

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

NATIONAL CASUALTY	)	
COMPANY,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO. 1:16-cv-00679-WSD
FULTON COUNTY, GEORGIA,	)	
	)	
Defendant.	)	

**BRIEF IN SUPPORT OF DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

COMES NOW defendant Fulton County, Georgia (“Fulton County”) and submits this brief in support of its motion for summary judgment.

**I. Introduction**

“Before the Court is, once again, the classic case of the insurer requesting relief from the consequences of the inartfully drafted... terms of its insurance policy.” Liberty Surplus Ins. Co. v. Norfolk S. Ry. Co., No. 16-14767, 2017 U.S. App. LEXIS 5763, \*1 (11th Cir. Apr. 4, 2017). The Eleventh Circuit’s words apply with equal force to this insurance coverage dispute between Fulton County and its liability insurer, plaintiff National Casualty Company (“National Casualty”), regarding coverage for underlying employment liability claims. As discussed

below, the majority of the issues raised in this case involve interpretation and application of National Casualty's inartfully drafted insurance policies, which are particularly well suited for summary judgment because these are questions of law for the Court. Further, as demonstrated below, the facts in this case are undisputed.

As explained below, the underlying "Pay Parity Claims" are covered by the National Casualty policies. In addition, the undisputed evidence shows that National Casualty had notice of the underlying Pay Parity Claims prior to issuing any insurance policies to Fulton County and that Fulton County did not hide anything from National Casualty. Because there is no genuine issue of material fact and, based on those undisputed facts, Fulton County is entitled to judgment in its favor as a matter of law.

## **II. Statement of Material Facts<sup>1</sup>**

### **A. The Pay Parity Cases**

Fulton County was named as a defendant in seven lawsuits and one grievance brought by 316 individual plaintiffs and 22 grievants who are current

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<sup>1</sup> Fulton County has summarized the facts in this brief that are set forth with records citations in its accompanying Statement of Undisputed Material Facts, as required by LR 56.1B(1), NDGa. Citations to "SOMF" refer to Fulton County's Statement of Undisputed Material Facts filed herewith.

and former County employees (“Pay Parity Claims”). (SOMF ¶ 40.) The majority of the claims were brought by Staff, Senior, and Supervising Attorneys employed in the Public Defender’s Office, the Solicitor’s Office, the District Attorney’s Office, the Child Advocate’s Office, and in the Superior and State Courts, who alleged that the County failed to pay them “equal pay for equal work,” because attorneys in the Office of the Fulton County Attorney were compensated differently than they were. (*Id.* at ¶ 41.) Subsequent to the initial attorney claims, similar claims were brought by a group of employee within the Fulton County Sheriff’s Office, who alleged that the County violated its personnel regulations by compensating some groups of deputies differently than others.<sup>2</sup>

The Pay Parity Claims are all breach of contract claims in which the plaintiffs (and grievants) alleged that Fulton County breached its personnel regulations, which constituted a part of each plaintiff’s contract of employment with the County. (SOMF ¶¶ 42-45.) After the Georgia Court of Appeals issued its opinion in Fulton County v. Andrews, 332 Ga. App. 473, 773 S.E.2d 432 (2015) on June 11, 2015, affirming summary judgment in favor of the Andrews

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<sup>2</sup> The Pay Parity Claims are described in the underlying plaintiffs’ mediation statement from the underlying cases. (See SOMF ¶¶ 41-43.)

plaintiffs, Fulton County agreed to participate in a global mediation in an effort to resolve all pending cases and grievances. (Id. at ¶¶ 42-45, 52-53.) On October 2, 2015, Fulton County entered into a global settlement to resolve all of the Pay Parity Cases for approximately \$18,362,100. (Id. at ¶¶ 54-55.)

By two letters from its counsel dated August 20, 2015, National Casualty denied coverage to Fulton County for the Pay Parity Claims. (SOMF ¶ 51.) Prior to mediation, Fulton County notified National Casualty that it intended to engage in a global mediation to resolve the Pay Parity Claims and invited National Casualty to participate. (Id. at ¶ 52.) In response, National Casualty reiterated its earlier denial of coverage and refused to participate in the mediation. (Id. at ¶ 53.) Fulton County subsequently requested that National Casualty provide indemnity for its portion of the global settlement. (Id. at ¶ 56.) National Casualty stood by its prior denial of coverage and filed the present declaratory judgment action, seeking to confirm its position. (Id. at ¶ 57.)

