

# Independent Counsel Not Warranted Absent Explicit Factual Basis for Conflict of Interest

July 2009

The United States Court of Appeals for the Seventh Circuit has held that, under Illinois law, an insured is not entitled to independent counsel unless there are issues of fact in the underlying complaint that can be conclusively resolved in such a way that coverage would be precluded under the relevant policy, thereby creating a conflict of interest between the insured and the insurer. *Nat'l Cas. Co. v. Forge Indus. Staffing Inc.*, 2009 WL 1531686 (7th Cir. June 3, 2009).

The instant employment practices liability policy provided coverage for any legal damages arising out of intentional acts, including intentional discrimination against any of the insured staffing company's own employees. The policy did not provide for coverage for "punitive damage awards" or any claim arising out of the staffing company's "willful failure . . . to comply with any law . . . or regulations relating to employment practices." The policy defined "willful" as "acting with intentional or reckless disregard for such employment-related laws, orders or regulations."

Former employees of the insured filed Equal Employment Opportunity Commission (EEOC) claims against the staffing company, alleging that they had been fired due to their race and/or gender, and/or in retaliation for complaining about the insured's racially-biased staffing policies. The EEOC claims neither sought punitive damages nor alleged any willful violation of any antidiscrimination statutes. The staffing company declined to accept insurer-appointed counsel to defend against the EEOC claims, assertedly because it feared that the insurer would manipulate the defense to preclude coverage. The parties subsequently filed cross claims for declaratory judgment to determine whether a conflict of interest existed such that the staffing company was entitled to reimbursement for independent counsel. The trial court ruled in favor of the insurer.

The Seventh Circuit affirmed, concluding that there was no conflict of interest warranting the appointment of independent counsel. The court first noted that, under Illinois law, an insured is only entitled to independent counsel if "it appears that factual issues will be resolved in the underlying suit that would allow insurer-retained counsel to 'lay the groundwork' for a later denial of coverage." The court then concluded that the possibility that the underlying EEOC claims might give rise to future suits seeking punitive damages did not

create a conflict of interest necessitating the appointment of independent "conflict counsel." Further, the court held that there was no conflict of interest where the underlying claims presented no alternative theory of liability that would preclude coverage, rejecting the staffing company's argument that insurer-appointed counsel would have some incentive to characterize the facts in such a way that would remove the claims from the policy's coverage.