The 5th Annual
Hospitality Law Conference

Insurance Solutions

Andrew Cutler is the Global EPL Team Leader for Beazley – a leading insurer based both in Lloyd's of London and here in the United States.

With over 15 years of experience in underwriting Employment Practices Insurance Andrew will touch on the evolution of the class and then speak in detail on the following topics:

- Important EPL insurance product features
- Wage & Hour coverage
- Claims services
- Defense counsel

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THE HOSPITALITY INDUSTRY

The Background

The hotel and hospitality industry, as a whole, has made a significant contribution to the national employment figures in 2004 by providing 1.8 million wage and salary jobs.[1] The industry offers a diverse variety of services. The hospitality industry includes all types of lodging, from upscale hotels to RV parks, motels, resorts, casino hotels, bed-and-breakfast inns, and boarding houses, amongst others. In fact, nearly 62,000 establishments provide overnight accommodations to suit many different needs and budgets.[2] The industry also employs the largest percentage of gaming services workers because much of gaming takes place in casino hotels.[3]

The hospitality industry is very vulnerable to market pressures (particularly human capital program expenses) because of its labor-intensive business model.[4] This has resulted in a significant increase in employment related litigation as a result of mass layoffs. Data from the Mass Layoff Statistics program shows that in 2005, in the accommodation industry, there were 357 extended mass layoff events, 74,711 separations, and 63,366 initial claimants for unemployment insurance.[5]

The Current Population Survey shows that in 2005, the unemployment rate of persons most recently employed in leisure and hospitality was 7.8 percent – well above the overall unemployment rate of 5.1 percent in 2005.[6] From July 2005 to July 2006, the accommodations employment level decreased by 4,700 jobs.[7]

Mass layoffs, reductions in force, and terminations frequently lead to lawsuits brought by employees for wrongful discharge and age discrimination. Hotels and casinos are perceived to be targets because they are viewed as "deep pockets" and averse to negative publicity.

Moreover, according to a leading hospitality magazine,[8] employee incentives programs, such as bonuses, are means by which employers are attempting to retain employees and curb the high-turnover rate. While the incentive programs may be well meaning, they are also potential factors that could increase EPL exposure. Consider, for instance, an executive that is promised a year-end bonus but does not receive it because the hotel's profits were below expectations. That executive could potentially bring a claim for breach of implied contract (or breach of an actual contract if the bonus incentive program was in writing).

The hotel and casino sectors are also targeted because of the perception that there is a preference for younger, attractive workers. This perception undoubtedly contributes to the

[1] http://www.bls.gov/oco/cg/cgs036.htm
[2] Id.
[3] Id.
[4] http://www.hospitalitynet.org/file/152001510.pdf
[5] http://www.bls.gov/iag/leisurehosp.htm
[6] Id.
[7] Bureau of Labor Statistics. Table B-1. http://www.bls.gov/news.release/empsit.t14.htm
[8] www.hotelnewsresource.com/article11388.html.

frequency of gender discrimination (i.e. claims both that women are hired over men and/or men are placed in the more prestigious managerial positions) and sexual harassment claims in the industry.

In addition, the industry tends to attract younger workers because it has traditionally been a common provider of "first jobs" to many new entrants to the labor force. This results in a perception that older workers are more likely to be discharged, which in turn results in age discrimination lawsuits. In 2004, 19 percent of the workers within the hotel and accommodations industry were under the age 25, compared with 14 percent across all industries nationwide.[9]

Another potential area for EPL exposure in the hospitality industry arises from the alleged employee harassment by third-party customers and/or vendors. The hospitality industry, unlike many other industries, is highly dependent on vendors and suppliers. Many of the EPL claims against hospitality employers arise out of the conduct of hotel guests or vendors/suppliers. Even in the rare situations where the hotel had an indemnification agreement from the vendor or supplier, the hotel still faces exposure as a result of the vendor or supplier's conduct.

With respect to third party discrimination claims, according to the 2004 NAACP Lodging Industry Report Card, the African-American travel market is the fastest growing segment of the hospitality industry –rising 16% over a two year period, compared to only 1% growth in the general market. Yet, there have been many racial discrimination lawsuits brought by African-American patrons who were allegedly refused lodging or placed in less than suitable conditions and/or treated differently than other customers. [10]

Sample Claims

Sexual Orientation:

- *Plaintiff, former general manager of the defendant's Park Lane Hotel, alleged that defendant, Leona Helmsley, subjected him to a hostile and abusive work environment, and that she terminated his hotel employment because he is gay. Plaintiff claims that defendant Helmsley berated him, called him a "fag" and a "faggot"; warned him to stay away from the "Miami faggot crowd," and told him, "You look like a fag; you dress like a fag; you are a fag." The jury found that the defendant subjected the plaintiff to a hostile and abusive work environment, and that she fired him because of his sexual orientation. Plaintiff obtained a verdict for $11,175,000, $10,000,000 of which was punitive damages. The verdict was later reduced to $554,000 in March 2003.*

***National Origin and Racial Discrimination**:*

- *The EEOC brought suit against the Plaza Hotel and Fairmont Hotel and Resorts, Inc. for alleged discrimination of a class of Muslim, Arab, and South Asian employees based on their religion and national origin. The suit specifically claimed that the employees were*

[9] http://www.bls.gov/oco/cg/cgs036.html.
[10] http://www.hotel-online.com/News/PR2004_3rd/Jul04_NAACP.html

subjected to offensive comments including being called "terrorist," "Osama," "Taliban," and "Dumb Muslim" by high level managers and employees. The case settled for $525,000 in July 2005.

- *The EEOC, on behalf of 24 housekeepers, sued Las Vegas-based Anchor Coin Inc. d/b/a Colorado Central Station Casino Inc., for Title VII discrimination based on national origin. Eleven employees intervened after the EEOC filed suit. Members of the housekeeping staff at Colorado Central Station Casino claimed that supervisors imposed an English-only rule. The staff, most of whom only spoke Spanish, claimed that they endured name-calling and shouting by their superiors for speaking Spanish and that they were not only held to the English-only rule during work but also on lunch breaks and when engaged in casual conversations. The parties settled for $1,500,000.*

- *The EEOC brought suit against the Mirage Hotel in Las Vegas alleging that the casino discriminated against African American employees for two years prior to the acquisition of the Mirage by MGM Grand. The plaintiffs settled for $1,400,000.*

- *The EEOC filed a lawsuit alleging that nine former valet bell staff at defendant Mondrian Hotel were the victims of discrimination based on race and national origin. The EEOC claimed that the impetus for the lawsuit arose when the current owner bought the Mondrian Hotel after it had been in bankruptcy for several years. When defendants made the decision to overhaul the hotel, management discharged the existing valet bell staff and hired an all-new valet bell staff for the reopening. The staff that had been discharged was Asian, Filipino, Mexican or those who had "associated" with "minority co-workers." After the EEOC filed the lawsuit, eight of the nine discharged valet bell staff filed a complaint-in-intervention. Plaintiffs-in-intervention added a claim of wrongful termination based on discrimination pursuant to the California Fair Employment and Housing Act. The parties settled for $1,800,000.*

Wrongful Termination:

- *Plaintiff, general manager of an inn and spa owned by Pequot Hotel Group, alleged that she and three other employees were investigated and eventually terminated because she fired an employee for alleged abusive and violent behavior. She claimed that the employee had familial connections to a member of the hotel's upper management while the hotel did not agree that he should have been terminated. She claimed the reasons given for her termination were a pretext because they were actually longstanding parts of her employment contract, including uses of travel allowance and her exercise of expenses signing privileges. The hotel contended that the plaintiff and the other three employees were fired for not cooperating with their investigation into mismanagement of funds and employee relation problems. The plaintiffs obtained a verdict for $6,813,444 against the hotel for intentional infliction of emotional distress.*

- *Flagship Resort Development Corp. Inc., a timeshare resort in Atlantic City, terminated three employees after they refused to undergo a polygraph test in connection with the theft of an employee's money. The plaintiffs brought suit, alleging that they were*

wrongfully terminated in violation of the federal Employment Polygraph Protection Act, which protects employees from having to take such a test. The act states that it is unlawful to either request or administer a polygraph examination to an employee except under very limited circumstances. In a pretrial hearing, a judge determined that such circumstances did not apply in the case. The plaintiffs obtained a verdict for $4,076,645, $2,980,000 of which was for punitive damages.

- *Plaintiff was employed as a casino general manager at the Mono Wind Casino, which is owned and operated by the Big Sandy Band of Western Mono Indians. The plaintiff was employed under a three-year contract that contained a $50,000 bonus after one year of employment. The plaintiff was terminated after approximately 11 months on the job. The plaintiff sued the Big Sandy Band, alleging wrongful termination and that he was terminated so that the casino would not have to pay him the promised bonus. The plaintiff received an arbitration award of $605,810.*

Gender and Age Discrimination:

- *The plaintiff, a former hotel concierge alleged that she was turned down for employment at the Four Seasons Hotel in Manhattan because she was 54 years of age. She had previously held the same position in Boston. Plaintiff obtained a verdict of $320,000.*

Sexual Harassment:

- *Two former cocktail servers of the Borgata Hotel Casino filed suit against their former employer alleging sexual harassment. It was alleged that the hotel required the women to sign a consent form when they were hired. The women claimed they suffered endless humiliation and anguish due to the terms of the consent form, which cited that the women would always keep clean smiles, an hourglass figure, and their weight under control. The women also claimed that they were encouraged by supervisors to get breast implants. The matter is still pending.*

- *Plaintiffs, two male waiters, filed a lawsuit against the Waldorf Astoria for alleged sexual harassment. Both men claim that the general manger harassed them for months by repeatedly grabbing their buttocks and genitals. The men also claim that their boss was aware of the harassment and did nothing to prevent the harassment. Plaintiffs are seeking $150 million from the hotel.*

- *The EEOC filed suit against Caesars Palace on behalf of kitchen workers who claim that they were sexually harassed by supervisors for years. The suit includes allegations of a supervisor trying to force sex on a worker while she was pregnant, a supervisor exposing himself to a worker several times, and supervisors offering favorable treatment in exchange for sex. The suit also alleges that when workers complained about the abuse, Caesars management retaliated against workers with further harassment, demotion, loss of wages, discipline or demotion. The matter is still pending.*

- *The plaintiff, a 28 year old female, was employed as a bartender at the lounge of a hotel owned by the defendants. A male supervisor at the hotel allegedly sexually harassed plaintiff verbally and physically for 6 years. Plaintiff complained to the bar manager, but no action was taken. After a written harassment policy was issued, the plaintiff contacted the corporate head of Human Resources. The supervisor was disciplined, but plaintiff was again put under his control. He took away plaintiffs most profitable shift and denied her vacation requests. Plaintiff alleged that: (1) the sexual harassment and hostile work environment caused humiliation, loss of self-esteem, and emotional distress; (2) defendants' remedial action was inadequate; (3) the supervisor retaliated against her, constituting constructive discharge; and (4) she was not excessively tardy or absent from work. Plaintiff obtained a verdict of $279,300.*