**B. The National Casualty Policies**

National Casualty issued two policies of liability insurance to Fulton County:

- (1) A Retained Limit Liability Insurance Policy for Public Entities, Policy No. PGO0000107, with a policy period from July 6, 2013 through July 6, 2014 (“the 2013 Policy”); and
- (2) A Retained Limit Liability Insurance Policy for Public Entities, Policy No. PGO0000182, with a policy period from July 6, 2014 through July 6, 2015 (“the 2014 Policy”; collectively with the 2013 Policy, “the Policies”).

(SOMF ¶ 1.) The 2013 Policy contains a liability limit of \$7 million per “employment practices wrongful act” with a \$7 million aggregate limit, subject to a \$2 million retained limit. (Id. at ¶ 2.) The 2014 Policy contains a liability limit of \$10 million per “employment practices wrongful act” with a \$10 million aggregate limit, subject to a \$2 million retained limit. (Id. at ¶ 3.) The 2013 Policy and the 2014 Policy contain identical insuring language. (Id. at ¶ 4.)

The National Casualty Policies provide coverage for, among other things, “Employment Practices Liability.” (SOMF ¶ 5.) Under the terms of the Policies, National Casualty agreed to pay for “loss” that Fulton County became legally obligated to pay on account of any “employment practices wrongful act” Fulton County committed during the policy periods. (Id. at ¶ 6.) Both Policies define “loss,” in pertinent part, as the amount that “(ii) is against an insured for any . . . ‘employment practices wrongful act’ . . . including but not limited to damages . . . , judgments, settlements, pre-judgment and post-judgment interest.” (Id. at ¶

7.) The Policies define “employment practices wrongful act,” in pertinent part, as

any employment-related act, omission, policy, practice or representation of the insured directed at or against any natural person, occurring in whole or in part at any time, including any:

...

2. Breach of any express or implied covenant;

...

6. Discrimination, harassment or segregation;

...

9. Failure or refusal to advance, compensate, employ or promote; [or]

...

12. Any other employment-related act, omission, policy, practice, representation or relationship in connection with any insured at any time. . . .

(Id. at ¶ 8.)

**C. The Underwriting of the Policies**

Civic Risk Underwriting Managers (“Civic Risk”), which specializes in underwriting excess liability for governmental entities, acted as the underwriter for the National Casualty Policies issued to Fulton County. (SOMF ¶¶ 9-11.)

National Casualty agreed that anything Civic Risk did or reviewed in connection with the applications submitted by Fulton County was done on behalf of National Casualty. (Id. at ¶ 12.) During the course of the underwriting for the Policies, Fulton County completed policy applications and submitted those to Civic Risk. (Id. at ¶¶ 14-16.) Although Civic Risk did not actually provide copies of the applications to National Casualty, Civic Risk reviewed and evaluated the applications on behalf of National Casualty. (Id. at ¶¶ 17-18; see also ¶¶ 10-12.)

During the course of the initial policy application in 2013, Fulton County submitted “Loss Runs” to Civic Risk. (SOMF ¶ 22.)<sup>3</sup> The submission included Loss Runs from insurance carriers who had insured the County during prior policy periods, as well as a Loss Run from the County’s internal claims system, called “Stars Enterprise.” (Id. at ¶ 23.) The Stars Enterprise Loss Runs provided to Civic Risk (on behalf of National Casualty) in 2013 listed several of the Pay Parity Claims under “Cause 2903 - Employee benefits dispute.” (Id. at ¶ 24.)

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<sup>3</sup> A loss run is a listing of claims (both open and closed) with an incurred value and a paid amount and a brief description of what each claim is. (SOMF ¶¶ 20-21.) Loss runs are requested during the underwriting process so that the underwriter will know what the insured’s prior loss history has been and have an idea of what current claims are open at the time of the submission. (Id. at ¶¶ 19, 21.)

Thus, the Pay Parity Claims were disclosed to National Casualty prior to the inception of the 2013 Policy. (Id. at ¶¶ 26-28.)

