No. 11-3158

In the
United States Court of Appeals
for the Seventh Circuit

NATIONAL CASUALTY COMPANY, et al.,

Plaintiffs-Appellees,

vs.

WHITE MOUNTAINS REINSURANCE COMPANY OF AMERICA
a/k/a FOLKSAMERICA REINSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of Illinois, Urbana Division, No. 2:09-cv-02278.
The Honorable **Harold A. Baker**, Judge Presiding.

BRIEF OF DEFENDANT-APPELLANT

LAWRENCE D. MASON
JOHN A. LEE
SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD.
Willis Tower – Suite 5500
233 South Wacker Drive
Chicago, Illinois 60606
(312) 645-7909

Attorneys for Defendant-Appellant

ORAL ARGUMENT REQUESTED

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant SIRIUS AMERICA INSURANCE COMPANY, formally known as, WHITE MOUNTAINS REINSURANCE COMPANY OF AMERICA [incorrectly identified in the Amended Complaint as "a/k/a Folksamerica Reinsurance Company of America, as successor-in-interest to Imperial Casualty and Indemnity Company"], submits its Circuit Rule 26.1 Disclosure Statement as follows:

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Sirius America Insurance Company, formally known as White Mountains Reinsurance Company of America, formally known as Folksamerica Reinsurance Company of America, all for purposes of this appeal as successors-in-interest to Imperial Casualty and Indemnity Company.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

- Segal McCambridge Singer & Mahoney, Ltd. (since February, 2006)
- Fisher Kanaris, P.C. (prior to February, 2006)

[Counsel of Record, Lawrence D. Mason, has been involved in all respects in the representation of the Appellant's interests at all relevant times and at all relevant law firms.]

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Sirius International Holding Company, Inc., is the direct parent company of Sirius America Insurance Company f/k/a White Mountains Reinsurance Company of America and owns 100% of its stock. Sirius International Holding Company, Inc. is a separately capitalized company within Sirius International Insurance Group Ltd.

ii) List any publically held company that owns 10% or more of the party's or amicus' stock:

Sirius International Insurance Group Ltd.

Dated in Chicago, Illinois this 2nd day of July, 2012

By: s/ Lawrence D. Mason

Lawrence D. Mason (IL #6201602) –
Lead Counsel of Record
Segal McCambridge Singer & Mahoney, Ltd.
233 South Wacker Drive, Suite 5500
Chicago, Illinois 60606
(312) 645-7909 (Direct Phone)
(312) 645-7711 (Facsimile)
lmason@smsm.com

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STATEMENT OF JURISDICTION

I. Jurisdiction of the District Court

The District Court had jurisdiction as a civil action arising under the laws of the United States pursuant to 28 U.S.C. §2201, as Plaintiffs and Counter-Plaintiffs in Case No. 09-cv-02278 were seeking a determination of their rights and obligations under more than one insurance policy as well as the recovery of amounts expended in defense costs concerning two underlying actions styled: *Gordon Randy Steidl v. City of Paris, et al.,* Case No. 05-cv-02127 ("the *Steidl* Lawsuit") and *Herbert Whitlock v. Edgar County, et al.,* Case No. 08-cv-2055 ("the *Whitlock* Lawsuit").

Jurisdiction was proper in the district court pursuant to 28 U.S.C. §1332 as the amount in controversy in this matter is in excess of $75,000.00, exclusive of interest and costs, and there is diversity of citizenship amongst the parties. Appellant White Mountains Reinsurance Company of America ("White Mountains") is a New York corporation with its principal place of business in New York, New York. Scottsdale Indemnity Company and National Casualty Insurance Company (collectively, "National Casualty") are wholly owned subsidiaries of The Scottsdale Insurance Company. The

Scottsdale Insurance Company and Scottsdale Indemnity Company are Ohio corporations with their principal places of business in Scottsdale, Arizona. National Casualty Company is a Wisconsin corporation with its principal place of business in Scottsdale, Arizona. Edgar County is a municipal governmental entity in the State of Illinois and therefore is a citizen of the State of Illinois. The Edgar County Sheriff's Department provides law enforcement services for Edgar County. Michael McFatridge is a citizen of the State of Illinois. Gordon Randy Steidl is a citizen of the State of Illinois. Herbert Whitlock is a citizen of the State of Illinois.