Age Discrimination:

- *The EEOC brought suit alleging that the Beverly Hilton Hotel failed to hire applicants over the age of 40 to work at the Coconut Club, a high-end supper club formerly located there. The plaintiff brought this suit on behalf of 15 individuals who had applied for jobs and were rejected. The Beverly Hilton Hotel, which is the largest employer in Beverly Hills with about 650 employees, denied the allegations but agreed to cooperate with the EEOC to resolve the dispute and further its anti-discrimination policies. Plaintiff settled for $220,000.*

Third Party Racial Discrimination:

- *In 2003, the NAACP and 25 individuals filed two lawsuits in federal court in South Carolina, alleging that restaurants, including Denny's and Red Lobster, and hotels, such as Yachtsman Hotel, in Myrtle Beach, engaged in wide spread discrimination during an annual event, the Black Bike Week, attended primarily by hundreds of thousands of African Americans. It was alleged that white bikers, who visit the restaurants and hotels, for "Harley Week", a week prior to Black Bike Week, are treated better than blacks. For instance, the restaurants either close their doors early or do not open at all during Black Bike Week, while they operate their normal hours during Harley Week. One of the hotels asked black patrons to pay for their entire stay in advance, although the same rule did not apply to the white hotel guests during Harley Week. The cases have been settled with the restaurants agreeing to use nondiscriminatory standards in deciding whether restaurants will remain open during special events in Myrtle Beach. Also, the settlement requires the City of Myrtle Beach to provide special training to all law enforcement personnel deployed by the City during Black Bike Week.*

- *The U.S. Justice Department and the state of Florida brought lawsuits against Adam's Mark Hotel after black guests allegedly were singled out as security risks and made to wear orange wristbands during a Black College Reunion weekend. White guests were not given similar wristbands. It was also alleged that black guests were charged higher prices and segregated to less desirable parts of the hotel. The case settled for $8,000,000.*

THE RESTAURANT INDUSTRY

The Background

The restaurant industry is currently the largest employer segment outside of the federal government, employing over 12.5 million people.[11] By 2016, the industry is expected to add 1.9 million jobs, for a total employment of 14.4 million in 2016.[12] The restaurant industry is also one of the fastest growing sectors. Since July 2005, it has managed to gain an additional 230,000 jobs.[13] More specifically, 30,000 new jobs were gained between June 2006 and July 2006 alone.[14]

Employees within the restaurant industry are more likely to be single or female than workers in other industries. According to the Bureau of Labor Statistics data, 6 percent of all employed women work in food preparation and food service occupations. Seventy-one percent of employees in the food service industry are single, and while women make up only 46 percent of the total employed civilian labor force, they constitute 52 percent of those employed in food-preparation and foodservice occupations.[15]

The percentage of female workers in the restaurant industry may account for the large number of sexual harassment lawsuits. The often relaxed environment at restaurants has attributed to a higher degree of horseplay and frolicking, which, unfortunately, often leads to allegations of sexual harassment against male managers or supervisors, as indicated by the sample cases listed below.

Those employed in food preparation and food service occupations also tend to be younger than employees in other occupations. Their youth is reflected in their marital and educational status, as well as in the industry's high turnover rates and average job tenure. Fifty-nine percent of food preparation and food service employees are under age 30, and women in their childbearing years (ages 18 to 44) account for 38 percent of those employed in those occupations.[16] The high turnover rates among the younger generation and the high percent of women in their childbearing years spawn the high frequency of wrongful termination suits within the restaurant industry. The youth of most employees in this industry has also been cited by older workers as a sign of age discrimination when employers are accused of preferring younger employees who may be viewed as faster and more effective than the older employees.

Minorities also account for a disproportionately high amount of restaurant industry workers. Specifically, people of Hispanic origin account for 17 percent of all eating-and-drinking-place employees and 16 percent of all persons employed in food preparation and food service occupations. 11 percent of all eating-and-drinking-place employees and 11 percent of all persons employed in food preparation and food service occupations are African-American. In

[11] http://www.restaurant.org/research/ind_glance.cfm.
[12] Id.
[13] Bureau of Labor Statistics. Table B-1. http://www.bls.gov/news.release/empsit.t14.htm.
[14] Id.
[15] http://www.restaurant.org/pdfs/research/workforce_overview.pdf
[16] Id.

comparison, people of Hispanic origin account for 13 percent of all employed civilians, while African-Americans account for 11 percent of all employed civilians.[17] These statistics become significant when employers in the industry are accused of practices resulting in minorities historically being passed up for promotion. Thus, the high proportion of minorities working in the restaurant industry contributes to the frequency of racial and national origin discrimination cases.

In addition to the many laws prohibiting employment discrimination, Title III of the Americans with Disabilities Act ("ADA") prohibits businesses and nonprofit service providers that are places of public accommodations, including restaurants, from discriminating against customers. Restaurants must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other disabled access requirements. Additionally, restaurants must remove barriers in existing buildings where it is easy to do so without much difficulty or expense. Given these requirements, the restaurant industry, particularly the fast food business, has recently seen a major increase in third-party disability discrimination claims brought under Title III and similar state laws. Although the costs of modifying the premises to ensure compliance with the ADA are often not covered under EPL policies, the attorneys' fees and compensatory damages component of the claims could lead to significant exposure, and coverage for those costs can be purchased.

Sample Claims

Wrongful Termination and Sexual Harassment:

- *Female personnel recruiter filed a lawsuit against a restaurant chain alleging that she was subjected to verbal and physical sexual harassment from management and co-workers. Plaintiff was allegedly routinely subjected to lewd and obscene comments, gestures and physical confrontations. In addition, plaintiff alleged that she was terminated because of her complaints and was paid less than male workers who did the same work. The jury awarded her $8,137,000, $7,449,000 of which was for punitive damages.*

- *Two waitresses alleged that they were regularly subjected to verbal and physical sexual harassment by the kitchen staff and busboys. One resigned and alleged that the investigation following her resignation was inadequate because no remedial action was taken. The other complained to management that she had been grabbed by a busboy, who had three known prior sexual harassment complaints against him. Management allegedly told the busboy about the complaint. The busboy then allegedly began to threaten and retaliate against the waitress, who then told management that she could no longer report to work because of the threats. In response, she was terminated. The busboy was promoted shortly thereafter, and later harassed another employee, resulting in his termination. Plaintiffs also alleged that defendant's general manager participated in the sexual harassment. Plaintiffs contended that their repeated complaints to management were ignored, that no effective remedial action was taken, and that the*

[17] Id.

restaurant's management officials, especially the general manager, actively participated in the sexual harassment. Plaintiffs were awarded $2,331,319.

- *A 32 year old waitress was employed at a restaurant until she was fired after complaining of on-the-job sexual harassment. The plaintiff alleged that the defendant, a 50% owner of the restaurant, began requiring her to wear sexy clothing, fraternize with male customers, and to be subjected to sexually suggestive comments, including being asked to have sex with him. Plaintiff claimed that the defendant periodically touched her on her buttocks and elsewhere on her body. Plaintiff claims that her complaints were ignored. Finally, after another touching incident, the waitress was fired. Plaintiff obtained a verdict for $650,000.*

Race Discrimination:

- *Class action lawsuit against a restaurant chain alleged a pattern and practice of racial discrimination as reflected in the low percentage of minority employees relative to the percentage of employees in the employment pool. Plaintiffs obtained a settlement of $7,500,000.*

- *Plaintiff was hired as the manager of a Denny's restaurant by the defendant, a Denny's franchisee. Approximately one year later, defendant terminated plaintiff's employment. Plaintiff was a 38 year old black male who claimed that he was discriminated against and wrongfully discharged by defendant on the basis of his race. His claims were based on the fact that he was allegedly subjected to numerous references to him as a "nigger" by defendant and other employees. Plaintiff further argued that defendant paid $500 to a manager to find someone to slash his tires and offered $250 to a female server to falsely accuse plaintiff of sexual harassment. The Plaintiff alleged that he suffered humiliation and lost wages as a direct result of the defendant's actions. Plaintiff obtained a verdict in his favor for $600,000, $500,000 of which was punitive damages.*

- *Plaintiff, a black male, was hired as a server by Macaroni Grill Restaurant, and then terminated. During his employment, plaintiff had worked for two different general managers. One of the issues in the case was whether plaintiff had verbally agreed to cover another employee's shift yet failed to show. Plaintiff alleged that: (1) he was treated differently and less favorably than white servers by being subjected to a longer training period and being assigned less favorable stations; (2) he had not agreed to cover the shift as evidenced by medical documentation which excused him from work that week; (3) he was discriminated against and wrongfully discharged by defendants on the basis of his race; and (4) he was entitled to recover compensatory and punitive damages as a result of the defendants' actions. Plaintiff received a verdict for $253,125.*

Sexual Harassment:

- *A 37 year old brought a lawsuit against a restaurant's holding company alleging that she was sexually harassed by the vice president of product development. The Plaintiff alleged that the male supervisor continually harassed her and the company refused to*

respond to her complaint. The Plaintiff was presented with the option of an unpaid leave of absence, after which she would be terminated with a neutral evaluation, or psychological counseling, or termination. The Plaintiff chose counseling, but her supervisor remained and allegedly the harassment continued, causing the plaintiff to resign. The Plaintiff obtained a verdict for $6,846,840, $4,350,000 of which was for punitive damages.

- *Former chef brought a lawsuit against a restaurant staffing company. He alleged that while he was hired to work at a university, he was frequently asked out on dates, subjected to comments about the fit of his pants, and moans and groans, by his manager. The judge, who upheld the $5,000,000 jury verdict, noted that the manager's conduct was "outrageous", "especially egregious", and "out of control."*

- *Five female employees of the Rio Bravo restaurant filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which later sued the restaurant. The suit alleged Title VII sexual discrimination, hostile work environment and violations of the Florida Civil Rights Act. After the EEOC filed suit, four of the woman intervened. The plaintiffs claimed that their manager sexually harassed them. The women, aged between 16 and 24, claimed that their manager forced them to submit to "leg shave checks," in which he would feel their legs to determine if they were recently shaved. They also alleged that he performed "panty checks," in which he would grope the women's buttocks to ensure that they were not wearing "granny panties." They further claimed that he would require them to sit on his lap and kiss him before they cashed out after their shifts. The plaintiffs claimed that complaints to his superiors went unanswered. The plaintiffs obtained a verdict for $1,550,000, $1,500,000 of which was on account of punitive damages.*

- *The EEOC sued Colonial Ice Cream, Inc. under Title VII for sexual harassment and hostile work environment on behalf of a group of 13 current and former waitresses of the Colonial Ice Cream restaurant. The plaintiffs claimed that they were subjected to sexual harassment by their male co-workers. The waitresses, mostly young women working part-time while attending school, claimed that male cooks and other employees directed derogatory terms at them, including "baby" and "mamacita", and told them that they loved them. Some of the waitresses claimed that they were also subjected to physical abuse, with one claiming that an employee pulled her pants down while she was inside the restaurant's walk-in cooler. The waitresses claimed that managers were present when the co-workers directed the derogatory terms at them, and that they made numerous complaints to management, but that management did nothing to correct the problem. The case settled for $368,000.*

- *Four former female servers of a now-closed Pizza Hut restaurant claimed that they were sexually harassed by a male co-worker. The women claimed that the co-worker grabbed, groped and made sexual comments to them. The women claimed that the restaurant's management took inadequate remedial actions to correct the problem, allowing the co-worker to continue working at the restaurant. Three of the women quit their jobs because of the alleged harassment, while a fourth went on medical leave for stress and did not*

return. The women filed a claim with the EEOC, which then sued Pizza Hut Inc. for Title VII discrimination, hostile work environment and constructive termination. Plaintiffs settled for $360,000.

