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QBE Ams., Inc. v ACE Am. Ins. Co.
2014 NY Slip Op 51330(U)
Decided on August 27, 2014
Supreme Court, New York County
Kornreich, J.
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Supreme Court, New York County

QBE Americas, Inc., QBE FINANCIAL INSTITUTION RISK SERVICES, INC. (D/B/A QBE FIRST), QBE FIRST INSURANCE AGENCY, INC., QBE HOLDINGS, INC., QBE INSURANCE CORPORATION, QBE SPECIALTY INSURANCE COMPANY, NEWPORT MANAGEMENT CORPORATION and SEATTLE SPECIALTY INSURANCE SERVICES, INC., Plaintiffs,

against

ACE American Insurance Company, AXIS INSURANCE COMPANY, CATLIN SPECIALTY INSURANCE COMPANY, CHARTIS SPECIALTY INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, DARWIN SELECT INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, LEXINGTON INSURNACE COMPANY, and ZURICH AMERICAN INSURNACE COMPANY, Defendants.

653442/2013

Kasowitz, Benson, Torres & Friedman LLP, for plaintiffs.

Bressler, Amery & Ross, P.C., for

Hangley Aronchick Segal Pudlin & Schiller and Ansa Assuncao, LLP, for Darwin.

Shirley Werner Kornreich, J.

SHIRLEY WERNER KORNREICH, J.:

Before the court is a pre-discovery partial summary judgment motion in which plaintiffs (collectively, QBE) seek a declaration that they are entitled to the advancement of defense costs from defendants Chartis Specialty Insurance Company (Chartis), Illinois National Insurance Company (Illinois) (Chartis and Illinois are collectively referred to as AIG), and Darwin Select Insurance Company (Darwin). AIG and Darwin separately oppose the motion. QBE's motion is granted in part and denied in part for the reasons that follow.

*[*2]I.Factual Background & Procedural History*

Unless otherwise indicated, the following facts are undisputed.

Background

This is an insurance coverage action in which QBE seeks indemnification for its participation in alleged kickback schemes involving forced-placed insurance. QBE claims it is entitled to coverage in approximately 40 lawsuits and a state government investigation, though other lawsuits and investigations may be pending.

To explain, banks usually require mortgage borrowers to purchase insurance to protect the bank's secured interest in the home. If the borrower fails to procure the requisite amount of insurance, the bank will buy it and bill the borrower accordingly. This is called "forced-placed" insurance. Over the last few years, borrowers and state governments across the country alleged that banks and insurance companies conspired to overcharge borrowers for "forced-placed" insurance. Allegedly, the insurance company would charge an egregiously high rate, the bank would pass on that rate to the borrower, and the insurance company would kick-back a portion of the rate to the bank.

QBE, who provided "forced-placed" insurance, has and continues to face substantial litigation for allegedly engaging in this scheme. QBE seeks indemnification from its primary and excess carriers under various professional liability policies for policy periods between May 31, 2010 and June 30, 2014. Since an adjudication of QBE's ultimate right to coverage is not at issue on this motion, the court limits its discussion of the policies to the issue at stake: QBE's entitlement to defense costs from its primary carriers, AIG and Darwin, during the pendency of this action. QBE's excess policies (from defendants ACE, Axis, Continental, Lexington and Zurich) are not at issue on this motion.[FN1] *The AIG Policies*

Chartis and Illinois issued plaintiff QBE Holdings, Inc. (QBE Holdings) substantially

similar primary professional liability policies between 2010 and 2014 (the AIG Policies). Chartis issued a policy for the 2010-2011 period and Illinois issued polices for the 2011-2012, 2012-2013, and 2013-2014 periods.[FN2] *See* Dkt. 53-56. The first two policies have a $15 million limit while the latter two policies have a $10 million limit, and each policy is subject to a $1.5 million retention. *See* Dkt. 53 at 2. Under the AIG Policies, QBE Holdings and its Subsidiaries are named insureds. *Id.* at 5, 18-19, 22-23. Subsidiary is defined, *inter alia*, to include corporations that become a Subsidiary during the Policy Period (assuming the provided notice requirements are met). *Id.* at 6, 22-23. The AIG Policies cover:

Loss of the Insured arising from a Claim first made against the Insured during the Policy Period and reported in writing to the Company during the Policy Period or within thirty (30) days after the end of the Policy Period for any actual or alleged Wrongful Act of the Insured in the

rendering of or failure to render Professional Services, but only if such Wrongful Act occurs prior to the end of the Policy Period.

