

**Tower Natl. Ins. Co. v National Bus. Capital, Inc.**

2014 NY Slip Op 31985(U)

July 28, 2014

Supreme Court, New York County

Docket Number: 155786/2012

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 11

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TOWER NATIONAL INSURANCE COMPANY,

Index # 155786/2012

Plaintiff,

-against-

NATIONAL BUSINESS CAPITAL, INC. and 3081  
MAIN STREET, LLC d/b/a NEW ENGLAND WINE  
AND SPIRITS,

Defendants.

-----X  
JOAN A. MADDEN,

Plaintiff Tower National Insurance Company (“Tower”) moves for summary judgment declaring that it has no duty to defend or indemnify defendant National Business Capital, Inc. (“NBC”) in the underlying action entitled *3081 Main Street, LLC d/b/a New England Wine and Spirits v. National Business Capital, Inc.*, pending in the United States District Court, District of Connecticut, under Docket Number 3:12-cv-00531 (AWT) (hereinafter “the underlying action”); and dismissing NBC’s counterclaims against it.

NBC opposes the motion and cross moves for summary judgment on its first counterclaim for breach of the covenant of good faith and fair dealing, on its second counterclaim for a declaratory judgment that NBC has a right to a defense by independent counsel, on its third counterclaim for a declaratory judgment that Tower has an obligation to defend and indemnify NBC, and on its fourth counterclaim for attorneys’ fees.

Defendant 3081 Main Street, LLC d/b/a New England Wine and Spirits (“3081”) opposes Tower’s motion, and cross moves for summary judgment seeking a declaration that Tower is obligated to defend and indemnify NBC.

In the underlying action, a proposed class action, 3081, on behalf of itself and those similarly situated, seeks damages for NBC's alleged faxing of unsolicited advertisements in violation of 47 U.S.C. §227, i.e., the Telephone Consumer Protection Act ("the TCPA"), and Conn. Gen. Stat. §52-5709 (c), Connecticut's version of the TCPA. Specifically, the complaint alleges that NBC faxed more than 10,000 unsolicited advertisements without an opt-out notice as required under the TCPA and the Connecticut statute. The complaint alleges that NBC either negligently or intentionally sent and/or arranged to send the faxes at issue. The complaint seeks "actually monetary loss" or \$500, whichever is greater, for each violation and treble damages for any willful and knowing violation pursuant to the TCPA and \$500 per violation pursuant to the Connecticut statute.

Tower argues that it is entitled to summary judgment because such "fax blast" claims are not covered under the standard commercial general liability policy it issued to NBC. NBC, on the other hand, argues that the claims are covered and asserts counterclaims related to Tower's denial of coverage. The New York courts have not ruled on the issue of whether such fax-blast claims are covered under general liability policies and the courts outside of New York have split over whether such claims are covered under the "right of privacy" clause of the "personal and advertising injury" coverage part and the accidental "property damage" coverage part.

#### The Tower Businessowners Policy

The Tower policy issued to NBC, entitled "Businessowners Policy," bearing policy number B31-601-3379-01/000, and in effect from December 19, 2011 to December 19, 2012 contains the following insuring agreement following the title "Business Liability":

We will pay those sums that the insured becomes legally obligated to pay as

damages because of “bodily injury,” “property damage,” or “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages.

Businessowners Coverage Form, Section II—Liability, ¶ A.1.a., p. 26.

The policy then defines the circumstances under which the insurance applies to “bodily injury” and “property damage.” Specifically, the policy provides in relevant part: “This insurance applies . . . to ‘bodily injury’ and ‘property damage’ only if . . . the ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence.’” *Id.* ¶ A.1.b.(1)(a), p. 26. The policy also applies to “personal and advertising injury” caused by an offense arising out of your business, but only if the offense was committed in the ‘coverage territory’ during the policy period.” *Id.* ¶ A.1.b.(2), p. 26.

The policy contains the following relevant definitions:

“property damage” means the “physical injury to tangible property, including all resulting loss of use of that property . . . or . . . loss of use of tangible property that is not physically injured”;

“occurrence” means “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”;

“personal and advertising injury” means “injury, including consequential ‘bodily injury,’ arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the private right of occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products, or services;
- e. *Oral or written publication, in any nature, of material that violates a person’s right of privacy;*

- f. The use of another's advertising idea in your own 'advertising'; or
- g. Infringing upon another's copyright, trade dress or slogan in your 'advertisements.'

Id. ¶¶ F.17, F.13, F.14, p. 39 (emphasis added).