During the course of National Casualty's claims investigation in 2015, the underwriter, Kathleen Adamson, corresponded by e-mail with the National Casualty adjuster, Amy Coryer Miller. (SOMF ¶ 25.) In one e-mail sent by Ms. Adamson to Ms. Miller on July 30, 2015 (prior to National Casualty's denial of coverage), Ms. Adamson explained:

Per our telephone conversation, I have gone through my Files to locate any references to Pay Parity Claims. It does turn out that there were Pay Parity Claims, including the Jernigan-Andrews Claim, on the Loss Runs that I received with my initial Submission – I just did not feel a concern about them at that time.

(Id. at ¶ 26.)

Ms. Adamson, the underwriter for both Policies, is not aware of any false statement or misrepresentations made by Fulton County in the application for either of the National Casualty Policies. (SOMF ¶ 29.) Nor is she aware of anything that Fulton County concealed in the 2013 application or the application for the 2014 renewal policy. (Id.)

**D. The 2014 Renewal**

National Casualty agreed to issue a renewal policy to Fulton County for the 2014-2015 policy year. (SOMF ¶ 30.) National Casualty discussed the Pay



Parity Claims during the 2014 renewal. (Id. at ¶¶ 31-32, 35.) Specifically, prior to issuing the 2014 renewal policy, National Casualty was aware that Judicial Staff Attorneys had filed a grievance alleging pay disparity and that Fulton County had paid over \$4.9 million on that claim. (Id. ¶¶ 32, 35.)

The updated Loss Runs submitted for the 2014 renewal showed a \$4.9 million “pay disparity claim.” (SOMF ¶ 33.)<sup>4</sup> While underwriting the 2014 renewal, Ms. Adamson “looked back” and reviewed the Loss Runs for the other pay disparity claims and saw that “some were there.” (Id.)

The Civic Risk Rating Workbook for the 2014 renewal Policy included this description of losses that exceeded 50% of the retained limit/attachment point:

Law Clerks (Judicial Staff Attorneys) filed a grievance alleging they were being wrongfully compensated approximately 36% less than Staff Attorneys (Attorneys in the County Attorney’s Office), even though they had similar job classifications. This case has been in arbitration and gone through appeals and cross-appeals. A Judgment was made against the County. This Claim was submitted to the Excess Carrier for a Coverage Determination – Coverage was denied. **Ken Scroggin feels that coverage could potentially be found under our Policy.**

(SOMF ¶ 34) (emphasis in original). A National Casualty underwriter, Kim

Lorenz, also sent an e-mail on June 20, 2014 in which she noted “the frequency of

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<sup>4</sup> Fulton County notes that it is not seeking indemnity from National Casualty for the \$4.9 million payment.

the pay disparity claims...” and suggested a higher premium, if possible. (Id. at ¶¶ 36-37.) However, National Casualty also authorized Civic Risk to renew the policy at the original pricing quoted by Civic Risk. (Id. at ¶ 37.) Ultimately, National Casualty not only agreed to renew the Fulton County Policy in 2014, it increased the coverage limits from \$7 million to \$10 million. (Id. at ¶ 38.) National Casualty also offered Fulton County a renewal policy in 2015, but Fulton County elected to go with a cheaper premium. (Id. at ¶ 39.)

**E. The Coverage Litigation**

After denying any coverage obligations to Fulton County, National Casualty filed its Complaint for Declaratory Judgment, seeking a declaration confirming its stated position. (See generally [Doc. 1]; id. at ¶ 46.) In its Complaint, National Casualty essentially raises everything but the kitchen sink as a coverage defense. Specifically, National Casualty contends that (1) the underlying Pay Parity Claims do not fall within the Policies’ insuring agreements; (2) the underlying Pay Parity Claims are excluded by multiple exclusions to coverage; (3) Fulton County breached conditions by (a) failing to give timely notice of the underlying Pay Parity Claims and (b) failing to disclose the underlying Pay Parity Claims in applying for the Policies; and (4) coverage is

void because Fulton County made misrepresentations and/or omissions in applying for the Policies. (See id. at ¶¶ 51-79.)

For its part, Fulton County has asserted two counterclaims: (1) declaratory judgment that the underlying Pay Parity Claims are covered by the National Casualty Policies and that National Casualty has a duty to indemnify Fulton County; and (2) breach of contract for failing to provide coverage for the underlying Pay Parity Claims. (See generally Doc. 9.) Essentially, all these claims present the same overarching issue: are the underlying Pay Parity Claims covered by the National Casualty Policies. As explained below, the answer is yes.