Id. at 4. Professional Services are defined as:

those services rendered or required to be rendered by the Insured for or on behalf of a policyholder or a customer or client of the Named Insured or any Subsidiary thereof pursuant to a contract with such policyholder or customer or client, for a fee, commission or other remuneration or financial consideration which inured to the benefit of the Named Insured or any Subsidiary thereof.

Id. at 5. The AIG Policies further provide that:

[AIG] shall have the right, but not the duty, to assume the defense of any Claim made against the Insured The Insured shall defend and contest any Claim made against it. The Insured shall not admit or assume any liability, enter into any settlement agreement, stipulate to any judgment, or incur any Defense Costs in excess of the Retention, without the prior written consent of [AIG]. Only those settlements, stipulated judgments, and Defense Costs in excess of the Retention to which [AIG] has consented in writing, shall be recoverable as Loss under the policy. [AIG]'s consent shall not be unreasonably withheld.

If all Insured defendants are able to dispose of all Claims which are subject to one Retention amount for an amount not exceeding the Retention amount (inclusive of Defense Costs), then [AIG]'s consent to such disposition shall not be required for such Claims.

Id. at 4. The AIG Policies' definition of "Loss" includes Defense Costs. *See id.* at 5. The AIG Policies, however, further provide that:

Loss shall not include (1) civil or criminal fines or penalties imposed by law (4) any profit or

advantage to which the Insured is not legally entitled; [and] (5) any liability or cost incurred by any Insured in complying with any judgment, award or settlement for non-monetary relief.

Id. at 5. The AIG Policies also contain a Fee Arrangement Exclusion:

[AIG] shall not be liable in connection with any claim made against any Insured alleging, arising out of, based upon or attributable to any allegations that any Insured intentionally or negligently permitted, or aided and abetted others is using, was aware of others using, or was a participant or connected in any way in the use of any agreement or other arrangement between an insurance broker or insurance agent and an insurance carrier involving the payment of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier, whether referred to as a Market Placement Agreement, Market Service Agreement, Placement Services Agreement or Contingent Commission Agreement or similar [*3]agreement or arrangement, however named.

It is the intent of the parties that this policy shall exclude such loss regardless of the form, style, or denomination of any such claim . . . and shall specifically apply but not be limited to claims alleging bid rigging, bribes or kickbacks, schemes to provide fictitious quotes, conflict of interest, breach of contract, failure to supervise, negligent supervision or negligence of any contract, controlling person liability, breach of fiduciary duty, personal profiting, improper or undisclosed fees, commission or charges of any kind, criminal activity, market manipulation, violation of any law related to the insurance industry, estoppel or repudiation of any commitment and any other theory of liability.

Id. at 16.

The Darwin Policies

Darwin issued substantially similar primary professional liability policies to (1) plaintiff QBE Financial Institution Risk Services, Inc. (QBE FIRST), covering policy periods of December 23, 2010 to December 23, 2011 and June 1, 2011 to June 1, 2012; and (2) QBE Holdings, covering policy periods of May 31, 2012 to June 30, 2013 and June 30, 2013 to June 30, 2014

(collectively, the Darwin Policies). *See* Dkt. 57-60. The Darwin Policies, which are subject to a $5 million retention, provide $5 million per Claim for Losses and Defense Expenses. *See* Dkt. 57 at 2. For Government Claims, the limit is $25,000. *Id.* Claim is defined as:

1. any written notice of demand for monetary relief;

2. any civil proceeding in a court of law; or

3. any administrative proceeding;

made against any Insured seeking to hold such Insured responsible for damages for a Wrongful Act or Personal Injury.

Id. at 45. Wrongful Act is defined as "any actual or alleged negligent act, error or omission of an Insured arising solely from the Insured's rendering or failing to render Professional Services." *Id.* at 47. Professional Services are defined as "insurance services performed for others for a fee or a commission as an insurance agent, insurance broker [etc.]." *Id.* Defense Expenses are defined as:

1. reasonable and necessary legal fees and expense incurred by the Insurer to defend the Insureds; and

2. all other fees, costs and expenses incurred by the Insurer resulting from the investigation, adjustment, defense and appeal of a Claim.