The Policy includes various exclusions to the liability coverage provided which appear within the Businessowners Coverage Form. These include exclusions for Expected or Intended Injury, Contractual Liability, Liquor Liability, Workers Compensation and Similar Laws, Employer's Liability, Pollution, Aircraft, Auto or Watercraft, Mobile Equipment, War, Professional Services, Damage to Property, Damage to Your Product, Damage to Your Work, Damage to Impaired Property. See generally id. ¶ B.1(p), p. 32.

### DISCUSSION

"An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy." Throgs Neck Bagels, Inc. v. G.E. Ins. Co. of New York, 241 AD2d 66, 68 (1<sup>st</sup> Dept 1998), citing Breed v. Insurance Co. of N. America, 46 NY2d 351, 355 (1978). In general, "the court will construe the limitations of an insurance contract in the light of the speech of common [people]," quoting Gittelson v. Mut. Life Ins. Co. of NY, 266 AD 141, 145 (1<sup>st</sup> Dept 1943)(internal citation omitted). "Any ambiguities will be resolved against the insurer, as drafter of the policy [and][t]he touchstone for interpreting insurance contracts, as with other contracts, is the reasonable expectation of the parties." Id. (citations omitted).

"It is well settled that an insurer's duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the

complaint suggest a reasonable possibility of coverage” (internal citations and quotations omitted). BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 NY3d 708, 714 (2007); see also W & W Glass Systems, Inc. v. Admiral Ins. Co., 91 AD3d 530 (1<sup>st</sup> Dep’t 2012) “[I]f the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, a duty to defend exists.” City of New York v. Certain Underwriters at Lloyd's of London, England, 15 AD3d 228, 230 (1<sup>st</sup> Dep’t 2005)(internal citations omitted). “The duty to indemnify is...distinctly different from the [duty to defend].” Servidone Const. Corp. v. Security Ins. Co. of Hartford, 64 NY2d 419, 424 (1985). Specifically, while “the duty to defend is measured against the allegations of the pleadings, the duty to pay is determined by the actual basis for the insured’s liability to a third person.” Id.; see also, BP Air Conditioning Corp. v. One Beacon Insurance Group, 33 AD3d 116, 124 (1<sup>st</sup> Dept 2006), modified on other grounds, 8 NY3d 708 (2007)(holding that “a duty to defend an additional insured is not contingent on there having been an adjudication of liability giving rise to a duty to indemnify the additional insured”).

The court will consider the motion and cross motion in the context of these standards.

### **Property-Damage Provision**

The first issue is whether the underlying action is covered under the property-damage provision which applies when “property damage” is caused by an “occurrence.” As indicated above “property damage” is defined under the Policy to mean “physical injury to tangible property, including all resulting loss of use of that property . . . or . . . loss of use of tangible property that is not physically injured.” Here, the court finds that

the loss of ink, time and paper resulting from the receipt of unwanted faxes constitutes “property damage” for the purpose of the Policy. See e.g., Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F3d 631, 639 (4th Cir. 2005)(“sending a fax, and receipt alone [results in] ... depletion of the recipient's time, toner and paper”); Am. States Ins. Co. v. Capital Assocs. of Jackson County Inc., 392 F3d 939, 943 (7th Cir. 2004)(same).

The next question is whether the sending of such fax constitutes an “occurrence” within the meaning of the Policy. “Occurrence” is defined under the Policy to mean “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” In general, “the issue of what constitutes an occurrence has been a legal question for courts to resolve.” Roman Catholic Diocese of Brooklyn v. National Fire Ins. Co. of Pittsburgh, 21 NY3d 139, 148 (2013). An insured has the burden of demonstrating that the damage at issue is the result of an occurrence within the meaning of the policy. Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co., 98 NY2d 208, 220 (2002).

The court finds that NBC has not met this burden. Under New York law, “the requirement of a fortuitous loss is a necessary element of insurance policies based on either an ‘accident’ or ‘occurrence.’” See Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co., 98 NY2d at 220. Here, although NBC may not have intended to violate the TCPA or the Connecticut statute, it cannot be said that it did not know that it was sending 10,000 unsolicited faxes such that this act was a fortuitous or unexpected event which would qualify as an “occurrence” or “accident” within the meaning of the Policy. See also, National Mut. Ins. Co. v. David Randall Associates, Inc., 551 FedAppx. 638 ,

641 (3d Cir. 2014)(finding that sending of faxes in violation of the TCPA was not an occurrence within the meaning of the relevant policy since the damages were not “caused by an event so unexpected, undesigned and fortuitous as to qualify as accidental”); Terra Nova Ins. Co. v. Fray-Witzer, 869 NE2d 565, 571 (Mass 2007)(finding that, under New Jersey law, the sending of faxes in violation of the TCPA was not covered as property damage under the general liability policy as it was not caused by “an occurrence” defined as “an accident...” since the insured “knew full well that its facsimile advertisements would reach Massachusetts customers' facsimile machines as unsolicited”). Accordingly, the property-damage provision does not provide a basis for coverage for the underlying action.

