

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

NATIONAL CASUALTY :
COMPANY, :

Plaintiff, :

v. :

FULTON COUNTY, GEORGIA, :

Defendant. :

Civil Action No. _____

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW Plaintiff, National Casualty Company (“National Casualty”), by and through counsel and pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, and alleges and states the following:

PRELIMINARY STATEMENT

1. Pursuant to 28 U.S.C. § 2201, National Casualty seeks a declaratory judgment and adjudication of an actual controversy concerning rights, obligations, and liabilities under certain policies of insurance issued by National Casualty to the Fulton County government.

2. Specifically, Fulton County, Georgia, operating in its various capacities and governmental subdivisions (“Fulton County”), alleges entitlement to

defense and indemnity in various civil actions brought against it by past and present employees asserting breach of contract and statutory actions for Fulton County's failure to pay its employees ("Underlying Lawsuits").

3. National Casualty seeks a judgment declaring that it has no obligation under its insurance policies to defend or indemnify Fulton County in connection with the Underlying Lawsuits, because the claims are not covered under the policies.

PARTIES

4. At all times relevant to this action, National Casualty was, and still is, a corporation organized and existing under the laws of the State of Wisconsin with its principal place of business in Arizona.

5. At all times relevant to this action, Fulton County was, and still is, a political and administrative division of the State of Georgia, providing certain local governmental services.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the claims contained herein pursuant to 28 U.S.C. § 1332(a)(1) and (c), in that there is complete diversity of citizenship between the parties and the amount in controversy exceeds the sum of \$75,000.

7. Venue is proper in the United States District Court for the Northern District of Georgia, Atlanta Division, pursuant to 28 U.S.C. § 1391(b)(1) and LR 3.1B(1)(a) because the Defendant Fulton County resides in this judicial district.

FACTUAL ALLEGATIONS

-The Insurance Policies-

(General Provisions)

8. National Casualty incorporates by reference the preceding paragraphs as if fully set forth herein.

9. On or about July 6, 2013, National Casualty issued a Retained Limit Liability Insurance Policy for Public Entities Policy Number PGO0000107 to Fulton County Government, for the policy period July 6, 2013 through July 6, 2014 (“2013 Policy”). (A certified copy of 2013 Policy is attached hereto as **Exhibit A** and incorporated herein by reference).

10. The 2013 Policy contained a liability limit of \$7,000,000 per wrongful act with a \$7,000,000 aggregate limit, subject to a \$2,000,000 retained limit.

11. On or about July 6, 2014, National Casualty issued a Retained Limit Liability Insurance Policy for Public Entities Policy Number PGO0000182 to Fulton County Government, for the policy period July 6, 2014 through July 6, 2015 (“2014 Policy”). (A certified copy of 2014 Policy is attached hereto as **Exhibit B** and incorporated herein by reference).

12. The 2014 Policy contained a liability limit of \$10,000,000 per wrongful act with a \$10,000,000 aggregate limit, subject to a \$2,000,000 retained limit.

13. The 2013 Policy and the 2014 Policy (hereinafter collectively “the Policies”) contained identical insuring language and provided various insurance coverages to Fulton County for claims of wrongful acts in excess of Fulton County’s retained limit of \$2,000,000 (“Retained Limit”).

14. The definition of “retained limit” in the Policies provided that the retained limit shall include the sum of all losses for covered claims and all defense costs.

15. Section I.B. “Defense and Settlement” required Fulton County to investigate, defend, and settle claims against it that did not exceed the Retained Limit.

16. Notwithstanding the “Defense and Settlement” provisions of the Policies, Fulton County was not permitted to admit any liability or to settle, or offer to settle, any claim in an amount exceeding or that may exceed the Retained Limit without National Casualty’s prior written consent.

17. Under the Policies, National Casualty agreed to pay for “loss” that Fulton County becomes legally obligated to pay on account of any “employment practices wrongful act” Fulton County committed during the policy periods.