- *Plaintiffs were 23 year old part-time waitresses at the defendant restaurant who claimed that during the time they were employed by the restaurant, the cooks constantly made lewd comments and made passes at them. They also claimed that a supervisor participated in the harassment. The plaintiffs claimed that they tolerated this harassment for a while until the harassment worsened and included instances of fondling. Eventually, both plaintiffs left the restaurant and sued. The plaintiffs contended that they reported the behavior to management and the owner of the restaurant, but they failed to investigate their claims or correct the problem. The restaurant was uninsured and agreed to settle with the plaintiffs for $235,000.*

- *A settlement was reached in a federal class action lawsuit alleging sexual harassment against the owners of Rookies Sports Bar. The EEOC filed the suit on behalf of seven women. According to the EEOC, the owners and management were accused of uttering "unwelcome derogatory comments regarding female anatomy and obscene and vulgar language on an ongoing basis." The case settled for $200,000. The consent decree mandated changes in the way the employers conduct business and handle employees.*

Age Discrimination:

- *Four former managers of a restaurant chain filed suit alleging that they were terminated because of their age. The plaintiffs contended that the company's purported reorganization plan was merely a pretext to terminate older workers. Plaintiff obtained a verdict for $6,700,000.*

Age Discrimination and Wrongful Termination:

- *Plaintiff was a 47 year old head of security for the Splitfire Bar & Grill, a nightclub/bar and restaurant. He had been employed there for 13 months when he was terminated. He sued the Splitfire & Grill for breach of contract, wrongful termination, age discrimination, defamation and negligence. He also maintained that the defendants acted with malice, oppression or fraud when they fired him. Plaintiff obtained a verdict for $230,000.*

- *The plaintiff, a 55 year old manager of the benefits and records department at International House of Pancakes ("IHOP"), alleged that for the first 15 years of her employment with IHOP, she received positive work reviews, gained responsibility, became a supervisor and steadily received merit raises. According to the plaintiff, a change in management resulted in the hiring of a new supervisor who stated that her philosophy was "out with the old and in with the new." Plaintiff alleged that the new supervisor excluded her from regular meetings and from communications within the company, assigned her additional work when she was already carrying a heavy workload and wrote her up for not completing the additional work assignments. Plaintiff*

maintained that this harassment and abuse was a tactic to force her to resign or to create a reason to terminate her because she was an older female employee. Plaintiff further claimed that her situation worsened when she informed upper management about "regular and pervasive hiring of illegal aliens" in IHOP restaurants. She was then demoted and eventually terminated. The case resulted in a $600,000 settlement.

Disability Discrimination and Wrongful Discharge:

- *A manager brought suit against a large fast food chain alleging that he was forced to resign after the company learned that he was HIV positive. Plaintiff, a 20-year veteran of the corporation, had just been promoted to manage a corporate store with promises of quick advancement. Plaintiff claimed that following an AIDS-related incident that required him to be hospitalized, the company refused to allow him to return to work until he signed an agreement allowing the company to review his medical records. Upon return to work, Plaintiff was allegedly stripped of his managerial duties. He also alleged the area operations manager refused to investigate his complaint of hostile work environment. Plaintiff obtained a verdict for $5,000,000.*

- *The EEOC filed a lawsuit against R.P.H. Management, which operates a McDonald's restaurant, on behalf of a former employee with a cosmetic disfigurement. The lawsuit claimed that McDonald's violated the Americans with Disabilities Act of 1990 (ADA) and the Civil Rights Act of 1991. The former employee claimed she began her employment with McDonald's as a cook with the understanding that she would have the opportunity to advance to a management position. Eligibility for a management position requires an employee to show proficiency in handling several areas of the restaurant, including the front counter serving customers. The former employee further claimed she was removed from the front counter because of her appearance and was told that she would never be promoted to a management position because of her appearance. The case is still pending.*

Racial and Gender Discrimination:

- *Plaintiffs were waitresses at the King Chef Buffet restaurant. The plaintiffs, from the Fujian Province in southern China, claimed that their bosses constantly called them "stupid Fujianese women" and that male servers from northern China received preference in assignment of tables. The women's only income was from tips, from which management took a cut. Their lawsuit also alleged that they frequently were not allowed to wait tables and were required to perform other uncompensated tasks. The women worked 80 hours a week and were housed with more than a dozen other employees in a small apartment without hot water, which was owned by the restaurant's owners. The plaintiffs alleged violations of 42 U.S.C. 1981, the Fair Labor Standards Act, the Equal Pay Act, the New Jersey Wage and Hour Law and the New Jersey Law Against Discrimination. The suit also claimed that the women were entitled to relief under the New Jersey Consumer Fraud Act for the substandard housing. The judge awarded the women $3,455,184.*

Gender Discrimination:

- *A lawsuit filed by the EEOC against John Harvard's Brew House alleged pregnancy discrimination. Former employee claimed that her career rapidly advanced from a starting position as a server, to supervisor, and to manager in training. She further claimed that when she informed the company of her pregnancy that she was told to "consider her options." When she insisted on continuing her pregnancy, her management training was discontinued and her employment was ultimately terminated. The case settled for $145,000.*

- *Plaintiff was employed as a general manager of one of defendants' restaurants for nine months. She was the second best performing general manager in the district. When she became pregnant she experienced some complications early on and was confined to bed rest for one week. After she returned to work, her district manager gave a poor performance review. Approximately one month later, she was demoted to a second assistant manager position and moved to another restaurant. Subsequently she applied for a first assistant manager position and was declined. Plaintiff alleged that defendants discriminated and retaliated against her based on her pregnancy and that she was demoted and denied job opportunities as a result. Plaintiff received a verdict for $1,826,000, $1,700,000 of which represented punitive damages.*

Gender Discrimination and Sexual Harassment:

- *Plaintiff was the assistant dining room manager at Shoney's restaurant. The general manager of the restaurant allegedly became persistent and offensive with his invitations towards plaintiff, made remarks about plaintiff's body, and used profanity when commenting on her job performance. When plaintiff complained to the regional manager, he advised her that she was not a team player and needed to learn to get along with people. Plaintiff quit when the number of shifts she had to work with that general manager was increased. Plaintiff alleged that the general manager sexually harassed her and that she received disparate treatment from the regional manager based on her gender in violation of the Elliott-Larson Act. The jury awarded plaintiff $250,000.*

Retaliation:

- *Two plaintiffs, one a former employee for Jack in the Box and the other a shift leader, brought suit against the defendant restaurant. The first plaintiff was an African-American man who worked as a fast food manager at the restaurant. He claimed that he was called derogatory terms by the assistant manager on at least three occasions. He further claimed that the assistant manager made other racially inappropriate comments to him, such as referring to African-American customers as his "cousin" or "family member." According to the plaintiff, when he made complaints against the assistant manager, the general manager took no action and retaliated against him by giving him bad shifts, reducing his hours, and not giving him promotion opportunities. The second plaintiff, a 32 year old shift leader who was also an African-American, alleged that she heard the assistant manager say the "N" word to the first plaintiff. The plaintiff alleges*

that her hours were reduced in retaliation for her reporting the discrimination. Plaintiffs were awarded $235,000.

Racial Harassment and Retaliation:

- *The plaintiff, a black kitchen worker in his early 30s, sued Pinnacle Restaurant Group, his employer, for intentional infliction of emotional distress and, under the Texas Labor Code, racial harassment, racial discrimination, sexual harassment and retaliation. The plaintiff alleges that his supervisor, the kitchen manager, along with other co-workers, all of whom were male, grabbed his buttocks and genitals and rubbed their own genitals up against him. The plaintiff claimed that his supervisor and co-workers regularly used racial slurs that were demeaning to blacks. The supervisor acknowledged using the word "nigger." About a year after the plaintiff filed an EEOC charge and a Texas Commission on Human Rights Act charge, the primary area manager, who was white, made the decision to terminate plaintiff's employment. Plaintiffs obtained a verdict for $210,060, $200,000 of which was punitive damages.*

Third Party Disability Discrimination Claims:

- *Colorado Cross-Disability Coalition brought a lawsuit against Taco-Bell on behalf of disabled patrons who alleged that line widths and counter heights at Taco-Bell were inaccessible and failed to comply with the ADA. The lawsuit was brought under Title III and Colorado's anti-discrimination statute. Taco-Bell agreed to modify the defects, make overall improvements to its restaurants, and conduct training sessions regarding the ADA. As part of the settlement, Taco-Bell paid $210,000 in attorneys' fees and a total of approximately $5,700 to class members in compensatory damages.*

- *Plaintiff sued Spinnaker Restaurant in California under Title III of the ADA and California's civil rights statute. The plaintiff alleged that the restaurant violated the ADA because it did not have a policy that would allow patrons in wheelchairs to use the restroom. The plaintiff alleged, among other things, that the restaurant should have prioritized seating for the disabled in order to alleviate the unequal access to the building's facilities, since long waits for seating aggravated the burdens imposed by this disparity. Final disposition of claim is not known.*

- *Not-for-profit organization brought a lawsuit against American Huts Restaurant in Florida on behalf of disabled patrons. The plaintiffs alleged that restaurant had the following barriers: (1) the accessible parking space is too narrow; (2) the curb ramp protrudes into the vehicular path and is too steep; (3) the payment counter is too high; (4) the door going into the toilet room is too narrow; (5) the alcove into the toilet room is too small; (6) the hardware requires pinching, grasping, twisting of the wrists; (7) there is lack of maneuvering space within the toilet room; (8) there is no fully accessible stall; (9) many of the elements are out of reach range; and (10) there are numerous barriers to access within the toilet room. The court dismissed the claim to the extent the not-for-profit organization had no standing to bring the claim, but allowed the action to proceed with respect to actual plaintiffs. The final disposition of the claim is not known.*

- *Two patrons brought a lawsuit against Burger King and its franchises in New Jersey federal court. The lawsuit sought to certify a class of disabled individuals who visited Burger King throughout the United States, with an emphasis on ten states.*[18] *The plaintiffs alleged that Burger King discriminated against them by failing to remove certain architectural barriers or by otherwise denying plaintiffs full and equal access to the restaurants' goods, services, and programs. The court ruled earlier on in the case that the plaintiffs could only maintain a lawsuit as to those restaurants they actually visited. The final disposition of the case is unknown.*

[18] New Jersey, California, Vermont, Arizona, Wisconsin, Illinois, Idaho, Ohio, Nevada, and Michigan.