#### **Personal-Advertising Injury Provision**

The court next considers whether the claims in the underlying action are covered as “personal and advertising injury,” which includes “injury...arising out of...oral or written publication, in any manner, of material that violates a person’s right to privacy.” In considering this issue the two main questions are whether the faxes are “a publication” and whether the sending of the faxes can be said to violate “a person’s privacy right.”

Here, the Policy does not define the terms publication or privacy right so the terms must be accorded their “plain and ordinary meaning.” Vigilant Ins. Co. v. Bear Stearns Companies, Inc., 10 NY3d 170, 177 (2008). The term publication is ordinarily defined as a “communication (as of news or information) to the public” or a “public announcement.” Terra Nova Ins. Co. v. Fray-Witzer, 869 NE2d at 572, citing Webster's Third New Int'l Dictionary, at 1836 (2002); see also, Owners Ins. Co. v. European Auto Works, Inc., 695

F3d 814, 818 (8<sup>th</sup> Cir. 2012). The court finds that the transmission of 10,000 faxes, as alleged in the underlying action, constitutes a publication as that word is ordinarily understood to mean.

With respect to the phrase “the right of privacy” Tower argues that it should be interpreted to mean “the right to secrecy” as opposed to a “right of seclusion,” and thus would not cover the TCPA claims in the underlying action.<sup>1</sup> Moreover, Tower argues that to the extent privacy includes that right of seclusion, the right to privacy would not include fax blasting since it is not the type of intrusion that “would be highly offensive to a reasonable person,” citing Restatement (Second) Torts § 625. NBC counters that the ordinary meaning of the term privacy includes that right to seclusion and thus covers the type of privacy interests protected by the TCPA (Shulman v. Chase Manhattan Bank, 268 AD2d 174 (2d Dept 2000)(noting that the TCPA is intending to protect “privacy interests”).

The term privacy is ordinarily understood to mean “seclusion or isolation from the view of, or contact of others.” Webster New College Dictionary 880 (2001). Black’s Law Dictionary 1325 (7<sup>th</sup> ed. 1999) defines the right of privacy as “the right to personal autonomy” or “the right of a person and the person’s property to be free from unwarranted public scrutiny or exposure.” Here, given that the phrase “right of privacy” is susceptible

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<sup>1</sup>The courts considering the issue have construed the “right of privacy” to mean either the right of secrecy, such as a person wishing to conceal a criminal conviction or bankruptcy, or a right to seclusion, such as a person asserting a desire to be free from door-to-door sales people ringing the doorbell at night. ” Terra Nova Ins. Co. v. Fray-Witzer, 869 NE2d at 572, citing See e.g. American States Ins. Co. v. Capital Association of Jackson Co., Inc., 392 F3d 939, 941 (7<sup>th</sup> Cir. 2004).

to at least two reasonable interpretations, the court finds that the phrase is ambiguous and thus must be construed in favor of coverage. Handelsman v. Sea Ins. Co. Ltd., 85 NY2d 96, 101 (1994). Indeed, courts considering the issue have held that “[t]he receipt of an unsolicited fax advertisement implicates a person's right of privacy insofar as it violates a person's seclusion, and such a violation is one of the injuries that a TCPA fax-ad claim is intended to vindicate.” Valley Forge Ins. Co. v. Swiderski Electronics, Inc., 860 NE2d 307, 315 (Ill. 2006). Accordingly, the court finds that “privacy right” includes the injury alleged in the underlying action resulting from NBC’s sending of unsolicited faxes in alleged violation of the TCPA and the Connecticut statute. See Terra Nova Ins. Co. v. Fray-Witzer, 869 NE2d at 572; Owners Ins. Co. v. European Auto Works, 695 F3d 814 but see, American States Ins. Co. v. Capital Association of Jackson Co., Inc., 392 F3d 939.