18. Both Policies define “loss” as the amount that “(ii) is against an insured for any . . . employment practices wrongful act”

19. The Policies define “employment practices wrongful act” 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; . . . 5. Demotion, discipline, evaluation or reassignment; . . . 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”

FACTUAL ALLEGATIONS

-The Insurance Policies-
(Policy Exclusions)

20. National Casualty incorporates by reference the preceding paragraphs as if fully set forth herein.

21. In addition to the general coverage provisions, the Policies contained exclusions for certain liability risks, including but not limited to Exclusions A, H, and S.

22. Exclusion A excludes coverage for any “Obligation in which any insured may be held liable under any applicable workers' compensation law, unemployment compensation law, disability benefits law, or any similar law.”

23. Exclusion H excludes coverage for “Liability arising out of your wrongful act for gain, profit, or advantage to which you are not legally entitled....”

24. 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.”

FACTUAL ALLEGATIONS
-The Insurance Policies-
(Conditions Precedent to Coverage)

25. National Casualty incorporates by reference the preceding paragraphs as if fully set forth herein.

26. Notwithstanding Fulton County's independent obligations with respect to the costs of claims and defense within the Retained Limit, both Policies required Fulton County – as a condition precedent to coverage – to notify National Casualty of all wrongful acts, employment practices acts, or employee benefit wrongful acts, that “may result in a claim or suit that may exceed fifty percent (50%) of your retained limit.”

27. In addition, Fulton County was required to notify National Casualty “as soon as practicable” of any “claim” made against Fulton County.

28. The Policies defined “claim” as: (1) a written demand for monetary damages or non-monetary relief; (2) a lawsuit or other civil proceeding commenced by the service of a complaint or similar proceeding; (3) an arbitration proceeding in which damages are claimed, and to which such proceeding [Fulton County] must submit, or does submit with our prior written consent; or (4) any other alternative dispute resolution proceeding in which damages are claimed, and

to which such proceeding [Fulton County] submit[s] with [National Casualty's] consent.

29. In addition, the Policies required Fulton County to notify National Casualty as soon as practicable of "Special Serious Claims" which include wrongful acts, employment practices wrongful acts, employee benefit wrongful acts or claims of which Fulton County becomes aware which involve: (a) Fulton County's judgment for which exposure exceeds or may exceed fifty percent (50%) of the Retained Limit and (b) any demand or demands that equal or exceed fifty percent (50%) of the Retained Limit.

30. Section M of the Conditions section, as amended by endorsement, also imposed a duty upon Fulton County to aver that all statements, representations and information provided by Fulton County in application for the Policies were (i) true, accurate and complete, (ii) were made or provided by you in order to induce us to issue the policy, and (iii) are material to our acceptance of the risk to which this policy applies.

31. Section M further stated that "[i]n the event that any of the statements, representations or information in the application for this policy are not true, accurate and complete, coverage will not apply to any insured who knew as of the effective date of such application for this policy the facts that were not truthfully,

accurately or completely disclosed, whether or not the Named Insured knew of such untruthful, inaccurate or incomplete disclosure in such application.”

FACTUAL ALLEGATIONS

-History of Fulton County Compensation Litigation-

32. National Casualty incorporates by reference the preceding paragraphs as if fully set forth herein.

33. All of the Underlying Lawsuits, the defense of and indemnity for which Fulton County seeks coverage, similarly allege breach of contract claims seeking back pay based on Fulton County’s obligations pursuant to employment contracts, the Civil Service Act of 1982 (“Civil Service Act”), and the compensation programs.

34. The plaintiffs in the Underlying Lawsuits allege that they are or once were employees classified under the Civil Service Act, which determined pay grades based on job classification.

35. The following six actions are the only ones for which Fulton County has demanded coverage under the Policies at issue in this case.

36. On **September 19, 2012**, thirty-five current or former employees of the Solicitor’s Office filed a lawsuit against Fulton County for breach of contract to recover back pay (“Manchel Lawsuit”). (A copy of the complaint filed in the Manchel Lawsuit is attached hereto as **Exhibit C**).

37. On **October 10, 2012**, three current or former attorneys in the Fulton County State Court filed a lawsuit against Fulton County for breach of contract to recover back pay (“DeFoor Lawsuit”). (A copy of the complaint filed in the DeFoor Lawsuit is attached hereto as **Exhibit D**).