### III. Argument and Citation of Authority

#### A. Georgia Law Regarding Insurance Policies<sup>5</sup>

Under Georgia law, “insurance is a matter of contract, and the parties to an insurance policy are bound by its plain and unambiguous terms.” Hays v. Ga. Farm Bureau Mut. Ins. Co., 314 Ga. App. 110, 111, 722 S.E.2d 923, 925 (2012).

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<sup>5</sup> Because jurisdiction in this case is based on diversity of citizenship, the Court must apply the substantive law of Georgia. E.g., Liberty Surplus, 2017 U.S. App. LEXIS 5763 at \*5; Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 752 (11th Cir. 1998). Further, Georgia substantive law controls the terms the contractual terms and obligations since the Policies were delivered in Georgia. (See [Doc. 1-1] at 6; [Doc. 1-2] at 6.) E.g., Boardman, 135 F.3d at 752.

However, “[a]n insurance policy should be read as a layman would read it.” St. Paul Mercury Ins. Co. v. FDIC, 774 F.3d 702, 708 (11th Cir. 2014). While insurers in Georgia are free to fix the terms of their policies as they see fit, consistent with the above-rules, insurers are required to draft their policies using clear and unambiguous language. Henning v. Cont’l Cas. Co., 254 F.3d 1291, 1295 (11th Cir. 2001); Liberty Surplus, 2017 U.S. App. LEXIS 5763 at \*5-6. This is especially true regarding exclusions to coverage, which “must be defined clearly and distinctly” and are “narrowly and strictly construed against the insurer and forgivingly construed in favor of the insured to afford coverage.” Liberty Surplus, 2017 U.S. App. LEXIS 5763 at \*6. See also St. Paul, 774 F.3d at 709 (“Exceptions, limitations, and exclusions to insurance agreements require a narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad premises assumes a duty to define any limitations on that coverage in clear and explicit terms.”).

Because interpretation of policy provisions and the determination of whether policy language applies to a particular circumstance presents a question of law for the Court, courts applying Georgia law have long held that insurance disputes are well-suited for adjudication by summary judgment. See Liberty

Surplus, 2017 U.S. App. LEXIS 5763 at \*4; Nationwide Mut. Fire Ins. Co. v. Somers, 264 Ga. App. 421, 423, 591 S.E.2d 430, 433 (2003).

**B. The Pay Parity Claims Fall Within The Policies' Grant of Coverage**

The first consideration in any insurance coverage dispute is whether the claims fall within the grant of coverage (or insuring agreement). See, e.g., Allstate Ins. Co. v. Neal, 304 Ga. App. 267, 268, 696 S.E.2d 103, 104 (2010); Scottsdale Ins. Co. v. Great Am. Assur. Co., 271 Ga. App. 695, 696, 610 S.E.2d 558, 560 (2005). In its Complaint, National Casualty contends that the Pay Parity Claims do not fall within the Policies' grant of coverage for two reasons: (1) the settlement payments made to resolve the Pay Parity Claims do not constitute "loss," as defined in the Policies; and (2) the Pay Parity Claims do not arise out of any "employment practices wrongful act," as defined in the Policies. (See [Doc. 1] at ¶¶ 60-61.) However, as demonstrated below, the Pay Parity Claims fall within the Policies' grant of coverage, and National Casualty's arguments are nothing more than the "classic case of [an] insurer requesting relief from the consequences of the inartfully drafted...terms of its insurance policy." Liberty Surplus, 2017 U.S. App. LEXIS 5763 at \*1.

**1. The Settlement Payments for the Pay Parity Claims Constitutes a “Loss,” as Defined in the Policies**

The Policies broadly define “loss,” in pertinent part, as

the amount [that] ... (ii) is against an “insured” for any ... “employment practices wrongful act” ... including any appeal therefrom, and including but not limited to damages (including punitive or exemplary damages, if and to the extent that such punitive or exemplary damages are insurable under applicable law), judgments, settlements, pre-judgment and post-judgment interest. “Loss” shall include “defense costs.”