Insuring Agreement

We will pay all **Loss** that the **Insureds** become obligated to pay as a result of **Claims** first made against any **Insured** during the **Policy Period**, or the Extended Reporting Period if applicable, and reported in accordance with the notice provisions in Section V.B.1, for **Wrongful Employment Practices** or **Third-Party Discrimination**.

Definitions

Loss means damages, judgments, settlements, verdicts, and awards, including compensatory damages, back pay, front pay, statutory attorneys' fees, pre-judgment and post-judgment interest, and statutory liquidated damages. Punitive, exemplary, and multiple damages are also **Loss** if such coverage is purchased and indicated by an amount appearing in Item 3(c) of the Declarations, and to the extent insurable under the law of any applicable jurisdiction most favorable to insurability.

Third-Party Discrimination means any actual or alleged discrimination, including harassment, or civil rights violation by an **Insured** against any non-**Employee**.

Wrongful Employment Practice means any actual or alleged

1. violation of any federal, state, local or common law, prohibiting any kind of employment-related discrimination;

2. harassment, including any type of sexual or gender harassment as well as racial, religious, sexual orientation, pregnancy, disability, age, or national origin-based harassment and including workplace harassment by non-employees;

3. abusive or hostile work environment;

4. wrongful discharge or termination of employment, whether actual or constructive;

5. breach of an implied employment contract;

6. wrongful failure or refusal to hire or promote, or wrongful demotion;

7. wrongful failure or refusal to provide equal treatment or opportunities;

8. employment terminations, disciplinary actions, demotions or other employment decisions that violate public policy or the Family Medical Leave Act or similar state or local law;

9. defamation, libel, slander, disparagement, false imprisonment, misrepresentation, malicious prosecution, or invasion of privacy;

10. wrongful failure or refusal to adopt or enforce adequate workplace or employment practices, policies or procedures;

11. wrongful, excessive or unfair discipline;

12. wrongful infliction of emotional distress, mental anguish, or humiliation;

13. retaliation, including retaliation for exercising protected rights, supporting in any way another's exercise of protected rights, or threatening or actually reporting wrongful activity of an **Insured** such as violation of any federal, state, or local "whistle blower" law;

14. wrongful deprivation of career opportunity, negligent evaluation or failure to grant tenure;

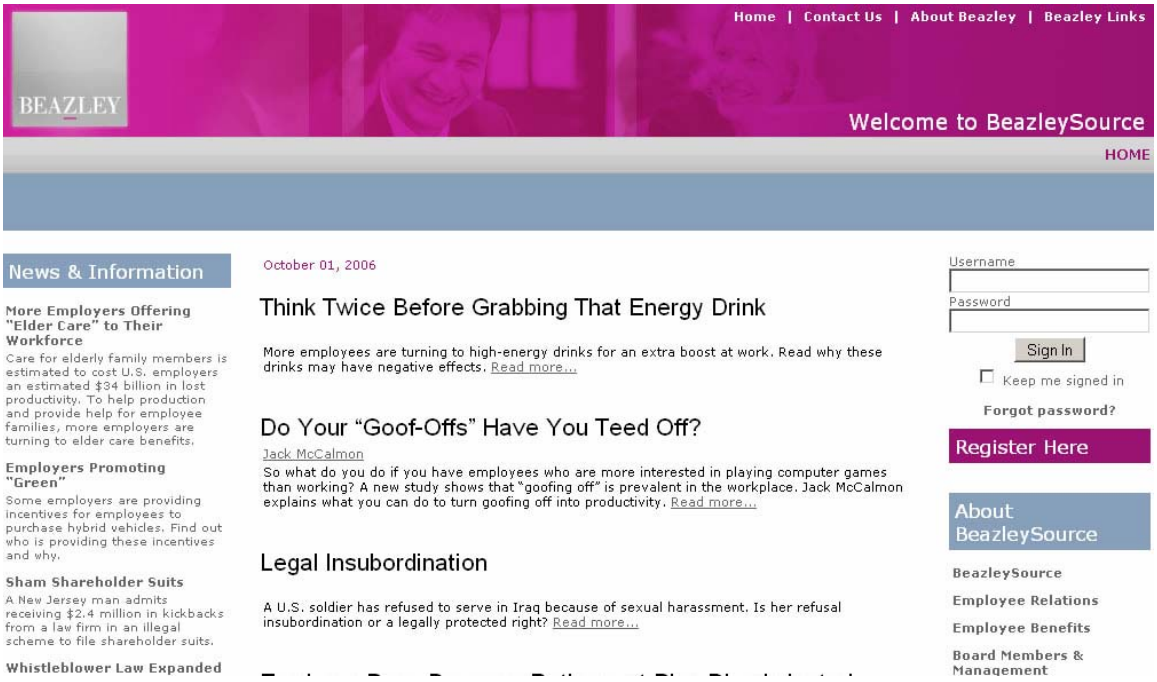
15. violations of the Uniformed Services Employment and Reemployment Rights Act; or

16. negligent hiring or negligent supervision of others, including wrongful failure to provide adequate training, in connection with 1 through 15 above,

but only if employment-related and claimed by or on behalf of an **Employee**, former **Employee**, or applicant for employment, and only if committed or allegedly committed by any of the **Insureds** in their capacity as such.

Risk Management

If, prior to the termination of any **Employee**, the **Insured** obtains and adopts the written advice of legal counsel recommended or approved by us as respects such termination, then the Self-Insured Retention amount stated in Item 4 of the Declarations shall be reduced by 25% for any **Claim** commenced by that **Employee** arising from the events of the termination; *provided, however*, that no such reduction shall apply in connection with those terminations that result from any reduction in force, systematic lay-off or closure of any division, office or facility you own or operate.



Model Workplace Policy

Employment At-Will

You are an at-will employee and nothing in this [memorandum, statement, Employee Handbook] shall constitute a contract guaranteeing employment or compensation for any specific period of time.

As an at-will employee, you or [Organization] can terminate this employment relationship with or without cause or reason, and with or without notice, at any time. Nothing contained in any handbook, workplace policy or work rule of [Organization] and no verbal statements or promises shall alter the at-will employment relationship between [Organization] and you or restrict the option of [Organization] to terminate the employment relationship. Furthermore, no manager, supervisor, or other organization representative, including any representative with hiring authority, other than the [President, Vice-President, Human Resources, etc.], has the authority to enter into any agreement or contract for employment for any specified duration, or to make any agreement,

Política Modelo para Centros Laborales

Empleo a Voluntad

Usted es un empleado a voluntad, y ninguna parte de este [memorándum, declaración, Manual de Empleados] constituirá un contrato que garantice empleo ni compensación por ningún plazo específico.

Como empleado a voluntad, usted o [Organización] pueden dar por terminada la relación laboral con o sin causa justificada y con o sin aviso anticipado, en cualquier momento. Ninguna parte del contenido de ningún manual, política del centro laboral o regla de trabajo de [Organización] y ninguna declaración o promesa verbal alterará la relación a voluntad de empleo entre [Organización] y usted, ni restringirá la opción de que [Organización] dé por terminada la relación laboral. Además, ningún gerente, supervisor ni ningún otro representante de la organización, incluyendo a los representantes con autoridad de contratación que no sea [Presidente, Vicepresidente, Recursos Humanos, etc.], tiene la autoridad

Effective date of this Endorsement:
This Endorsement is attached to and forms a part of Policy Number:

WAGE AND HOUR ENHANCEMENT ENDORSEMENT

This endorsement modifies insurance provided under the following:

EMPLOYMENT PRACTICES LIABILITY POLICY

In consideration of the premium charged for the Policy, it is hereby understood and agreed that:

1. Notwithstanding EXCLUSIONS: WHAT IS NOT COVERED, section **XI. D**, we agree to provide Defense Costs coverage for Wage and Hour Claims.

   For purposes of this endorsement, Wage and Hour Claim shall mean any Claim solely alleging violations of any Wage and Hour Law.

   The maximum aggregate limit of liability pursuant to this endorsement shall be $150,000 and shall only apply to Defense Costs ("the Wage and Hour Limit"). The Wage and Hour Limit shall be part of, and not in addition to, the LIMIT OF LIABILITY identified in Item 4(d) of the Declarations. In no event shall the Wage and Hour Limit apply to Loss other than Defense Costs incurred in connection with Wage and Hour Claims and in no event shall we be obligated to pay more than the LIMIT OF LIABILITY identified in Items 4 (a) - 4 (d) of the Declarations.

   As respects coverage for Claims that allege violations of any Wage and Hour Law and also contain allegations of otherwise covered Insured Events, the $150,000 Wage and Hour Limit shall apply to those Defense Costs attributable solely to that portion of the Claim alleging violations of any Wage and Hour Law. Notwithstanding WHAT IS COVERED, section **I. D.** Defense, the LIMIT OF LIABILITY stated in Item 4.(d) shall apply to Loss, including Defense Costs, attributable solely to that portion of such Claim alleging the covered Insured Events.

2. This policy does not cover any Wage and Hour Claim, or that portion of any Claim that alleges violations of any Wage and Hour Law if any Insured who is a principal, partner, officer, director, trustee, in-house counsel, Employee(s) within the HR or Risk Management department or Employee(s) with personnel and risk management responsibilities was aware of the violations of the Wage and Hour Law by actual knowledge prior to the inception date in Item 2 of the Declarations.

3. This policy does not cover that portion of any Claim:

   a. alleging violation of a California state or local Wage and Hour Law; or

   b. which is brought in California alleging violation of any Wage and Hour Law.

4. In excess of the applicable SELF INSURED RETENTION and subject to the Wage and Hour Limit, the Insureds shall bear uninsured and at their own risk <percentage>% of Defense Costs resulting from any Wage and Hour Claim brought as a class action (whether certified or not) or by multiple claimants or in multiple plaintiff suits arising out of related Insured Events, and our liability shall apply only to the remaining percentage of such Defense Costs.

All other terms and conditions of this Policy remain unchanged.

Sample Wage & Hour Questions	YES	NO
Does Applicant retain payroll records for the last three years?	☐	☐
Does Applicant track the number of hours of salaried employees for payroll purposes?	☐	☐
Has the Applicant changed the status of any non-exempt job category to exempt in the last 4 years? If yes, please provide details.	☐	☐
For any non-exempt employees that are required to be on-call or stand-by to the extent that they are restricted from doing their normal activities (ie, must stay with in a 3 mile radius from work) are they compensated for this time?	☐	☐
Have any losses, lawsuits, administrative proceedings, including audits or reviews by the Department of Labor or similar state agencies, hearings or demands been made against the Applicant or any entity or person proposed for this insurance during the last five (5) years alleging violation of any Wage and Hour Law?	☐	☐

Know your claims manager

Do not spend good money on an Employment Practices Liability policy without knowing the company's claims philosophy – find out what they expect of you and what you can expect of them.