38. On **November 5, 2012**, sixty-four current or former attorneys in the Public Defender’s Office filed a lawsuit against Fulton County for breach of contract to recover back pay (“Andrews Lawsuit”). (A copy of the complaint filed in the Andrews Lawsuit is attached hereto as **Exhibit E**).

39. On **November 16, 2012**, fourteen current or former employees of the Fulton County Office of the Child Attorney filed a lawsuit against Fulton County for breach of contract to recover back pay (“Bigelow Lawsuit”). (A copy of the complaint filed in the Bigelow Lawsuit is attached hereto as **Exhibit F**).

40. On **October 25, 2013**, eighty-four current or former attorneys in the District Attorney’s Office filed a lawsuit against Fulton County for breach of contract to recover back pay (“Allen Lawsuit”). (A copy of the complaint filed in the Allen Lawsuit is attached hereto as **Exhibit G**).

41. On **August 13, 2014**, seventy-three current or former employees of the Sheriff’s Office filed a lawsuit against Fulton County for breach of contract to

recover back pay (“Benson Lawsuit”). (A copy of the complaint filed in the Benson Lawsuit is attached hereto as **Exhibit H**).

42. Because both Policies contained a \$2,000,000 Retained Limit, Fulton County was obligated under Section I.B. and did initially undertake to investigate and defend the Underlying Lawsuits.

43. Fulton County did not notify National Casualty of the Benson Lawsuit or the associated claims until March 9, 2015.

44. Fulton County did not notify National Casualty of the remaining five Underlying Lawsuits or the associated claims until August 4, 2015.

45. In response to this first notification and a tender of defense, National Casualty undertook a full investigation of Fulton County’s Policies and the allegations in the Underlying Lawsuits under a reservation of rights.

46. On or about August 20, 2015, National Casualty issued its denial of coverage on the grounds that, among other things, the Policies did not cover or otherwise excluded the claims asserted in the Underlying Lawsuits.

47. Fulton County continued to defend the Underlying Lawsuits.

48. On or about October 2, 2015, Fulton County entered into a global settlement of all of the Underlying Lawsuits for approximately \$18,362,100 (“Global Settlement”).

49. Fulton County alleges that National Casualty is liable for \$6,552,991.29 of the Global Settlement (\$8,552,991.29 it allocated to National Casualty's policy periods, less one \$2,000,000 Retained Limit).

50. Thereafter, on or about January 19, 2016, Fulton County reiterated its demand for coverage, seeking indemnity under the Policies.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment – Late Notice/Breach of Condition Precedent)

51. National Casualty incorporates by reference the preceding paragraphs as if fully set forth herein.

52. Fulton County did not notify National Casualty of the Benson Lawsuit or the underlying claim until **March 9, 2015**, almost *seven months* after the action was filed.

53. Fulton County did not notify National Casualty of the remaining five Underlying Lawsuits or the associated claims until **August 4, 2015**, *between two and almost 3 years* after the actions were filed (one year and ten months after the Allen Lawsuit).

54. The notice provisions in the Policies constituted an express condition precedent to coverage.

55. Fulton County's delay of seven months to more than two years constituted a significant and unreasonable delay.

56. Fulton County's failure to notify National Casualty constitutes a material breach of the Policies, and therefore, National Casualty is relieved of any duties under the Policies.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment – No Coverage Under the Policies)

57. National Casualty incorporates by reference the preceding paragraphs as if fully set forth herein.

58. The Policies provide coverage for "loss" that Fulton County becomes legally obligated to pay on account of "employment practices wrongful acts" "committed during the policy period."

59. The Underlying Lawsuits all seek back pay and reimbursement for compensation Fulton County already owed pursuant to its employment contracts.

60. Therefore, liability for the claims in the Underlying Lawsuits does not constitute a loss under the Policies.

61. In addition, Fulton County's liability for back pay and reimbursements did not arise out of any employment practices wrongful act within the meaning of the Policies.

62. Moreover, Fulton County's liability for back pay and reimbursements are excluded by multiple Policy exclusions, including but not limited to Exclusions A, H, and S.