(SOMF at ¶ 7.) While National Casualty contends that back pay and for compensation owed pursuant to employment contracts does not constitute “loss” under the Policies, ([Doc. 1] at ¶¶ 59-60,) nothing in the broad definition of “loss” supports that argument. Rather, the Policies make clear that “loss” is any amount against an insured for any employment practices wrongful act, “including but not limited to damages ..., judgments, settlements, pre-judgment and post-judgment interest.” (SOMF at ¶ 7.) If National Casualty wanted “loss” to not include an award of back pay, it could have easily drafted the Policies to say as much. However, National Casualty did not, and it cannot now seek to avoid coverage based on what it hopes or desires the Policies to provide. See, e.g., Liberty Surplus, 2017 U.S. App. LEXIS 5763 at \*15 (“If [insurer]

contemplated narrower coverage than what is apparent from the Policy's language, it was its responsibility to draft the Policy to reflect a narrower scope, which it did not do in this instance.").

**2. The Pay Parity Claims Arise Out Of "Employment Practices Wrongful Acts"**

The Policies define "employment practices wrongful act" broadly, in pertinent part, as

any employment-related act, omission, policy, practice or representation of the "insured" directed at or against any natural person, occurring in whole or in part at any time, including any:

...

2. Breach of any express or implied covenant;

...

6. Discrimination, harassment or segregation;

...

9. Failure or refusal to advance, compensate, employ or promote;

...

12. Any other employment-related act, omission, policy, practice, representation or relationship in connection with any "insured" at any time.

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(SOMF ¶ 8.)

Here, the acts complained of certainly fall within that broad definition. Indeed, as National Casualty admits in its Complaint for Declaratory Judgment, all of the underlying Pay Parity Claims allege breach of contract claims. ([Doc. 1] at ¶¶ 2, 33, 36-41.) Further, the Georgia Court of Appeals has also made clear that the Pay Parity Claims sound in contract and assert breach of contract. E.g., Fulton County v. Andrews, 332 Ga. App. 473, 473, 476-78, 773 S.E.2d 432, 433, 435-37 (2015); Fulton County v. Lord, 323 Ga. App. 384, 389-90, 746 S.E.2d 188, 193-94 (2013), *cert. denied*, 2014 Ga. LEXIS 31 (Jan. 6, 2014).

Fulton County's liability for the Pay Parity Claims is based on Fulton County breaching express or implied covenants in employment agreements by paying similarly-situated employees differently. See Andrews, 332 Ga. App. at 476-78, 773 S.E.2d at 435-37. (See also SOMF ¶¶ 41-45, 47.) More specifically, Fulton County was found to have violated its Civil Service Act, the provisions of which are part of an employee's contract with the County. Andrews, 332 Ga. App. at 476-78, 773 S.E.2d at 435-37. (See also SOMF ¶¶ 42-45.) Notably, subparagraph (2) of the definition of "employment practices wrongful act" is



“[b]reach of any express or implied covenant.” (SOMF ¶ 8.) As such, the Pay Parity Claims fall within the Policy’s grant of coverage as they arise out of “employment practices wrongful act[s],” as defined by the Policies.

**C. No Exclusions To Coverage Apply**

Because, as demonstrated above, the Pay Parity Claims fall within the Policies’ grant of coverage (or insuring agreement), the next consideration is whether any exclusions to coverage apply. Under Georgia law, an insurer has the burden to prove that an exclusion to coverage applies. See, e.g., Dolan v. Auto Owners Ins. Co., 333 Ga. App. 601, 604, 773 S.E.2d 789, 792 (2015).

Moreover, as noted above, any exclusions invoked by an insurer are “‘narrowly and strictly construed against the insurer and forgivingly construed in favor of the insured to afford coverage.’” Liberty Surplus, 2017 U.S. App. LEXIS 5763 at \*6.

In its Complaint, National Casualty asserts that three exclusions to coverage apply: Exclusion A, Exclusion H, and Exclusion S. (See [Doc. 1] at ¶ 62.) However, National Casualty cannot satisfy its burden of proving that any of the exclusions are “defined clearly and distinctly” or that any of the exclusions, “narrowly and strictly construed,” apply.

**1. Exclusion A Does Not Apply**

Exclusion A excludes coverage for any “[o]bligation in which [Fulton County] may be held liable under any applicable workers’ compensation law, unemployment compensation law, disability benefits law, or any similar law.”

([Doc. 1-1] at 15; [Doc. 1-2] at 15.)