In reaching this conclusion, the court rejects Tower’s argument that New York rules of insurance policy construction requiring that policy language be considered in context mandate a different result. In this connection, contrary to Tower’s position, it cannot be said that the “right of privacy” clause does not include coverage for fax blasts claims since such interpretation is inconsistent with the other clauses in the personal and advertising injury provision, which refer to specific torts. See Purdue v. Frederick Co., 40 AD3d 285, 286 (1<sup>st</sup> Dept 2007)(“personal injury coverage is designed only for defined risks and thus limited to claims actually arising out of torts enumerated under the policy”). This argument is without merit since the tort of invasion of privacy “includes unreasonable intrusion upon seclusion” (See Howell v. New York Post, Inc., 81 NY2d 115, 123 (1993), which, as indicated above, is implicated by the fax blasting claims in the underlying

action.

Tower next makes the context related argument that by using the term “person” with respect to the right of privacy but omitting the term “organization.” which is included in the proceeding clause,<sup>2</sup> the right of privacy clause limits coverage to injuries sustained by natural persons. This argument is without merit, particularly as, with the exception of the wrongful eviction or invasion of the occupancy offense which refers to a person, the other clauses in the provision either omit any reference to a person or organization or use the term “another.”<sup>3</sup> Thus, at best, the provision is ambiguous in this regard and must be interpreted in favor of the insured. Handelsman v. Sea Ins. Co. Ltd., 85 NY2d at 101.

The next, and related issue, concerns Tower’s argument that there can be no coverage as the named plaintiff in the underlying action is a corporation and a corporation cannot claim a right to privacy, particularly as the Policy refers to “a *person’s* right to privacy” (emphasis supplied).

While this motion was pending, the Appellate Division, Third Department issued Sports Specialities, Inc. v. Twin City Fire Ins. Co., 116 AD3d 1270 (3d Dept 2014), which considered the issue of whether the insured, a corporation, was covered under two policies of insurance, including a commercial general liability and an umbrella policy, in an action brought against it for tortious interference with contract and business relations, unfair and

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<sup>2</sup> Specifically, this clause refers to “[o]ral or written publication in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products, or services.”

<sup>3</sup> Thus, for example, the offense of malicious prosecution does not indicate whether it applies to a person or an organization. In addition, the Policy refers to the use of “another’s” advertising idea and the infringing upon “another’s” copyright, trade dress or slogan.

deceptive trade practices and misappropriation of trade secrets. The insured sought coverage under a “personal and advertising injury” portion of the both policies for an injury other than bodily injury, arising out of both the insured's business and one or more of the enumerated offenses set forth therein, including the “[o]ral or written publication of material that violates a person's right of privacy.” *Id.*, at 1273 (internal quotations omitted).

The Third Department rejected the insured's assertion of coverage. While the Third Department acknowledged that the term “person” can be construed to mean an individual or a corporation, it also stated that its analysis, at least with respect to the general liability policy, did not permit this construction, citing with approval the trial court's observation that “the offense at issue—the “[o]ral or written publication of material that violates a person's right of privacy”—is sandwiched between two other offenses in [the general liability] policy that make express reference to misdeeds perpetrated against either a person or an organization thereby suggesting that the omission of any reference to an organization from the subject offense was intentional .” *Id.*, at 1273.

However, the court went on to say that “[a]lthough parties debate whether [the umbrella] policy draws as clear a distinction between the terms at issue, this issue need not detain us because plaintiff's actions—tortious interference with contract and business relations, unfair and deceptive trade practices and misappropriation of trade secrets—do not constitute a violation of ‘person's right of privacy’ within the meaning of [the subject policies].” *Id.* In further support of this determination, the court explains that “[t]o be sure, the complaint in the underlying action alleged conduct on the part of plaintiff that extended beyond the misappropriation of trade secrets and, in general, encompassed the

acquisition and/or use of confidential and proprietary information belonging to its competitor. However, equating those allegations with an invasion of the competitor's 'right of privacy' ignores both the competitor's status as a corporate entity...and the historically personal nature of privacy rights in general." *Id.* 1274 (internal citations omitted).

The foregoing quotations reveal that the decision bases the lack of coverage on the nature of the claims asserted against plaintiff, and render the court's statements with respect to the meaning of the term "person" ambiguous. Furthermore, the right of privacy clause in general liability policy at issue in Sportsfield Specialities Inc., 116 AD3d at 1273, was "sandwiched between two other offenses in [the subject] policy that make express reference to misdeeds perpetrated against either a person or an organization," and thus is distinguishable from the Tower policy. Specifically, in the Tower policy, while the clause before the violation of privacy offense, relating to libel and disparagement refers to an organization and a person, the following clause does not and, instead, refers to "the use of another's advertising idea in your advertising." The next clause similarly refers to "[i]nfringing on another's copyright, trade dress or slogan in your advertisement."