Id. at 45. Government Claim is defined as "a Claim or investigation brought by any federal, [*4] state or municipal agency, insurance department, or other governmental or quasi-governmental authority." *Id.* Under the Darwin Polices, Darwin:

shall have the right and duty to defend any Claim to which the Insuring Agreements apply. [Darwin] will have the right to make investigations and conduct negotiations and enter into the settlement of any Claim as [Darwin] deems appropriate, and no Insured shall admit any liability or offer to settle any Claim or incur any costs, charges or expenses without [Darwin]'s prior written consent.

Provided that, in the event the total amount of the [Claim, Loss, or Defense Expenses] is less than $100,000, it shall be the sole duty of the Insured and not the duty of [Darwin] to defend and settle any such Claim."

Id. at 33. Like the AIG Polices, the Darwin Polices cover Subsidiaries created or acquired during the policy period. *See id.* at 36.

The Underlying Lawsuits & Government Investigations

On April 7, 2011, the first forced-placed lawsuit, and the one most discussed by the parties, was commenced in the United States District Court for the Southern District of Florida, styled *Williams v Wells Fargo Bank, N.A.*, No. 1:11-cv-21233 (*Williams*). QBE's forced-placed lawsuits are listed at Dkt. 72. Additionally, QBE has been, or is currently being investigated by the following states: New York, Massachusetts, Minnesota, and Missouri.In letters dated April 26 and April 28, 2011, QBE provided notice of the *Williams* action to AIG and Darwin. *See* Dkt. 61 & 67. In letters dated June 1, 2011 and September 28, 2011, AIG and Darwin informed QBE that they were reserving their rights and that they would investigate and evaluate their coverage positions. *See* Dkt. 63 & 69. In a letter dated June 6, 2012, AIG informed QBE that it would not provide coverage for the *Williams* action. *See* Dkt. 64. In a letter dated May 9, 2013, AIG informed QBE that it was denying coverage for several of the other pending forced-placed lawsuits. *See* Dkt. 65.[FN3] On May 13, 2013, the parties in the *Williams* action entered into a settlement agreement and filed it with the Florida federal court. Preliminary approval was granted by the court on May 28, 2013.[FN4] In a letter dated July 12, 2013, QBE requested coverage from Darwin for its defense costs and settlement contribution amount in the *Williams* action. *See* Dkt. 112. In that letter, QBE took the position that Darwin's June 1, 2011 letter acknowledged that coverage was available for the *Williams* action. *See id.* at 2. Darwin denied coverage in a letter dated September 6, 2013. *See* Dkt. 117.*[*5]Procedural History*

QBE commenced this action on October 4, 2013. The Complaint asserts five causes of action: (1) breach of contract against the primary carriers (duty to pay defense costs); (2) breach of contract against the primary carriers (duty to indemnify); (3) anticipatory breach of contract against all defendants; (4) declaratory relief against all defendants (duty to pay defense costs); and (5) declaratory relief against all defendants (duty to indemnify). A preliminary conference was held on December 12, 2013, at which a discovery schedule was set. *See* Dkt. 36. Fact discovery is still in its early stages, and is not scheduled to be completed until May 29, 2015. *See* Dkt. 204. On February 4, 2013, QBE filed the instant motion for partial summary judgment on its entitlement to payment of its defense costs from AIG and Darwin.

Summary of Issues

The requested defense costs apply to three categories of litigation: (1) litigation that has already settled or has been discontinued for which AIG and Darwin refuse to advance defense costs; (2) pending litigation for which AIG and Darwin refuse to advance defense costs; and (3) pending litigation for which Darwin has consented to advance defense costs and concluded litigation for which Darwin has agreed to reimburse past defense costs [*see* Dkt. 135 at 31]. With respect to the third category, the court considers the instant motion moot as to liability, and if the parties cannot agree upon the proper, reasonable amounts, the matter will be referred to a Special Referee to hear and report on the reasonable attorney fees owing.

