

# Insurer Entitled To Seek Reimbursement of Amounts Paid In Settlement; No Coverage for Retaliation and Wrongful Termination Claims

---

July 2010

The United States District Court for the Eastern District of California, applying California law, has held that an insurer was entitled to seek reimbursement of amounts it paid toward a settlement because it timely reserved its rights and advised the insured of its right to independent counsel. *Markel Am. Ins. Co. v. G.L. Anderson Ins. Svcs., Inc.*, 2010 WL 2106536 (E.D. Cal. May 25, 2010). The court also held that an intentional acts exclusion and California Insurance Code § 533 barred coverage for retaliation and wrongful termination causes of action, but not for sexual harassment and defamation and slander because those causes of action do not necessarily implicate intentional or willful conduct.

A former employee of the policyholder filed a lawsuit alleging sexual harassment and discrimination, retaliation, violation of public policy and defamation and slander against the policyholder and one of its employees. According to the underlying complaint, the defendant employee began sexually harassing and discriminating against the plaintiff in 2006 and ultimately retaliated against her complaints of sexual harassment by firing her effective January 2008. The defendant employee admitted to calling the plaintiff certain derogatory terms, but asserted that this was in the context of a joke. The defendants also asserted that they were unaware of any complaints of sexual harassment, that the plaintiff herself made sexually explicit comments and jokes in the workplace and that her termination was due to insubordination.

A few days after the complaint was filed, the insurer sent a letter to the insureds dated January 29, 2008 acknowledging receipt of the claim and advising that coverage would be addressed in future correspondence. The insurer appointed defense counsel in a letter dated January 31, 2008 and, on February 25, 2008, the plaintiff made a settlement demand for the \$500,000 policy limit, less attorneys' fees and costs, to expire on April 4, 2008. The insurer sent a coverage letter on March 26, 2008, advising the insureds that it would defend under a reservation of rights and specifically reserving the right to deny coverage based on the intentional acts exclusion in the policy and California Insurance Code § 533. The intentional acts exclusion precluded coverage for claims "based on conduct of the Insured or at the Insured's direction that is committed with wanton, willful, reckless or intentional disregard of any law or laws that are the foundation for the Claim." The insurer also reserved the right to seek reimbursement of claim expenses and advised that the insureds were entitled to independent counsel under California law.

After defense counsel obtained an extension to respond to the settlement demand by April 14, 2008, the insureds retained independent defense counsel on April 10, 2008. Independent counsel demanded that the insurer accept the policy limits demand. The insurer accepted the demand subject to a reservation of its right to seek reimbursement of all amounts paid. The insurer later filed the instant coverage action seeking a declaratory judgment that it owed no duty to indemnify the insured and to recover the amounts it paid in the underlying settlement. The insurer and insureds filed motions for summary judgment.

The court first denied the insureds' motion for summary judgment. It held that the insurer could seek reimbursement for amounts paid in the settlement because it had timely reserved its rights to deny coverage and advised the insureds of their right to independent counsel. In this regard, the court reasoned that the insurer had not unconditionally undertaken the defense of the underlying lawsuit and noted that its initial acknowledgement letter advised that nothing in that letter should be construed as a waiver of any of the insurer's rights under the policy. The court also determined that the insurer's later reservation of rights, which was issued approximately two months after the complaint was filed, was timely. In light of the insurer's efforts to advise the insured of the possibility of no coverage, the court rejected the insureds' argument that the insurer's reservation of rights shortly prior to settlement was improper.

The court next granted the insurer's motion for summary judgment in part, ruling that the intentional conduct exclusion in the policy and California Insurance Code § 533 barred coverage for the causes of action for retaliation and wrongful termination in violation of public policy. The court reasoned that "[a] termination affirmatively undertaken with the intent to interfere with sexual discrimination laws and in violation of public policy cannot be the result of negligence because liability 'necessarily involves willful and intentional misconduct' based upon impermissible motivation."

However, the court ruled that the remaining allegations of sexual harassment and defamation and slander did not necessarily implicate intentional or willful conduct. The court determined that, in order for the intentional conduct exclusions to apply, the insurer had to demonstrate that the sexual harassment and defamation and slander claims necessarily were "part of the intentional wrongful conduct." Here, the court noted that the insurer had not presented evidence indicating that the underlying plaintiff's retaliation and wrongful termination claims were inseparable from the harassment and defamation claims and that California courts had found that sexual harassment claims against a party who asserts that the conduct was consensual, as here, "are not so intertwined with wrongful termination claims as to necessarily bar coverage." The court also noted that there was a factual dispute as to whether the defendant employee believed the conduct at issue was welcome. Accordingly, the court concluded that the insurer had failed in its motion for summary judgment to establish that the sexual harassment and defamation claims necessarily were based on intentional conduct.