Thus, based on these distinctions and the Third Department's concerns about the language in the umbrella policy, Sports Specialities, Inc., does not provide controlling case law with respect to the issue of whether the plaintiff/corporation in the underlying action qualifies "a person" whose right to privacy was violated by the sending of faxes. Moreover, in contrast to the claims at issue in Sports Specialities, Inc., as indicated above, the sending of numerous faxes in alleged violation of the TCPA, implicate the privacy rights of persons and businesses, and thus claims in the underlying action arising out of

such violation are covered under the Policy's advertising injury provision. See e.g. Universal Underwriters Ins. Co. v. Lou Fusz Automobile Network, Inc., 401 F3d 876, 882 (8<sup>th</sup> Cir 2005)(pointing out that prior to passage of the TCPA, Congress heard complaints from individuals and businesses that junk faxes were "a nuisance, *invasion of privacy* and interfere with interstate commerce")(emphasis in original). Finally, as the underlying action is a putative class action, there may be individual plaintiffs named.

### **Alleged Punitive Nature of Damages under TCPA**

Tower also seeks to disclaim coverage on ground that the damages sought in the underlying action in connection the TCPA violations constitute punitive damages. "New York public policy precludes insurance indemnification for punitive damage awards, whether the punitive damages are based on intentional actions or actions which, while not intentional, amount to gross negligence, recklessness, or wantonness or conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard." Home Ins. Co. v. American Home Prods. Corp., 75 NY2d 196, 200 (1990)(internal citations and quotations omitted).

Tower argues that the damages sought under the TCPA are punitive and therefore NBC cannot be indemnified under New York's public policy, citing Kaplan v. Democrat & Chronicle, 266 AD2d 848 (4<sup>th</sup> Dept 1999). In Kaplan, the Appellate Division, Fourth Department held that lower court erred in dismissing TCPA claims arising out defendant's telephone solicitations based on plaintiff's failure to prove actual monetary loss or specific damages. In reaching this conclusion, the court wrote that "TCPA provides for an action to recover for actual monetary loss from such a violation, or to receive up \$500 in

damages for each such violation, whichever is greater’ (47 USC § 227 [b] [3] [B]). We conclude the alternative remedy provided by the statute of up to \$500 in damages for each violation is punitive rather than compensatory and that claimant therefore was not required to prove actual damages in order to recover.” Id., at 849; compare Terra Nova Ins. Co. v. Fray-Witzer, 869 NE2d at 575 (noting that “the TCPA is a remedial statute intended to address misdeeds suffered by individuals, rather than one that punishes public wrongs”).

The Fourth Department also wrote that:

the legislative history of TCPA indicates that the statute was intended to provide a remedy to consumers for telemarketing abuses, and to encourage consumers to sue and obtain monetary awards based on a violation of the statute [and that] [b]ecause actual monetary losses from telemarketing abuses are likely to be minimal, a statutory penalty is necessary to provide incentive for consumers to enforce the statute. The penalty need not be measured by the loss incurred by claimant where it is imposed as a punishment for the violation of a public law.

Kaplan, supra, at 849.

Notably, however, the Kaplan court did not address whether the statutory damages under the TCPA were insurable. Moreover, while it would appear from Kaplan, that there is a punitive element to damages under the TCPA, to the extent there is also a compensatory element to such damages, they may be insurable. Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 NY2d 309, 316-317 (1994)(holding that where damage award had a compensatory and punitive purpose, New York public policy did not prohibit indemnification by insurer). At this juncture, the court finds that it would be premature to determine whether the nature of any remedy imposed in the underlying action is punitive or compensatory, and thus Tower is not entitled to summary judgment except insofar as

finding that it need not indemnify NBC for any damages that are punitive in nature. Moreover, the court notes that neither party addresses the issue as it relates to the Connecticut statute.

Accordingly, Tower's motion for summary judgment seeking a declaration that it has no duty to defend and indemnify NBC is granted only to the extent of declaring that Tower is required to defend NBC and to indemnify it for any damages that are nonpunitive in nature.