As for the first category, the subject polices define defense costs as part of the covered loss. Hence, a determination as to QBE's entitlement to such costs is tantamount to a final determination on the merits of coverage. The court will not determine this issue pre-discovery since questions of fact exist as to coverage. The resolution of the second category, however, is ripe for decision but differs for AIG and Darwin.

II.Legal Standard [FN5]

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman*

v City of New York, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).The "duty to defend" and the "duty to advance defense costs" are not the same. It "is well settled that the duty to defend is broader." *Fed. Ins. Co. v Kozlowski*, 18 AD3d 33, 40 (1st Dept 2005). "The obligation to defend is readily understood and its requirement is clear — the insurer must afford a defense to the insured for covered as well as non-covered claims if the latter are intertwined with covered claims." *Id.* at 41. In contrast, when a policy does not impart on the insurer the duty to defend, but merely provides that the insurer has "the obligation to pay defense expenses," "the insurer is entitled to differentiate between covered and non-covered claims." *Id.*

In other words, a duty to defend policy requires that the insurance company advance *all* of its insured's defense costs, even if only a portion of the litigation concerns covered claims. *See Fitzpatrick v Am. Honda Motor Co.*, 78 NY2d 61, 63 (1991) ("a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered"); *see BP Air Conditioning Corp. v One Beacon Ins. Group*, 33 AD3d 116, 120-21 (1st Dept 2006) (collecting cases). On the other hand, a duty to advance defense costs merely obligates the insurer to pay a pro-rata share of the costs based on the percentage of litigation attributable to covered entities and covered claims. *See Kozlowski*, 18 AD3d at 42. Moreover, even though a non-duty to defend policy may not provide for the advancement of legal costs, when the policy is silent on the matter, New York law generally requires the advancement of legal fees proportional to the covered claims, though such fees are subject to recoupment by the insurer if it is ultimately found that no coverage exists. *Id.; see Nu-Way Envtl., Inc. v Planet Ins. Co.*, 1997 WL 462010, at *2 (SDNY 1997) (Baer, J.) ("where the insurance policy does not impose a duty to defend, provides for payment of defense costs, and is silent as to the timing of payment of such costs, the insurer has a duty of contemporaneous payment of defense costs"). California law is not in conflict with New York law on this issue. *See Kozlowski*, 18 AD3d at 42, citing *Gon v First State Ins. Co.*, 871 F2d 863, 868-69 (9th Cir 1989); *see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v Ambassador [*6]Group, Inc.*, 157 AD2d 293, 299 (1st Dept 1990); *but see Petersen v Columbia Cas. Co.*, 2012 WL 5316352, at *8-10 (CD Cal 2012) (comparing New York and California law); *cf. In re Kenai Corp.*, 136 BR 59, 63-64 (SDNY 1992) (Wood,

J.) (questioning logic of mandating advancement of defense costs in non-duty to defend policies, albeit at time when New York law was unsettled)

That being said, the rule is different with past defense costs, even in a duty to defend policy. *See Dupree v Scottsdale Ins. Co.*, 100 AD3d 467, 468 (1st Dept 2012) (denial of injunction proper since not receiving past defense costs is not an irreparable injury).[FN6] With pending litigation, there is a concern that an insured's inability to procure legal fees will hamper its ability to put forth the best possible defense. In contrast, when the litigation is not pending, a determination about whether the insured will be able to recoup its defense costs will not impact the insured's ability to defend the case since the case is over. Hence, there is no compelling reason why an insured should not wait to recover until a coverage determination is made because a claim for defense costs rises and falls with the underlying coverage claim. To wit, any defense costs advanced are subject to recoupment if no coverage is found.

Indeed, the pendency of litigation is the gravamen of a claim for the advancement of defense costs. In most situations, such demand is made via a motion for preliminary injunction, not a pre-discovery summary judgment motion. On an injunction motion, it is well settled that "[t]he failure to receive defense costs under a professional liability policy at the time they are incurred constitutes an immediate and direct injury sufficient to satisfy the irreparable harm requirement." *XL Specialty Ins. Co. v Level Global Investors, L.P.*, 874 FSupp2d 263, 272 (SDNY 2012) (Engelmayer, J.) (collecting cases; quotation marks omitted); *see also Dupree v Scottsdale Ins. Co.*, 96 AD3d 546 (1st Dept 2012) (same).

