding arbitration  
9 proceeding, or plea of guilty or no contest by an **Insured** as to such conduct, at which time the  
10 **Insureds** shall reimburse the **Insurer** for **Defense Costs**.” Because the **Claim** alleges dishonest  
11 acts, errors and omissions, Exclusion 3(a) may apply to limit or preclude coverage for the VHT  
12 action.

13 c. Exclusion 3(j) bars coverage for some of the forms of relief requested in  
14 the VHT action, including “any profit or advantage to which an **Insured** is not legally entitled”  
15 and “an Insured’s costs and expenses of complying with any injunctive or other form of  
16 equitable relief” and “civil or criminal fines or penalties imposed against an Insured and any  
17 matters deemed uninsurable under the law pursuant to which this policy shall be construed.”  
18 Accordingly, Exclusion 3(j) may apply to limit or preclude coverage for the VHT action.

19 **IV. CAUSE OF ACTION FOR DECLARATORY JUDGMENT**

20 31. National Union incorporates each and every allegation contained within  
21 ¶¶ 1 through 30 of its Complaint, as set forth above.

22 32. A case and controversy exists between the parties.

23 33. The Policy, by its express terms, conditions and exclusions, does not provide  
24 coverage for the VHT action.

25 34. National Union is entitled to a declaratory judgment pursuant to the Declaratory  
26 Judgments Act, 28 U.S.C. § 2201, *et seq.*, providing that National Union has no duty under the  
27 Policy to defend or indemnify Zillow with respect to the VHT action.

1                   V.     **CAUSE OF ACTION FOR BREACH OF CONTRACT**

2           35.     National Union incorporates each and every allegation contained within  
3 ¶¶ 1 through 34 of its Complaint, as set forth above.

4           36.     The Policy is an insurance contract between the parties.

5           37.     Zillow has breached the Policy by: 1) failing to notify National Union of the  
6 **Claim** as soon as practicable; 2) failing to send National Union a copy of the Demand Letter  
7 and other pertinent documents, including defense cost invoices, as soon as practicable; 3)  
8 failing to select defense counsel in accordance with Endorsement No. 5; 4) failing to ensure  
9 that defense counsel follows the **Guidelines**; 5) failing to coordinate and communicate with  
10 National Union regarding the defense of the VHT action; and 6) otherwise failing to cooperate  
11 with National Union in the defense of the VHT action.

12           38.     National Union has been damaged by Zillow's multiple breaches of the Policy.

13           39.     Zillow's breaches of the Policy preclude coverage for the VHT action under the  
14 Policy.

15           40.     In the alternative or in addition to the foregoing, National Union is entitled to  
16 monetary damages as a result of Zillow's breaches of the Policy.

17                                   V.     **PRAYER FOR RELIEF**

18           WHEREFORE, National Union prays for the following relief:

19           A.     For a declaratory judgment stating that the Policy, by its express terms,  
20 conditions and exclusions, does not provide coverage for the VHT action, and, for that reason,  
21 National Union has no duty to defend or indemnify Zillow with respect the VHT action;

22           B.     For a declaratory judgment stating that, as of the date of judgment and order,  
23 National Union may immediately withdraw from the defense of Zillow in the VHT action;

24           C.     For a judgment stating that Zillow's breaches of the Policy preclude coverage  
25 for the VHT action under the Policy;

26           D.     For an award of monetary damages arising from Zillow's breach of contract;

27           E.     For an award of costs and attorneys' fees to National Union to the extent



1 permitted by law; and

2 F. For such other and further relief that this Court deems just and equitable.

3 DATED: September 15, 2016

4 JENSEN MORSE BAKER PLLC

5  
6 By /s Gabriel Baker  
7 Gabriel Baker, WSBA No. 28473  
8 Attorneys for Plaintiff National Union Fire  
Insurance Company of Pittsburgh, Pa.

9 JENSEN MORSE BAKER PLLC

10  
11 By /s Steven D. Jensen  
12 Steven D. Jensen, WSBA No. 26495  
13 Gabriel Baker, WSBA No. 28473  
14 Attorneys for Plaintiff National Union Fire  
15 Insurance Company of Pittsburgh, Pa.