None of the laws listed in the exclusion are at issue here. Rather, the state law at issue here is Georgia’s Civil Service Act. Further, Georgia courts have only applied such exclusions to cases where a claimant sought coverage but was also eligible for benefits under the state worker’s compensation, unemployment compensation, or disability benefits laws. See, e.g., Kelly v. Lloyd's of London, 255 Ga. 291, 291-92, 336 S.E.2d 772, 774 (1985) (nearly identical exclusion applied where employee’s “death occurred during the course of his employment.”); Williams v. Lumbermens Mut. Cas. Co., 164 Ga. App. 435, 437, 297 S.E.2d 345, 348 (1982) (finding that an identical exclusion applied where the claimant’s “injury arose out of and during the course of his employment and he received an award from the Workers' Compensation Board.”). Because the Pay Parity Claims do not seek compensation that would be covered by the state worker’s

compensation, unemployment compensation, or disability benefits laws, exclusion A does not apply as a matter of law.

## **2. Exclusion H Does Not Apply**

Exclusion H excludes coverage for “Liability arising out of [Fulton County’s ‘wrongful act’ for gain, profit, or advantage to which [Fulton County is] not legally entitled.” ([Doc. 1-1] at 16; [Doc. 1-2] at 16.)

Notably, exclusion H, by its plain terms, has no applicability to “employment practices wrongful act” coverage. Indeed, exclusion H explicitly applies to certain “wrongful act[s],” which is relevant to the Policies’ “errors and omissions liability” coverage, but not to the “employment practices liability” coverage. (See [Doc. 1-1] at 8, 16; [Doc. 1-2] at 8, 16.) As such, exclusion H does not apply as a matter of law.

Moreover, even if the exclusion applied to “employment practices liability” coverage, which it does not, it does not apply to the facts of this case. The general consensus among courts evaluating this exclusion is that it applies when a claim arises out of a deliberate and conscious effort to act in a way that results in a monetary benefit to which one is not entitled. See, e.g., Rizzo v. Ins. Co. of State of Pa., 969 F. Supp. 2d 1180 (C.D. Cal. 2013). Alternatively, where the

monetary benefit was not intentionally sought, this exclusion has not been held to apply. See Peerless Ins. Co. v. Pa. Cyber Charter Sch., 19 F. Supp. 3d 635 (W.D. Pa. 2014).

Here, Fulton County's alleged acts in not paying similar employees similar wages was not facially contrary to any law or payment guidelines. Instead, it was in compliance with the guidelines in place at the time. There was no conspiracy or intent to underpay employees in order to retain a profit the County knew it otherwise would not be entitled to. Because there is absolutely no evidence whatsoever that that Fulton County's behavior was something other than an "honest mistake," NCC cannot carry its burden of proving exclusion H applies as a matter of law. Peerless, 19 F. Supp. 3d at 655.

### **3. Exclusion S Does Not Apply**

Exclusion S excludes coverage for

Liability arising out of, based upon or attributable to any actual or alleged violation of the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act, the Occupational Safety and Health Act, any rules or regulations of the foregoing promulgated thereunder, and any amendments thereto, or any similar foreign, federal, state or statutory law or common law; provided that this Exclusion S shall not apply to any claim for retaliation.

([Doc. 1-1] at 18-19; [Doc. 1-2] at 18-19.)

As with exclusion A discussed above, none of the laws listed in exclusion S are at issue here. Rather, as noted, the law at issue here is Georgia's Civil Service Act. For that reason, exclusion S does not apply as a matter of law.

**D. Fulton County Satisfied All Conditions Precedent to Coverage**

As demonstrated above, the Pay Parity Claims are substantively covered by the Policies, in that they fall within the Policies' grant of coverage and no exclusions apply. In another attempt to avoid its coverage obligations, National Casualty asserts in its Complaint that Fulton County breached conditions precedent to coverage by failing to notify National Casualty of the Pay Parity Claims, as required by the Policies. (See [Doc. 1] at ¶¶ 52-56.)

However, the evidence in the record conclusively demonstrates that Fulton County provided notice to National Casualty of the Pay Parity Claims before the Policies were even issued. (See SOMF ¶¶ 12, 17, 22-24, 26-28, 31-36.) As National Casualty's corporate representative and claims adjuster testified, an insured can provide notice by disclosing information during the underwriting process. (See *id.* at ¶¶ 27-28.) Consistent with that testimony, it is undisputed that Fulton County provided notice to National Casualty of the Pay Parity

Claims when Fulton County applied for the Policies. (See *id.* at ¶¶ 12, 17, 22-24, 26-28, 31-36.) Thus, because Fulton County provided National Casualty with notice of the Pay Parity Claims at the earliest possible moment – i.e., before the Policies were even issued – National Casualty’s contention that Fulton County failed to provide timely notice fails as a matter of law.