II. Jurisdiction of the Court of Appeals

This Court has jurisdiction to decide this appeal pursuant to 28 U.S.C. §1291 because the appeal is taken from the final decision of the U.S. District Court for the Central District of Illinois. Specifically, this appeal is taken from the final judgment entered on August 31, 2011, by the Honorable Harold A. Baker [R:53; A1][1], and its corresponding Order on Motion for Summary Judgment, dated

[1] The citations used in this brief are as follows: Citations to the docket are given as, exhibit "R:01:10-12", which refers to Dkt. #01, pp. 10-12. References to the Appendix are given as, "A:10-12", which refers to Appendix pages 10-12. References to the Supplemental Appendix are given as "SA:10-12", which refers to Supplemental Appendix pages 10-12.

August 31, 2011. [R:52; A2-11]. The Notice of Appeal was timely filed with the District Court on September 21, 2011. [R:56].

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following three issues are presented for appeal:

I. Whether the District Court erred when it held that White Mountains owes a duty to defend former Illinois State's Attorney Michael M. McFatridge and, consequently, Edgar County in the *Steidl* and *Whitlock* lawsuits;

II. Whether the District Court erred when it held that White Mountains must immediately begin paying all costs of defense for former Illinois State's Attorney McFatridge and Edgar County in the *Steidl* and *Whitlock* lawsuits; and

III. Whether the District Court erred when it held that White Mountains must reimburse National Casualty for all defense fees and costs expended concerning former Illinois State's Attorney McFatridge and Edgar County since White Mountains was on notice of the underlying claims related to the *Steidl* and *Whitlock* lawsuits.

STATEMENT OF THE CASE

In 2005 and 2008, complaints were filed in the United States District Court for the Central District of Illinois, Urbana Division (hereinafter, "District Court"), by defendants Gordon Steidl and Herbert Whitlock, respectively, against several defendants, including former Illinois State's Attorney Michael McFatridge (hereinafter, "McFatridge") and Edgar County. [SA1-38; SA:39-78]. The lawsuits asserted against McFatridge allege multiple constitutional violations and state law claims relating to alleged wrongful arrest, imprisonment, and prosecution. In addition, these suits asserted *respondeat superior* claims arising out of operation of law against Edgar County while solely seeking indemnification for any potential judgment entered against McFatridge. [SA:37:¶138; SA:77:¶133].

McFatridge and Edgar County initially tendered the *Steidl* and *Whitlock* Lawsuits to National Casualty and, by letter dated March 14, 2008, to White Mountains for defense and indemnity under their respective insurance policies. [SA:79-80].

On April 18, 2008, the District Court granted National Casualty's Motion for Summary Judgment on its defense obligations

[SA:81-84] and entered judgment as a matter of law in their favor. [SA:85]. On April 28, 2010, the United States Court of Appeals for the Seventh Circuit in *National Casualty, et al. v. Michael M. McFatridge, et al.*, 604 F.3d 335, 2010 U.S. App. LEXIS 8762 (7th Cir. April 28, 2010) ("*McFatridge I*") [SA:132-138], affirmed the District Court's decision holding that National Casualty has no duty to defend or indemnify McFatridge or Edgar County.

Following the issuance of the *McFatridge I* decision, National Casualty, by letter dated May 7, 2010, demanded that White Mountains assume the defense of Edgar County and McFatridge and reimburse it for all defense costs expended from the date that White Mountains was on notice of the *Steidl* and *Whitlock* Lawsuits. [SA:86-89]. By letter dated June 4, 2010, White Mountains withdrew from the defense of McFatridge based on the reasoning and holdings in the *McFatridge I* decision. [SA:90-91].