Ask your broker for a 'Claims Interview'

What must you report?
Can you show adequate internal systems to get claim notifications out to your insurer?
If you have in-house counsel can you elect self-representation?

Who will handle your claim?

Many companies choose to focus their resources on Underwriting and Marketing – what lies in store when you have to deal with the claims department?

If you are a large hospitality client with thousands of employees and the inevitable monthly employment incident workflow, will your company elect a single claims point person for you? Many companies do not, so every claim involves educating the claims technician on who you are and how you will work together.

If you have paid a sizeable premium that is not acceptable.

Do you know more about Employment Claims/litigation than your company's claims staff?

Do you have any say in the choice of defense counsel?

"(b) The Company shall select defense counsel."

"We will give consideration to your preference for defense counsel, however the final decision rests with us."

"The Insureds will have the right and duty to retain qualified counsel of their choosing to represent them in the defense or appeal of Claims"

333 F.Supp.2d 595

Motions, Pleadings and Filings

United States District Court,
N.D. Texas,
Dallas Division.
The HOUSING AUTHORITY OF the CITY OF DALLAS, TEXAS, a/k/a Dallas Housing Authority, Plaintiff,
v.
NORTHLAND INSURANCE COMPANY, Defendant.
No. Civ.A. 3:03-CV-385-L.
Aug. 23, 2004.

Background: Insured city housing authority brought action in state court against insurer under nonprofit organization liability policy for breach of contract and violation of Texas statute requiring prompt payment of claims. After action was removed to federal court, insured moved for summary judgment.

Holdings: The District Court, Lindsay, J., held that:
(1) insured was given "opportunity to confer" with insurer regarding selection of counsel in underlying lawsuit against insured, as required by policy;
(2) under Texas law, liability insurer's tender of a defense subject to a reservation of rights letter created disqualifying conflict of interest that triggered insured's right to select its own counsel; and
(3) insured's demand for a defense was a "first party claim" within meaning of the statute.

Motion granted.

West Headnotes

[1] KeyCite Notes

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2929 k. Conflicts of Interest; Independent Counsel. Most Cited Cases

Insured was given "opportunity to confer" with insurer regarding selection of counsel in underlying lawsuit against insured, as required by nonprofit organization liability policy; after insured's general counsel expressed insured's dissatisfaction with defense counsel chosen by insurer and its preference that defense counsel it retained be allowed to continue her representation, insured's representative acknowledged those concerns, attempted to address them, and eventually offered to allow an attorney with same experience as counsel selected by insured to defend the suit.

[2] KeyCite Notes

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2929 k. Conflicts of Interest; Independent Counsel. Most Cited Cases

Provision of nonprofit organization liability policy requiring insurer to give insured "opportunity to confer" regarding selection of counsel did not require insurer to confer with insured before selecting counsel to represent insured in underlying lawsuit; insurer did not violate the provision by conferring with insured after it already had selected defense counsel.

[3] KeyCite Notes

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2929 k. Conflicts of Interest; Independent Counsel. Most Cited Cases

Under Texas law, liability insurer's tender of a defense subject to a reservation of rights letter created disqualifying conflict of interest that triggered insured's right to select its own counsel in underlying action against it; insured reserved its rights to disclaim coverage on, among other things, a willful violation of a statute, plaintiff in underlying lawsuit alleged violations of Title VII and characterized insured's conduct as willful, and facts to be decided in that lawsuit were the same facts upon which coverage depended. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[4] KeyCite Notes

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 k. Nonwaiver Agreements and Reservation of Rights. Most Cited Cases

The purpose of a reservation of rights letter is to notify the insured of a potential or actual conflict of interest.

[5] KeyCite Notes

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 k. Insurer's Options in General. Most Cited Cases

217 Insurance KeyCite Notes
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 k. Nonwaiver Agreements and Reservation of Rights. Most Cited Cases

An insurer properly reserves its rights when it has a good faith belief that the tendered claim may involve conduct for which the policy does not provide coverage; in such a situation, reservation of rights will not be a breach of the duty to defend, but notice of intent to reserve rights must be sufficient to inform the insured of the insurer's position and must be timely.

[6] KeyCite Notes

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3335 k. In General. Most Cited Cases

Insured's demand for a defense under liability policy was a “first party claim” within meaning of Texas statute requiring prompt payment of claims. V.A.T.S. Insurance Code, art. 21.55§ 6.

***596** Daniel T. Mabery, Ernest Martin, Jr., Trevor B. Hall, Haynes & Boone, Dallas, TX, for Plaintiff.
Cara Doak Kennemer, John C. Tollefson, Goins, Underkofler, Crawford & Langdon, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

LINDSAY, District Judge.
Before the court is Plaintiff's Motion for Summary Judgment, filed February 9, 2004. The court held a hearing on Plaintiff's Motion for Summary Judgment on August 19, 2004. After careful consideration of the motion, response, reply, summary judgment evidence, supplemental briefs, arguments of counsel, Defendant's letter brief dated August 20, 2004, record and applicable law, the court **grants** Plaintiff's Motion for Summary Judgment.

****597*** **I.** ***Factual and Procedural Background***

This is an insurance coverage dispute. Northland Insurance Company ("Defendant" or "Northland") issued a Nonprofit Organization Liability Policy ("policy"), policy number FG102255, to Plaintiff The Housing Authority of the City of Dallas, Texas, a/k/a Dallas Housing Authority ("Plaintiff" or "DHA") covering the time period relevant to this lawsuit.

The policy provides defense and indemnity coverage for, among other things, claims of wrongful employment practices. With respect to the defense and settlement of any covered claim, the policy provides that "[i]t shall be the right and duty of the Underwriter to defend Claims, however[,] the Insured shall be given the opportunity to confer with the Underwriter regarding the selection of counsel and defense of Claims." Pl.App. at 12 ¶ 4 (emphasis in original omitted).

On August 23, 2002, DHA was sued for alleged violations of law covered under the policy ("the underlying lawsuit" or "the *Bell* lawsuit").[FN1] DHA forwarded the underlying lawsuit to Northland for defense and indemnity coverage. Six days before the answer was due in the *Bell* lawsuit, DHA retained Katie Anderson ("Anderson"), an attorney at Strasburger & Price, L.L.P. ("Strasburger"), to defend its interests. Two days later, on September 13, 2002, Northland acknowledged DHA's claim and assigned Randy Nelson ("Nelson"), an attorney at Thompson, Coe, Cousins & Irons, L.L.P. ("Thompson Coe"), to represent DHA in the *Bell* lawsuit. On September 27, 2002, Northland agreed to defend DHA in the *Bell* lawsuit, subject to a reservation of rights.

FN1. The underlying lawsuit was styled *Louis Bell v. The Housing Authority for the City of Dallas,* civil action number 3-02-CV-1829-L, in the United States District Court for the Northern District of Texas, Dallas Division.

In response, DHA requested that Anderson be allowed to continue to defend it, as it had not been satisfied with the slow progression of other lawsuits against it that were being handled by Thompson Coe. Northland denied DHA's request because Nelson had more experience and lower hourly rates than Anderson; Thompson Coe was handling other lawsuits against DHA which were covered by Northland policies; and Northland had a potential conflict of interest with Strasburger, as they represent Northland's parent company in coverage disputes. DHA then requested that it be represented by any law firm, other than Thompson Coe, that is approved by Northland. Northland responded by offering to allow a more senior attorney with Strasburger defend DHA in the *Bell* lawsuit if that attorney would agree to be paid at Nelson's hourly rate. DHA did not agree. In the end, Strasburger successfully defended DHA in the *Bell* lawsuit, and Northland has not paid any of the defense costs incurred by DHA.

DHA filed this action on October 4, 2002 in the County Court of Law Number 4 of Dallas County, Texas, alleging a breach of contract and a violation of Article 21.55 of the Texas Insurance Code and seeking attorney's fees and other monetary relief. Northland removed the case on the basis of diversity of citizenship to federal court on February 21, 2003. DHA now moves for summary judgment.

II. ***Summary Judgment Standard***

Summary judgment shall be rendered when 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 ****598*** entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5 Cir.1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89

L.Ed.2d 538 (1986); *Ragas*, 136 F.3d at 458. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Anderson*, 477 U.S. at 254-55, 106 S.Ct. 2505.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir.1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.; see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n. 7 (5th Cir.), *cert. denied*, 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 59 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548.

III. *Analysis*

A. Breach of Contract

DHA contends that Northland breached the insurance contract because it was not given an "opportunity to confer" regarding the selection of defense counsel. DHA contends in the alternative that even if it was given an "opportunity to confer," it is entitled to its defense costs because Northland's tender of a defense subject to a reservation of rights letter triggered its rights to select its own counsel. Northland counters that DHA was given the opportunity to confer, and did confer, regarding the selection of defense counsel. Northland further contends that its reservation of rights did not trigger DHA's right to select its own counsel, and therefore, DHA is not entitled to its defense costs.

**599* 1. "Opportunity to Confer" Provision

[1] At issue here is the following provision: "It shall be the right and duty of the Underwriter to defend Claims, however[,] the Insured shall be given the opportunity to confer with the Underwriter regarding the selection of counsel and defense of Claims." Pl.App. at 12 ¶ 4 (emphasis in original omitted). DHA first contends that the phrase "opportunity to confer" as found in the policy provision in question allows it "to have, at a minimum, meaningful input into the selection of counsel." Pl. Br. at 9. It, however, offers no case law or other authority supporting this interpretation. Whether DHA had a meaningful opportunity to confer depends on the meaning of the term "confer" and the facts developed by the summary judgment record. As the term "confer" is not defined in the policy, the court must give it its "plain, ordinary, and generally accepted meaning." *See Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 369 (5th Cir.1993) (applying Texas law). The generally accepted meaning of "confer," as found in Merriam-Webster's Collegiate Dictionary, is "to compare views or take counsel: CONSULT." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 241 (10 ed.1997). Consult is defined by Merriam-Webster's Collegiate Dictionary as, *inter alia*, "to deliberate together: CONFER." *Id.* at 248.

The facts previously set forth reveal that the parties exchanged views on the selection of defense counsel. By way of example, the summary judgment evidence establishes that DHA's general counsel expressed DHA's dissatisfaction with the defense counsel chosen by Northland [FN2] and its preference that the defense counsel it retained by allowed to continue her representation in the *Bell* lawsuit. The summary judgment evidence also establishes that Northland's representative acknowledged DHA's concerns, attempted to address the concerns, [FN3] and finally concluded that he had "not yet heard a reason why [the defense of the *Bell* lawsuit] should be moved to a new firm" and that "[u]nless there is another reason that has not yet been disclosed, this really needs to be the end of the matter." Pl.App. at 25. The summary judgment evidence

further establishes that Northland eventually offered to allow a Strasburger attorney with Nelson's experience to defend the *Bell* lawsuit, although it would only agree to pay Nelson's hourly rate. Clearly, the parties discussed and deliberated the selection of counsel in the *Bell* lawsuit.