**E. National Casualty Cannot Establish A Material Misrepresentation**

In a last-ditch effort to avoid its coverage obligations, National Casualty asserts that coverage is void because Fulton County allegedly made misrepresentations and/or omissions in applying for the Policies. (See [Doc. 1] ¶¶ 65-79.) However, the undisputed evidence in the record conclusively demonstrates that no such misrepresentations or omissions were made. Moreover, National Casualty’s decision to renew the Policies after it discussed the Pay Parity Claims – and actually increase the liability limits by \$3 million – establishes that the claims were not material to any underwriting decision.

National Casualty’s claim in Count III of the Complaint tracks the language of Georgia’s misrepresentation statute, O.C.G.A. § 33-24-7. (See [Doc. 1] ¶ 77.) Because the undisputed evidence establishes that (1) Fulton County disclosed the Pay Parity Claims during the underwriting process and (2) the

claims were not material to National Casualty's underwriting decision, National Casualty's misrepresentation/concealment claim fails as a matter of law. Cf., Exec. Risk Indem. v. AFC Enters., 510 F. Supp. 2d 1308 (N.D. Ga. 2007) (finding insurer's claim under O.C.G.A. § 33-24-7 failed as a matter of law because there was no evidence of any misrepresentations made and, even if any misrepresentations were made, no evidence of materiality), *aff'd*, 279 F. App'x 793 (11th Cir. 2008); Nappier v. Allstate Ins. Co., 766 F. Supp. 1166, 1168 (N.D. Ga. 1991) (noting that, to prevail on claim under O.C.G.A. § 33-24-7, insurer must prove insured made false representation).

**1. The Pay Parity Claims were disclosed during the underwriting for the initial policy in 2013**

The Pay Parity Claims were disclosed to National Casualty prior to the inception of the 2013 Policy. (SOMF ¶ 28.) As the underwriter, Kathy Adamson of Civic Risk, reported to National Casualty in 2015 – *before* National Casualty denied coverage based in part on the alleged failure to disclose the claims: “It does turn out that there were Pay Parity Claims, ... on the Loss Runs that I received with my initial Submission – I just did not feel a concern about them at that time.” (Id. at ¶ 26.) In her deposition, Ms. Adamson testified unequivocally that she is not aware of any false statement or misrepresentations made by

Fulton County in the application for either of the National Casualty Policies. (Id. at ¶ 29.) Ms. Adamson also testified without contradiction that she is not aware of anything that Fulton County concealed or omitted from its applications for the National Casualty Policies. (Id. at ¶ 29.) National Casualty's 30(b)(6) representative was also unable to point to any evidence to support the misrepresentation claim. (Id.)

**2. The Pay Parity Claims were not material to any underwriting decisions**

National Casualty elected to issue the 2013 Policy after the Pay Parity Claims were listed on loss runs. It then renewed the policy in 2014, even though it was aware of the claims, including the fact that the County had paid \$4.9 million, the underwriter noted "the frequency of the claims," and a National Casualty Claims Manager felt "that coverage could potentially be found under our Policy." (SOMF ¶¶ 30-37.) Moreover, National Casualty actually agreed to *increase* the liability limit from \$7 million to \$10 million. (Id. at ¶ 38.) National Casualty even offered to renew the policies again in 2015. (Id. at ¶ 39.) Given this undisputed evidence, National Casualty's misrepresentation claim fails as a matter of law.



#### IV. Conclusion

For the foregoing reasons, Fulton County respectfully requests that the Court grant its motion for summary judgment and find that the underlying Pay Parity Claims are covered by the National Casualty Policies, such that National Casualty's failure to provide coverage constitutes a breach of its duty to indemnify.

This 28th day of April, 2017.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1 D, undersigned counsel certifies that the foregoing  
brief was prepared in Book Antigua, 13 point font.

/S/ David M. Atkinson

David M. Atkinson

CERTIFICATE OF SERVICE

I certify that on this 28th day of April, 2016, I electronically filed the foregoing **BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following counsel of record:

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/S/ David M. Atkinson

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