Here, however, the element of irreparable harm and an assessment of the likelihood of success on the merits are inapposite since this is a motion for summary judgment, not an injunction motion. Yet, as on an injunction motion, there is no irreparable harm to QBE if it has to wait until the end of the case (when a coverage determination will be made) to recoup its past defense costs. On a pre-discovery summary judgment motion, where there is less immediacy and insufficient knowledge of the facts, patience is all the more warranted.

III.AIG's Defense Cost Obligations

The AIG Policies expressly disclaim the duty to defend. *See* Dkt. 53 at 4 ("[AIG] shall have the right, **but not the duty**, to assume the defense of any Claim made against the Insured")

(emphasis added).[FN7] Hence, at most, before the merits of the coverage dispute is adjudicated, QBE [*7]could only compel AIG to pay for its defense costs for the portion of its pending litigation attributable to covered claims. However, the AIG Policies further provide that AIG is not liable to pay for QBE's Loss — including defense costs — until the policy's $1.5 million Retention is exhausted. *See id.* ("Only those settlements, stipulated judgments, and Defense Costs in excess of the Retention to which [AIG] has consented in writing, shall be recoverable as Loss under the policy"). In other words, the AIG Policies preclude QBE from seeking its defense costs until QBE itself has paid at least $1.5 million. It follows, therefore, that for QBE to be entitled to seek the advancement of defense costs from AIG, QBE must first provide proof that it has exhausted its $1.5 million retention for each claim. On this record, QBE has not done so. Indeed, AIG contends, and QBE does not deny, that QBE had not even given AIG notice of all of its forced-placed litigation until the instant motion was filed, let alone proffered proof that the applicable retention for each claim was exhausted.QBE's motion as against AIG, therefore, is denied without prejudice with respect to pending litigation, with leave to renew *after* QBE has provided AIG with proof that the applicable retentions are exhausted. An application for the advancement of defense costs, where no duty to defend exists, must be denied where the insured does not establish, at a minimum, which claims in each *pending* lawsuit are subject to coverage and that the applicable retention for such claims has been exhausted.[FN8] If QBE was not required to make such a showing before AIG was ordered to pay its defense costs, the court would, in effect, be rewriting the AIG policies to grant a duty to defend right.*Darwin's Defense Cost Obligations*

Darwin, in contrast, has a duty to defend. Hence, Darwin (under New York, California,[FN9] and Georgia [FN10] law) is obligated to advance *all* of QBE's litigation costs so long as each lawsuit presents the possibility that *any* of the QBE entities or *any* of the claims asserted *might* be covered. *See Regal Const. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 (2010) (collecting cases); *see BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 (2007) ("The inquiry is whether the allegations fall within the risk of loss undertaken by the insured [and, it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general [*8]coverage or within its exclusory provisions'"), quoting *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 (2002); *see also Sport Rock Int'l, Inc. v Am. Cas. Co. of Reading, PA*, 65 AD3d 12, 17 (1st Dept 2009), quoting *BP Air*, 8 NY3d at 714-15 ("the standard for determining whether an additional named insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense").

However, Darwin need not pay for past expenses either in pending litigation or litigation that has settled or was discontinued. If QBE wanted the advancement of its defense costs for those lawsuits, some of which were commenced more than 3 years ago, it should have sought such

costs while those suits were pending. As it did not (and also because some of the suits may well fall within the retention), those costs must wait for a final adjudication on the merits.

Finally, it should be noted that the applicability of the polices' exclusions (e.g., the Fee Arrangement Exclusion) and the question of which of QBE's subsidiaries are covered are highly fact specific inquiries that cannot be resolved without full discovery. Nothing in this decision shall be construed to imply any indication on the merits of the parties' coverage arguments. An informed coverage determination simply cannot be made at this juncture. The parties are directed to meet and confer regarding Darwin's advancement of legal costs and, if they cannot agree, the issue will either be referred to one of the court's special referees or a private special master.[FN11] Accordingly, it is

Ordered that QBE's partial summary judgment motion is (1) denied without prejudice as to AIG, with leave to proceed as directed in this decision; and (2) with respect to Darwin, granted on consent on some of the lawsuits [*see* Dkt. 135 at 31] and granted as to the remaining pending lawsuits to the extent set forth in this decision.Dated: August 27, 2014ENTER:

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J.S.C.