63. As such, the Underlying Lawsuits do not involve a covered “loss” and National Casualty has no obligation to defend and/or indemnify Fulton County with respect to any of the Underlying Lawsuits.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment – Misrepresentations or Omissions/Breach of Condition Precedent/Known Loss)

64. National Casualty incorporates by reference the preceding paragraphs as if fully set forth herein.

65. Fulton County applied for the 2013 Policy in or about April 2013.

66. Fulton County applied for renewal of its 2013 Policy for the issuance of the 2014 Policy in or about May 2014.

67. In conjunction with its application and/or renewal of the Policies, Fulton County was required to provide all information regarding current and previous claims and lawsuits, and all information relating to potential claims that National Casualty would rely upon in making its underwriting determinations.

68. In connection with these obligations, Fulton County completed questionnaires and provided claims and loss reports purporting to disclose all such information requested by National Casualty (“Disclosed Claims”).

69. At the time of its application for and/or renewal of the Policies, Fulton County was aware of claims, lawsuits, and/or other disputes with respect to alleged wrongful acts that were not disclosed to National Casualty.

70. One or more of the claims, lawsuits, and/or other disputes not disclosed and of which Fulton County was aware at the time of its application for and/or renewal of the Policies, are part of the Global Settlement for which Fulton County seeks indemnity from National Casualty.

71. At the time of its application for and/or renewal of the Policies, Fulton County misrepresented and/or failed to fully disclose the value, extent and seriousness of the Disclosed Claims.

72. At the time of its application for and/or renewal of the Policies, Fulton County misrepresented and/or failed to fully disclose the potential exposure to National Casualty of the Disclosed Claims, by listing other insurance companies as covering the loss.

73. At the time of its application for and/or renewal of the Policies, Fulton County misrepresented and/or failed to fully disclose the potential exposure to National Casualty of the Disclosed Claims, by listing the dates of loss for the Disclosed Claims as definitively outside of the policy periods for which Fulton County sought insurance from National Casualty.

74. One or more of the Disclosed Claims that Fulton County misrepresented and/or for which it otherwise failed to fully disclose material facts are part of the Global Settlement for which Fulton County seeks indemnity from National Casualty.

75. National Casualty relied upon the information provided by Fulton County in the applications in issuing the Policies.

76. The duties imposed upon Fulton County in the Policies with respect to disclosure of information in conjunction with the application for and/or renewal of the Policies constituted an express condition precedent to coverage.

77. Fulton County's misrepresentations with respect to and/or failure to disclose information grounded in the same factual and legal bases either: (1) were fraudulent; (2) were material to the acceptance of the risk or to the risk assumed by National Casualty; or (3) National Casualty in good faith would either not have issued the Policies or would not have issued Policies in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the risk resulting in the loss if the actual facts had been known to National Casualty as required under either by the application for the policy or contract or otherwise.

78. Fulton County's misrepresentations and/or failure to disclose material information constitute grounds for denial of coverage under the Policies.

79. In the alternative, Fulton County's misrepresentations and/or failure to disclose constitute a material breach of the Policies, which entitles National Casualty to be relieved of any duties under the Policies.

WHEREFORE, the Plaintiff, National Casualty Company, having fully complained against the Defendant, Fulton County, respectfully requests this Court to:

1. Declare that National Casualty has no duty to defend and/or indemnify Fulton County under the Policies by reason of Fulton County's material breach of a condition precedent by failing to timely notify National Casualty of the claims and/or lawsuits for which Fulton County seeks coverage;
2. Declare that the liability imposed on Fulton County for which it seeks indemnity is not covered under the Policies, and therefore, National Casualty has no duty to defend and/or indemnify Fulton County;
3. Declare that the National Casualty Policies do not provide coverage on the grounds that Fulton County misrepresented and/or failed to disclose information known by Fulton County and material to National Casualty's issuance of the Policies;
4. Award the costs and expenses of this action;

5. Grant a jury trial as to all issues so triable; and
6. Grant such other relief as this Court deems just and proper under the circumstances.

DATED this 3rd day of March, 2016.

Respectfully submitted,

/s/ John I. Malone, Jr.

JOHN I. MALONE, JR.

GA Bar. No. 812837

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