FN2. Specifically, DHA's general counsel told Northland's representative that while Thompson, Coe had provided adequate service in other cases, DHA was not pleased with the slow progression of these cases.

FN3. Pursuant to Northland's request, Nelson agreed "to take a more active role in all DHA cases [being handled by Thompson, Coe] and to investigate and resolve the source of DHA's dissatisfaction." Pl.App. at 25.

[2] DHA next contends that because Northland selected Nelson as defense counsel before conferring with it, Northland violated the policy provision in question. DHA contends that allowing the insurer to choose defense counsel and then discuss its selection with its insured renders the "opportunity to confer" provision meaningless. The court disagrees. The provision in question does not contain a temporal restriction. In other words, the policy provision in question provides only that the insured be given an opportunity to confer regarding the selection of counsel. That the insured confers with the insurer regarding the selection of counsel after the selection has been made does not render ***600** the insured's right meaningless. In this case, the summary judgment evidence establishes that a healthy discussion regarding the selection of counsel occurred after the selection was made. That Northland was not persuaded by DHA to change defense counsel, does not mean that DHA was not given the opportunity to confer regarding the selection of defense counsel. Even if it may be the common practice to confer before the selection is made, the language does not require that the parties confer in the sequence DHA prefers. The court therefore determines that Northland did not breach the "opportunity to confer" provision of the policy.[FN4]

FN4. As the court has determined that DHA had an opportunity to confer, it need not address DHA's alternate argument that the phrase "opportunity to confer" is ambiguous.

2. Tender of Defense

[3] [4] [5] DHA further contends that Northland's tender of a defense subject to a reservation of rights letter triggered its right to select its own counsel. The purpose of a reservation of rights letter is to notify the insured of a potential or actual conflict of interest. *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 n. 6 (5th Cir.1983). An insurer properly reserves its rights when it has a good faith belief that the tendered claim may involve conduct for which the policy does not provide coverage. *Rhodes*, 719 F.2d at 120. "In such a situation, reservation of rights will not be a breach of the duty to defend, but notice of intent to reserve rights must be sufficient to inform the insured of the insurer's position and must be timely." *Id.* Here, there is no dispute that the reservation of rights sufficiently informed DHA of Northland's position and that it was timely. Instead, the issue is whether DHA had a right to select its own counsel after Northland reserved its rights. DHA contends that it did, and the court agrees.

Northland sent DHA a reservation of rights letter shortly after verbally acknowledging receipt of the claim. In that letter, Northland advises DHA that it is undertaking the defense of DHA in the *Bell* lawsuit but is reserving its rights to later disclaim coverage if it is determined that (1) DHA interfered with its right to defend by failing to provide it with all information, assistance and cooperation that it requests, or DHA otherwise prejudices its position; (2) the claim is based upon, arises from or is in consequence of any fraudulent act or omission or any willful violation of any statute or regulation; (3) the claim is based upon, arises from or is in consequence of any conduct that DHA knew was wrongful; or (4) the claim is for damages due in any part for actual or alleged bodily injury, sickness, disease, or mental or emotional distress. Northland also disclaimed coverage for punitive damages, contending that insurance coverage for such damages is against public policy in Texas. Finally, Northland reserved its right to modify its coverage position at any time upon receipt of additional information.

Regarding a reservation of rights defense, the Fifth Circuit has held that:

When a reservation of rights is made, however, the insured may properly refuse the tender of defense and pursue his own defense. The insurer remains liable for attorneys' fees incurred by the insured and may not insist on conducting the defense.

Rhodes, 719 F.2d at 120; *see* *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir.1991) ("The insured, confronted by notice of the potential conflict [through a reservation of rights], may then choose to defend the suit personally."); *see also* ***601** *American Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 174 (Tex.App.-El Paso 1996, writ denied) ("Upon receiving notice of the reservation of rights, the insured may properly refuse tender of defense and defend the suit personally."). In *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex.1998), the Texas Supreme Court held that, in general, an insurer may exercise its contractual right to control the defense as if it were the client "where no conflict of interest exists." 980 S.W.2d at 627.

Recently, the Texas Supreme Court elaborated on the types of conflicts that were contemplated in *Traver*. *Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex.2004). Among other types of conflicts, which are not at issue in this case, the *Davalos* court explained that

Ordinarily, the existence or scope of coverage is the basis for a disqualifying conflict. In the typical coverage dispute, an insurer will issue a reservation of rights letter, which creates a potential conflict of interest···· And when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense.

Id. (internal citations omitted). Here, Northland reserved its rights to disclaim coverage on, among other things, a willful violation of a statute. It is undisputed that the plaintiff in the *Bell* lawsuit alleged violations of Title VII and characterized DHA's conduct as willful. It is also undisputed that the facts to be decided in the *Bell* lawsuit are the same facts upon which coverage depends.

Northland contends that despite that the facts in the *Bell* lawsuit are the same as those upon which coverage depends, there is no evidence that the facts could have been "steered" to exclude coverage. In other words, Northland contends that DHA has offered no evidence that the counsel it selected would have manipulated the facts of the case, thereby allowing it to avoid coverage. As support, Northland primarily relies on *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Kitty Hawk Airways, Inc.*, 964 F.2d 478 (5th Cir.1992). Its reliance on *Kitty Hawk*, however, is misplaced. In *Kitty Hawk*, the court determined the type of harm, namely, "clear and unmistakable" harm, that is necessary to establish that an insurer is estopped from raising coverage defenses or has waived coverage defenses when it assumes an insured's defense without issuing a reservation of rights letter or obtaining a non-waiver agreement and with knowledge of the facts indicating non-coverage. *Id.* at 482-83. Such is not the case here. Northland issued a reservation of rights letter, thus estoppel or waiver is not at issue.

Northland next contends that regardless of whether its reservation of rights letter created a potential conflict of interest, DHA's only opposition at the time it tendered a defense was "the slow progress of DHA's cases that Thompson, Coe handled," *see* Pl.App. at 3, ¶ 10, which, it contends, is insufficient to create a disqualifying conflict of interest. It is true that the record establishes that the slow progress of its cases handled by Thompson, Coe was DHA's only concern, and that the conflict of interest matter seemingly just "fell into DHA's lap"; however, the facts are what they are and necessarily establish or create a disqualifying conflict of interest. Specifically, Northland issued a reservation of rights letter, which created a potential conflict of interest. "And when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest *will* prevent the insurer from conducting the defense." ***602** *Davalos*, 140 S.W.3d at 688 (emphasis added). As previously stated, Northland acknowledged that the liability facts and coverage facts are the same, or at a minimum, did not dispute that the facts were the same, although it had the opportunity to do so. The court, therefore, determines that because the liability facts and coverage facts were the same and because a potential conflict of interest was created by the issuance of the reservation of rights letter, a disqualifying conflict existed; therefore Northland could not conduct the defense of the *Bell* lawsuit. Under these circumstances, DHA properly refused Northland's qualified tender of defense and defended the *Bell* lawsuit on its own. For the reasons stated herein, there is no genuine issue of material fact that Northland breached its duty to tender a defense. DHA therefore is entitled to summary judgment on this claim. Accordingly, Northland is responsible for the attorney's fees reasonably incurred by DHA in its defense of the *Bell* lawsuit.

B. Article 21.55 of the Texas Insurance Code

[6] Last, DHA contends that Northland's refusal to pay its defense costs constitutes a violation of Article 21.55 of the Texas Insurance Code. Section 6 of Article 21.55 provides as follows:

In all cases where a claim is made pursuant to a policy of insurance and the insurer liable therefor is not in compliance with the requirements of this article, such insurer shall be liable to pay the holder of the policy, or the beneficiary making a claim under the policy, in addition to the amount of the claim, 18 percent per annum of the amount of such claim as damages, together with reasonable attorney fees. If suit is filed, such attorney fees shall be taxed as part of the costs in the case.

Tex. Ins.Code. Ann. Art. 21.55 § 6. A "claim" is defined as "a first party claim made by an insured or a policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract that must be paid by the insurer directly to the insured or beneficiary." *Id.* § 1(3). Article 21.55, however, does not define a "first party claim." Northland contends that a demand for a defense is not a first party claim and therefore is not cognizable under Article 21.55.[FN5] The court disagrees.

FN5. The court noted at the hearing that Defendant's counsel took the opposite position in this case on the same issue in another case. Here he contends that a demand for defense is not a first party claim under Article 21.55; however, in *E & R Rubalcava Constr., Inc. v. Burlington Ins. Co.*, 148 F.Supp.2d 746 (N.D.Tex.2001), he contended that such a claim was a first party claim under Article 21.55. Defendant's counsel, Mr. John C. Tollefson, explains his position in a letter brief to the court dated August 20, 2004. The court fully understands that counsel has a duty to zealously represent a client and made the statement only to add a little levity to the proceedings. The court, for the reasons herein stated, reaches the same result irrespective of counsel's two positions. **The clerk of the court is directed to file Mr. Tollefson's letter.**

While the Texas Supreme Court has not specifically addressed this issue, it has, in dicta, indicated that Article 21.55 may be applicable to defense claims. *See State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex.1996) (hypothesizing that when disputes regarding coverage and the duty to defend arise between an insured and an insurer, the insured may be entitled to recover a penalty against the insurer equal to eighteen percent of the claim pursuant to Article 21.55). Such a determination has been made by a Texas appellate court, *Northern County Mut. Ins. Co. v. Davalos*, 84 S.W.3d 314 (Tex.App.-Corpus Christi 2002), *rev'd on other* ***603*** *grounds*, 140 S.W.3d 685 (Tex.2004),[FN6] and several federal district courts: *Travelers Indem. Co. v. Presbyterian Healthcare Res.*, 313 F.Supp.2d 648 (N.D.Tex.2004); *Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P.*, 267 F.Supp.2d 601 (E.D.Tex.2003); *Mt. Hawley Ins. Co. v. Steve Roberts Custom Builders, Inc.*, 215 F.Supp.2d 783 (E.D.Tex.2002); *Rubalcava*, 148 F.Supp.2d 746.

FN6. The Texas Supreme Court refused to determine the scope of Article 21.55, as it determined that regardless of whether the statute applies to a liability insurer, the insurer in *Davalos* did not violate the terms of the statute because it had properly tendered a defense. *Davalos*, 140 S.W.3d at 690-91. Although the Texas Supreme Court obviously had the opportunity to reverse the appellate court's ruling in this regard, it did not choose to do so.