Footnotes

Footnote 1: On June 11, 2014, QBE withdrew its claims against defendant Catlin Specialty Insurance Company, another of its excess carriers, without prejudice. *See* Dkt. 193.

Footnote 2: Each of the AIG Policies begin and end on May 31. Hence, the total covered period is May 31, 2010 to May 31, 2014.

Footnote 3: Further correspondence was exchanged disputing coverage. Since this motion is limited to the issue of defense costs, not a final coverage determination, the court will not discuss the correspondence. Additionally, while AIG and Darwin address myriad contested issues in

their briefs (e.g., which subsidiaries are covered), the court will not discuss such issues since they will not be resolved on this motion.

Footnote 4: Final approval was granted on September 11, 2013.

Footnote 5: According to QBE: "[s]ince the law of all potentially applicable jurisdictions is the same on the matters at issue, the Court need not make a choice of law determination. However, in the event the Court addresses that issue, the law of New York, where QBE Holdings is headquartered controls the interpretation of the policies as to which that entity is the first Named Insured — the AIG Policies and the second two Darwin Policies. The law of either California or Georgia may apply to the first two Darwin Policies, as QBE FIRST, the Named Insured therein, was domiciled in Georgia, but the policies list a California address, reference California statutory provisions

and list additional Named Insureds with California domiciles." Dkt. 45 at 13-14 n.11 (citations omitted). AIG and Darwin do not argue that New York law materially differs from another applicable jurisdiction's law, but Darwin does cite California and Georgia case law to support its arguments. The court applies New York law. Nonetheless, citations to California law are provided to indicate where California law might differ on future defense cost advancement disputes. It should be noted, however, that the court expresses no opinion herein on possible differences between New York and California law regarding issues that go to the ultimate coverage determinations, such as the interpretation of exclusions, public policy prohibitions on certain types of indemnity, and claims for reformation due to mutual or unilateral mistake.

Footnote 6: The payment of past defense cost could "disturb[], rather than maintain[], the status quo" because the policy limits could be exhausted, eliminating the availability of funds to pay for ongoing litigation costs. *Dupree*, 100 AD3d at 468, *aff'g* 36 Misc 3d 1210(A), at *6 (Sup Ct, NY County 2012) ("to order full payment of past defense costs on this motion for injunctive relief would decide the ultimate relief on the defense cost issue").

Footnote 7: If California law (which New York law looked to in developing its current duty to advance defense costs doctrine [*see Kozlowski*, 18 AD3d at 42 & *Nat'l Union*, 157 AD2d at 299]) applies, the analysis would be that set forth in *Jeff Tracy, Inc. v U.S. Specialty Ins. Co.*, 636 FSupp2d 995 (CD Cal 2009). Simply put, when the policy expressly disclaims the duty to defend, as it does here, the burden is on the insured to establish coverage, and, if that burden is met, the insurer can still avoid advancing defense costs if it can establish that an exclusion applies. *See id.* at 1003-04.

Footnote 8: Given the complexity of the coverage issues and that AIG's objections apply across multiple polices and claims, it may not be practical to make coverage determination before discovery is complete. Waiting until after discovery poses little prejudice to QBE since Darwin *does* have to fund the pending lawsuits under its duty to defend. It should also be noted that,

while not necessarily legally relevant, the usual concern about a litigant being unable to fund its defense is not present when that defendant is a large insurance company with ample cash flow to pay its attorneys.

Footnote 9:*See Buss v Superior Court*, 939 P2d 766, 773 (Cal 1997).

Footnote 10:*See Penn-America Ins. Co. v Disabled Am. Veterans, Inc.*, 490 SE2d 374, 376 (Ga 1997).

Footnote 11: The use of a special master may make sense here since there is the potential for continuous applications by QBE to AIG for the advancement of defense costs upon a proper showing by QBE that a pending lawsuit concerns a covered claim and that the attorneys' fees expended exceed the retention. Retaining a subject matter expert to rule on each of QBE's applications may be more efficient than making separate applications to the court.

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