### **NBC's Counterclaims**

The court will next address NBC's counterclaims, which are for (1) breach of the covenant of good faith and fair dealing, (2) a declaratory judgment that NBC has a right to a defense by independent counsel, (3) a declaratory judgment that Tower has an obligation to defend and indemnify NBC, and (4) for attorneys' fees

With respect to the third counterclaim, based on and in accordance with the foregoing discussion with respect to Tower's coverage obligations, NBC is entitled to summary judgment on its third counterclaim for a declaratory judgment that Tower has an obligation to defend NBC and to indemnify it to the extent that any damages awarded in the underlying action are not punitive in nature. Moreover, as for the fourth counterclaim for attorneys' fees, NBC is entitled to the attorneys' fees incurred in connection with this action. U.S. Underwriters Insurance Co. v. City Club Hotel, 3 NY3d 592, 598 (2004); Mighty Midgets Inc. v. Centennial Ins. Co., 47 NY2d 12, 21 (1979); (the "insurer's duty to defend an insured extends to any action arising out the occurrence, including a defense against the insurer's declaratory judgment action").

In contrast, with respect to the first and second counterclaims, as indicated below, NBC's cross motion is denied, and Tower is entitled to summary judgment dismissing these counterclaims.

The second counterclaim seeks a declaration that NBC has a right to a defense by independent counsel. The counterclaim is based on Tower's disclaimer of coverage, and its agreement to provide a defense while this action was pending only upon condition that NBC accept a defense counsel of Tower's choosing. Generally, absent a showing that there is a conflict of interest between a liability insurer and the insured, an insurer has the right to control the defense of an action brought against the insured. Ottaviano v Genex Co-op., Inc., 15 AD3d 924 (4<sup>th</sup> Dept 2005); Desriusseau v Val-Roc Truck Corp., 230 AD2d 704 (2d Dept 1996). However, where "a conflict of interest exists between an insured and the insurer which is obligated to defend, the remedy is to permit the insured to select defense counsel, with the reasonable cost of the defense to be borne by the insurer." Ladner v American Home Assur. Co., 201 AD2d 302, 304 (1<sup>st</sup> Dept 1994); City of New York v Clarendon Natl. Ins. Co., 309 AD2d 779, 779 (2d Dept 2003).

Here, as NBC has not pointed to any conflict of interest such that the Tower's interest in the defending the lawsuit is in conflict with that of NBC, NBC is not entitled to an independent counsel at this time.<sup>4</sup> Public Service Mut. Ins. Co. v. Goldfarb, 53 NY2d 392, 401 (1981)(holding that an insurer's interest in defending a lawsuit conflicts with that

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<sup>4</sup>While not the basis for the second counterclaim, nor argued by the parties and thus not before the court, to the extent that Tower is not required to indemnify NBC for damages that are punitive in nature, there may be potential grounds for a conflict of interest of the kind that would entitle NBC to a defense counsel of its own choosing to be paid for by Tower. Public Service Mut. Ins. Co. v. Goldfarb, 53 NY2d at 401.

of the insured when the insurer is “liable only upon some of the grounds for recovery asserted and not upon others”). Nor can it be said that given the conflicting state of the law as to coverage relating to fax blasting claims, like the ones at issue in the underlying action, that Tower can be held liable for a breach any covenant of good faith and fair dealing. Accordingly, the first and second counterclaims must be dismissed.

In view of the above, it is

ORDERED that Tower’s motion for summary judgment is granted to the extent of declaring that it is not required to indemnify NBC for any punitive damages in connection with the underlying action and to the extent of dismissing the first and second counterclaims and is otherwise denied; and it is further

ORDERED that NBC’s cross motion is granted on its third counterclaim to the extent set forth below; and it is further

ORDERED that 3081’s cross motion is granted to the extent set forth below; and it is further

ORDERED that NBC’s cross motion is granted as to liability on its fourth counterclaim for attorneys’ fees incurred by it in connection with this action, and the fourth counterclaim is severed and an assessment shall be held to determine the reasonable amount of such fees; and it is further


ORDERED that on or before August 28, 2014, NBC shall file a note of issue and statement of readiness and the court shall thereafter place the matter on the calendar for an assessment of reasonable attorneys’ fees; and it is further

ORDERED that NBC’s failure to comply with the immediately proceeding

paragraph shall result in the dismissal of the fourth counterclaim; and it is further

ADJUDGED AND DECLARED that Tower is obligated to defend and indemnify NBC in the underlying action except that it is not required to indemnify NBC for any damages that are punitive in nature.

DATED: July 28, 2014

  
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J.S.C. **HON. JOAN A. MADDEN**  
J.S.C.