Northland contends that the court should follow the recent holding of a Texas appellate court on this issue: *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex.App.-Dallas 2004, pet. filed). In *Dallas Basketball*, the court held that claims for defense are not first party claims and are therefore not subject to Article 21.55. *Dallas Basketball*, 129 S.W.3d at 242. The *Dallas Basketball* court acknowledged that its holding is contrary to the appellate court's opinion in *Davalos* and the holdings of several federal courts: *Luxury Living, Inc. v. Mid-Continent Cas. Co.*, 2003 WL 22116202 (S.D.Tex.2003); *Primrose Operating Co. v. National Am. Ins. Co.*, 2003 WL 21662829 (N.D.Tex.2003); *Westport*, 267 F.Supp.2d 601; *Mt. Hawley*, 215 F.Supp.2d 783; and *Rubalcava*, 148 F.Supp.2d 746. *Id.* at 240-41. It, however, dismissed these holdings as "unpersuasive" and "faulty." *Id.* The court disagrees. Even if this court were to accept the characterizations of the holdings of the federal cases as "unpersuasive" and "faulty," the appellate court's decision in *Davalos* and the dicta in *Gandy* indicate that a first party claim under Article 21.55 is applicable to defense claims. This court therefore believes that, in light of the appellate court's opinion in *Davalos*, the dicta in *Gandy* and the holdings of several federal district courts, the Texas Supreme Court would likely decide that claims for defense are first party claims for purposes of Article 21.55. Accordingly, DHA's claim against Northland for failure to pay defense costs is a first party claim which is subject to the statutory penalties under Article 21.55.

IV. *Conclusion*

For the reasons herein stated, there is no genuine issue of material fact regarding DHA's claims, and it is entitled to judgment as a matter of law. Accordingly, the court grants Plaintiff's Motion for Summary Judgment. With respect to the breach of contract claim, Northland is liable for the reasonable attorney's fees incurred by DHA in the defense of the *Bell* lawsuit. With respect to the Article 21.55, Northland is liable for the statutory penalties under Article 21.55 for failing to

reimburse DHA for the defense costs it incurred in the *Bell* lawsuit. Additionally, Northland is liable for the reasonable attorney's fees incurred by DHA's counsel in this case. The court **directs** the parties to inform it, in writing, no later than **August 30, 2004,** whether they desire a jury trial on damages, that is, the amount of reasonable attorney's fees incurred by DHA in the defense of the *Bell* lawsuit, on the breach of contract claim; or whether they can decide this issue without court intervention. As for the attorney's fees incurred in this lawsuit, this issue will be ***604** decided by the court pursuant to Fed.R.Civ.P. 54(d)(2).

It is so ordered.

Housing Authority of City of Dallas, Tex. v. Northland Ins. Co.
333 F.Supp.2d 595

Motions, Pleadings and Filings (Back to top)

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• 3:03cv00385 (Docket) (Feb. 21, 2003)
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738 F.2d 61

United States Court of Appeals,
Second Circuit.
NEW YORK STATE URBAN DEVELOPMENT CORPORATION, Plaintiff,
v.
VSL CORPORATION, Defendant and Third-Party Plaintiff-Appellant,
v.
AMMANN & WHITNEY, LIFT CONSULTANTS, Vollmer Associates, Inc., Von Rolltramways, Inc., Harvey Hubbell Inc., and Northbrook Excess and Surplus Insurance Company, Third-Party Defendants,
Northbrook Excess and Surplus Insurance Company, Third-Party Defendant-Appellee.
NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, Third-Party Defendant and Fourth-Party Plaintiff-Appellee,
v.
ZURICH INSURANCE COMPANY, Fourth-Party Defendant.
Nos. 832, 833, Dockets 83-7417, 83-7525.
Argued March 12, 1984.
Decided June 20, 1984.

Insured appealed from orders of the United States District Court for the Southern District of New York, 563 F.Supp. 187, Leonard B. Sand, J., which denied insured's motion to hold insurer in civil contempt and granted insurer's cross-motion for substitution of counsel and also from an order requiring insurer and another insurer to share equally in the costs of insured's defense pending ultimate determination of coverage. The Court of Appeals, Meskill, Circuit Judge, held that: (1) insurer's designation of certain law firm as independent counsel after insured continued to insist on being represented by another law firm satisfied insurer's obligations to provide independent counsel for insured and did not deprive insured of its right under New York law to independent counsel under circumstances in which insured sought to escape liability on all grounds alleged while insured's interest was in defeating liability only on those grounds that would render it liable under its architects and engineers professional liability policy, and (2) order requiring two insurers to share equally in costs of defense of insured was not appealable by insured.
Order denying insured's motion for contempt and granting insurer cross motion for substitution of counsel affirmed; appeal from District Court's temporary allocation of defense costs dismissed.

West Headnotes

[1] KeyCite Notes

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k66 Appeal or Error
93k66(2) k. Decisions Reviewable. Most Cited Cases

Generally, denial of motion for civil contempt may only be appealed after the conclusion of the principal action rather than in its course.

[2] KeyCite Notes

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k66 Appeal or Error
93k66(2) k. Decisions Reviewable. Most Cited Cases

Although insured had several claims pending against insurer which had yet to be determined, denial of insured's motion to hold insurer in civil contempt for failure to comply with final judgment ordering insurer to provide a defense for insured was appealable; furthermore, reviewing court could also consider merits of order granting insurer's cross motion for

substitution of counsel since it was inextricably intertwined with the judgment and refusal of trial court to hold insurer in contempt for violating the judgment.

[3] KeyCite Notes

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2929 k. Conflicts of Interest; Independent Counsel. Most Cited Cases
(Formerly 217k514.11)

Under New York law, an insurer is required to provide a defense under circumstances in which insured seeks to escape liability to a plaintiff on all grounds while insurer's interest is in defeating liability only on those grounds that would render it liable under its policy and insured is entitled to be represented by independent counsel.

[4] KeyCite Notes

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2929 k. Conflicts of Interest; Independent Counsel. Most Cited Cases
(Formerly 217k514.15)

Insurer's designation of certain law firm as independent counsel after insured continued to insist on being represented by another law firm satisfied insurer's obligations to provide independent counsel for insured and did not deprive insured of its right under New York law to independent counsel under circumstances in which insured sought to escape liability to plaintiff on all grounds alleged while insured's interest was in defeating liability only on those grounds that would render it liable under its architects and engineers professional liability policy.

[5] KeyCite Notes

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2929 k. Conflicts of Interest; Independent Counsel. Most Cited Cases
(Formerly 217k514.15)

It is not inherently objectionable to permit an insurer to participate in selection of independent counsel for the insured as long as the insurer discharges his obligation in good faith and the attorney chosen is truly independent and otherwise capable of defending the insured.

[6] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk543 Right of Review
170Bk544 k. Particular Persons. Most Cited Cases

170B Federal Courts KeyCite Notes
170BVIII Courts of Appeals

170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk574 k. Other Particular Orders. Most Cited Cases

170B Federal Courts KeyCite Notes
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk597 k. Costs and Security for Costs. Most Cited Cases

Order requiring two insurers to share equally in costs of defense of insured was not appealable by insured for reasons that insured had no interest in the dispute between two insurers as to temporary allocation of defense costs and was not injured by court's resolution of the issue and also for reason that the order was not a final appealable order and did not conclusively determine the disputed question so as to fall within "collateral order" exception. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.; 28 U.S.C.A. § 1291.

***63** Charles B. Ortner, New York City (Andrew L. Deutsch, Milgrim, Thomajan, Jacobs & Lee, New York City, of counsel), for third-party plaintiff-appellant VSL Corp.
Stephen H. Marcus, New York City (Gottesman, Wolgel, Smith & Secunda, New York City, of counsel), for third-party defendant-appellee Northbrook.

Before FRIENDLY, TIMBERS and MESKILL, Circuit Judges.

MESKILL, Circuit Judge:
This is a consolidated appeal from an order of the United States District Court for the Southern District of New York, Sand, J., denying appellant VSL Corporation's (VSL) motion to hold appellee Northbrook Excess and Surplus Insurance Company (Northbrook) in civil contempt and granting Northbrook's cross-motion for substitution of counsel. VSL also appeals from an order requiring Northbrook and the Zurich Insurance Company (Zurich) to share equally in the costs of VSL's defense pending the ultimate determination of coverage. We affirm the denial of the motion for contempt and the granting of the cross-motion substituting counsel; we dismiss the appeal from the decision on the allocation of defense costs.

BACKGROUND

VSL operated and maintained the Roosevelt Island tramway for the New York State Urban Development Corporation (UDC). The UDC brought an action against VSL on May 15, 1981 in the Supreme Court of the State of New York, County of New York, for damages allegedly sustained in connection with certain work performed by VSL on the tramway. VSL retained the law firm of Gold, Farrell & Marks (Gold, Farrell) to defend it and subsequently removed the action to the United States District Court for the Southern District of New York. Jurisdiction was asserted on the basis of diversity of citizenship.

VSL maintained several insurance policies that covered its work on the tramway project including an architects and engineers professional liability policy in the amount of $2 million issued by Northbrook and comprehensive general liability policies in the total amount of $10 million issued by Zurich. Both insurance carriers were required by the terms of their policies to defend VSL.

Zurich acknowledged its duty to defend VSL; Northbrook, however, refused to do so, asserting that the UDC claims were outside the coverage of the policy. In August 1981, Gold, Farrell brought a third-party action on behalf of VSL against Northbrook seeking declaratory and injunctive relief. It also claimed damages for Northbrook's refusal to defend, indemnification to the extent of any judgment rendered against VSL in the UDC action, plus fees and costs and punitive damages for bad faith.[FN1]

FN1. Northbrook brought a fourth-party action against Zurich.

A trial was held on May 24, 1982 before Judge Sand on the issue of Northbrook's obligation to defend VSL. In an opinion delivered from the bench, Judge Sand found that Northbrook was required to provide a defense for VSL. He ordered Northbrook and Zurich to decide between themselves how they would discharge their respective duties to defend. Specifically, he stated that Northbrook and Zurich should "determine such matters as the designation of counsel and the interim arrangements; to determine what percentage of the interim legal costs each will bear until such time as there shall be a resolution on the merits of the underlying action." Judgement was entered on May 28, 1982 and certified as final under Fed.R.Civ.P. 54(b).

On June 16, 1982, Northbrook advised VSL by letter that it would designate independent counsel if agreeable to VSL or, in the alternative, VSL could provide a list of firms to Northbrook from which a firm acceptable to Northbrook and Zurich would be selected. VSL rejected the offer and ***64** insisted that Gold, Farrell continue to provide representation in the UDC action. Northbrook subsequently designated the firm of Buckley, Treacy, Schaffel, Mackey & Abbate (Buckley, Treacy), a firm experienced in construction litigation, but with whom Northbrook had no previous dealings, as independent counsel to defend VSL. Northbrook instructed Buckley, Treacy to avoid any involvement in the dispute between itself and VSL.

Northbrook was unable to reach an understanding with Zurich on the allocation of defense costs. Northbrook offered to share the costs equally with Zurich, pending the ultimate determination of liability and coverage, but Zurich insisted that Northbrook pay a larger share.

In October 1982 VSL moved to hold Northbrook in contempt for failure to comply with the May 28 judgment requiring Northbrook to provide a defense. Northbrook cross-moved to substitute Buckley, Treacy as VSL's independent counsel. Northbrook also requested the court to order Zurich to share equally in the costs of VSL's defense. On May 3, 1983 Judge Sand denied VSL's contempt motion and granted Northbrook's cross-motion. He also adopted Northbrook's offer concerning the equal distribution of interim defense expenses. *New York State Urban Development Corp. v. VSL Corp.*, 563 F.Supp. 187 (S.D.N.Y.1983). This appeal by VSL followed.

DISCUSSION

[1] [2] Initially, we must decide whether we have jurisdiction to hear this appeal. In general, the denial of a motion for civil contempt may only be appealed "after the conclusion of the principal action rather than in its course." *Stringfellow v. Haines*, 309 F.2d 910, 911 (2d Cir.1962). *Cf. Fox v. Capital Co.*, 299 U.S. 105, 107, 57 S.Ct. 57, 58, 81 L.Ed. 67 (1936) ("except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt"). This policy is necessary to avoid piecemeal interlocutory appeals. *See Sanders v. Monsanto Co.*. 574 F.2d 198, 199 (5th Cir.1978); *Peabody Coal Co. v. Local Union Nos. 1734, 1508 and 1548, United Mine Workers*, 484 F.2d 78, 82 (6th Cir.1973). VSL cannot appeal the denial of its contempt motion at this time if this rule is applied without exception, because it has several claims pending against Northbrook which have yet to be determined. However, in *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir.1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974), we recognized an exception to this rule where "the interlocutory nature of the order is no longer present" and "the appeal does not interfere with the orderly progress of the main case." *Id.* at 115 n. 1. The appeal of the denial of the contempt motion here is not interlocutory in nature even though there has been no final judgment with respect to all of VSL's claims. VSL's contempt motion was based on the May 28 judgment ordering Northbrook to provide a defense for VSL. That judgment was certified as final by the district court under Fed.R.Civ.P. 54(b) and could have been appealed pursuant to 28 U.S.C. § 1291 (1982). *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297 (1956); *cf. Cromaglass Corp. v. Ferm*, 500 F.2d 601, 604-05 (3d Cir.1974) (en banc) (district court's order imposing sanctions on plaintiff for its failure to comply with defendants' discovery requests may be subject of appeal if certified under Rule 54(b)). It would defy logic to hold that while the May 28 judgment was final for the purposes of section 1291, a contempt motion based on Northbrook's alleged non-compliance with the judgment is not appealable. *See Sanders v. Monsanto Co.*, 574 F.2d at 199 ("if a motion for civil contempt is denied after the entry of the judgment which was the subject of the contempt, the denial is final and reviewable because no further district court action is necessary to give life to the ***65** denial"). [FN2] Therefore, we have appellate jurisdiction to hear VSL's appeal of the denial of the contempt motion. We may also consider the merits of the order of substitution because it is inextricably intertwined with the May 28 judgment and the refusal of the district court to hold Northbrook in contempt for violating the judgment.

FN2. Moreover, “our intervention by way of appeal runs no risk of disrupting the orderly course of proceedings below,” *New York Telephone Co. v. Communications Workers of America*, 445 F.2d 39, 45 (2d Cir.1971). By certifying the underlying decision under Rule 54(b), the district court indicated that it had considered the issues and had reached a final decision thereon.

[3] [4] We now turn to the merits of the contempt and substitution claims. There is no dispute that a conflict of interest exists between VSL and Northbrook in the UDC action. VSL seeks to escape liability to the UDC on all grounds alleged, whereas Northbrook's interest is in defeating liability only on those grounds that would render it liable under its insurance policy. *See* *Public Service Mutual Insurance Co. v. Goldfarb*, 53 N.Y.2d 392, 401 n. *, 442 N.Y.S.2d 422, 425 N.E.2d 810 (1981). Under New York law, an insurer is required to provide a defense in such circumstances and the insured is entitled to be represented by independent counsel. *Public Service Mutual Insurance Co. v. Goldfarb*, 53 N.Y.2d at 401, 442 N.Y.S.2d 422, 425 N.E.2d 810; *Prashker v. United States Guarantee Co.*, 1 N.Y.2d 584, 593, 154 N.Y.S.2d 910, 136 N.E.2d 871 (1956); *Rimar v. Continental Casualty Co.*, 50 A.D.2d 169, 173, 376 N.Y.S.2d 309 (1975); *Utica Mutual Insurance Co. v. Cherry*, 45 A.D.2d 350, 354-55, 358 N.Y.S.2d 519 (1974), *aff'd mem.*, 38 N.Y.2d 735, 381 N.Y.S.2d 40, 343 N.E.2d 758 (1975). Judge Sand noted in his opinion preceding the May 28 judgment that Northbrook was obligated to provide a defense and that VSL was entitled to independent representation. The sole question here is whether VSL or Northbrook may designate independent counsel. VSL argues that it has an unqualified right under New York law to select counsel. Northbrook maintains that under the terms of the policy it may select counsel to defend VSL.

The insurance contract contains a clause requiring Northbrook to “defend any suit against [VSL] seeking damages to which this Policy applies.” It stated that Northbrook would pay, subject to a deductible, “all claims expenses.” “Claims expenses” were defined as including “(1) fees charged by any attorney designated by [Northbrook] ··· (3) fees charged by any attorney designated by [VSL] with the written consent of [Northbrook].” After the May 28 judgment, Northbrook informed VSL that it would be satisfied with either mode of attorney designation. It suggested that VSL submit a list of law firms from which one firm, mutually acceptable to Northbrook and Zurich, would be selected. Northbrook designated Buckley, Treacy as independent counsel after VSL continued to insist on being represented by Gold, Farrell.

[5] Under the circumstances, Northbrook's designation of Buckley, Treacy according to the policy's provisions satisfied its obligations to provide independent counsel for VSL. It is not inherently objectionable to permit an insurer to participate in the selection of independent counsel for the insured as long as the insurer discharges its obligation in good faith and the attorney chosen is truly independent and otherwise capable of defending the insured. *See* *Employers' Fire Insurance Co. v. Beals*, 103 R.I. 623, 635, 240 A.2d 397 (1968).

Our decision is not inconsistent with New York law. The decisions that appear to indicate that the insured has the absolute right to choose counsel where a conflict exists, *see, e.g.*, *Klein v. Salama*, 545 F.Supp. 175, 179 (E.D.N.Y.1982) (New York law); *Public Service Mutual Insurance Co. v. Goldfarb*, 53 N.Y.2d at 401, 442 N.Y.S.2d 422, 425 N.E.2d 810; *Prashker v. United States Guarantee Co.*, 1 N.Y.2d at 593, 154 N.Y.S.2d 910, 136 N.E.2d 871, are inapposite. The insurance contracts in those cases did not state that the insurer ***66** would be obligated to pay for defense costs only if it was permitted to participate in the selection of counsel. “An insured's right to be accorded legal representation is a contractual right.” *International Paper Co. v. Continental Casualty Co.*, 35 N.Y.2d 322, 325, 361 N.Y.S.2d 873, 320 N.E.2d 619 (1974). The contract here provided that Northbrook was not obligated to pay for VSL's counsel unless it consented to the choice of counsel. The terms of the contract govern unless they are against public policy. 4 Williston on Contracts § 615A (3d ed. 1961). The participation of an insurer in the selection process does not automatically taint the independence of chosen counsel. Therefore, this provision is not contrary to public policy.

Northbrook's conduct following the May 28 judgment does not indicate a lack of good faith. Northbrook gave VSL the opportunity to submit a list of law firms acceptable to it from which one firm would be chosen. VSL declined the offer. Northbrook did not act in bad faith by refusing to permit Gold, Farrell to defend VSL. Gold, Farrell brought the third-party action against Northbrook, represented VSL in the proceeding leading to the May 28 judgment and instituted the contempt motion against Northbrook. Furthermore, Gold, Farrell *continued* to represent VSL with respect to its pending third-party claims. Northbrook might legitimately fear that, because of its prior adversarial relationship with Gold, Farrell, that firm might attempt to direct towards Northbrook any liability on VSL's part in the UDC action. It was not unreasonable for Northbrook to insist on counsel independent of both itself and VSL.

In addition, Northbrook's choice of Buckley, Treacy as independent counsel was not suspect. The firm evidently was

experienced in construction litigation and it had had no prior dealings with Northbrook. The firm was instructed by Northbrook not to become involved in the third-party action. We conclude that continued representation by Buckley, Treacy will not deprive VSL of its right under New York law to independent counsel.


[6] VSL's appeal from Judge Sand's order requiring Northbrook and Zurich to share equally in the costs of defense has two fundamental weaknesses. First, in order to have standing to appeal, VSL must have a stake in the outcome of the dispute. In other words, there must be a "direct injury suffered or threatened" by the order. *Frothingham v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). Here, VSL has no interest in the dispute between Northbrook and Zurich as to the temporary allocation of defense costs and is not injured by the court's resolution of the issue. VSL's sole concern is to have the costs of its defense that exceed the deductible amount paid by its insurers; the manner in which its insurers must temporarily share the costs is of no moment.[FN3] Second, there is nothing final about this order which would give us appellate jurisdiction under 28 U.S.C. § 1291. Unlike the May 28, 1982 judgment, it was not certified as final under Fed.R.Civ.P. 54(b). The interim cost sharing decision does not "conclusively determine [ ] the rights of the parties to the litigation, leaving nothing for the court to do but execute the order." *United States v. Sam Goody, Inc.*, 675 F.2d 17, 20 (2d Cir.1982). Neither does the appeal fall within the "collateral order" exception, because it does not "conclusively determine the disputed question." ***67** *Flanagan v. United States*, ---U.S. ----, ----, 104 S.Ct. 1051, 1055, 79 L.Ed.2d 288 (1984) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)).

FN3. This is not to say that VSL is uninterested in the ultimate determination of liability for the costs of its defense. The Northbrook policy provides that the first $100,000 of defense costs is deductible; Zurich's deductible is $200,000. VSL maintains that Northbrook should pay all of its defense costs in excess of $100,000 until a total of $200,000 in costs has been incurred; it claims that Zurich should be liable for all defense costs beyond $200,000. The district court's decision merely requires the two insurers to share equally in the costs of defense "until such time as the issues of coverage are determined." 563 F.Supp. at 191. Thus, there has been no determination as to who will ultimately bear the costs of defense. VSL's ultimate right to reimbursement of its defense costs is in no way implicated at this time by the district court's decision.

The order of the district court denying VSL's motion for contempt and granting Northbrook's cross-motion for substitution of counsel is affirmed. The appeal of the district court's temporary allocation of defense costs is dismissed.

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