In December 2010, National Casualty filed the current action against White Mountains seeking a declaratory judgment and equitable subrogation and equitable contribution. [R:45; SA102-131]. White Mountains filed a counterclaim against National Casualty and

cross-claims against McFatridge and Edgar County seeking decisions on its defense obligations. [R:30; SA:92-101].

On August 31, 2011, the District Court held that White Mountains has a duty to defend and pay the defense costs of McFatridge and Edgar County in the *Steidl* and *Whitlock* lawsuits and ordered White Mountains to reimburse National Casualty for all defense fees and costs expended concerning McFatridge's and Edgar County's defense since White Mountains was put on notice of the underlying claims. [R:52; A2-11]. White Mountains filed a timely Notice of Appeal. [R:56].

STATEMENT OF FACTS

Underlying Complaints Against Edgar County Arise Out of Operation of Law and Narrowly Seek Indemnification Recovery.

On or about May 27, 2005, a complaint was filed in the District Court by defendant Gordon Steidl against several defendants, including McFatridge and Edgar County. This case is styled *Gordon Randy Steidl, Plaintiff, v. City of Paris, et al., Defendants,* Case Number 05-CV-02127 ("the *Steidl* Lawsuit") [SA1-38]. In the *Steidl* Lawsuit, Defendant Steidl asserted multiple constitutional violations and state law claims relating to the alleged wrongful arrest,

imprisonment, and prosecution against him. [SA:26-36]. In addition, the *Steidl* suit asserted *respondeat superior* claims arising out of operation of law against Edgar County solely seeking indemnification for any potential judgment entered against McFatridge. [SA:37:¶138].

On or about February 27, 2008, a complaint was filed in the District Court by defendant Herbert Whitlock against several defendants, including McFatridge and Edgar County. This case is styled *Herbert Whitlock v. Edgar County et al.*, Case Number 08-CV-2055 ("the *Whitlock* Lawsuit") [SA:39-78]. In the *Whitlock* Lawsuit, Defendant Whitlock asserted multiple constitutional violations and state law claims relating to the alleged wrongful arrest, imprisonment, and prosecution against him. [SA:68-76]. Similar to the *Steidl* action, the *Whitlock* suit also asserted *respondeat superior* claims arising out of operation of law against Edgar County narrowly seeking indemnification for any potential judgment entered against McFatridge. [SA:77:¶133].

McFatridge and Edgar County initially tendered the *Steidl* and *Whitlock* Lawsuits to National Casualty and, on a later date, to White

Mountains for defense and indemnity under their respective insurance policies. [SA:79-80].

On April 18, 2008, the District Court granted National Casualty's Motion for Summary Judgment on its defense obligations [SA:81-84] and entered judgment as a matter of law in their favor. [SA:85]. On April 28, 2010, this Court in *National Casualty, et al. v. Michael M. McFatridge, et al.*, 604 F.3d 335, 2010 U.S. App. LEXIS 8762 (7th Cir. April 28, 2010) ("*McFatridge I*") [SA:132-138], affirmed the District Court's decision holding that National Casualty has no duty to defend or indemnify McFatridge or Edgar County. National Casualty withdrew from its defense of McFatridge and Edgar County in the *Steidl* and *Whitlock* Lawsuits shortly following the issuance of the *McFatridge I* decision. [SA:86].

Imperial Casualty and Indemnity Company issued the "Law Enforcement Professional Liability Policy" at issue in this appeal to the "Edgar County Sheriff's Department and Edgar County" with the following policy number and effective date: Policy No. 83LE 006626 (05/25/86--05/25/87) (hereinafter, the "White Mountains Policy"). [SA:139-148]. As stated in the "Policy Period" section of the White Mountains Policy, coverage is only afforded for "acts

committed or alleged to have been committed during the policy period". [SA:141].

By letter dated March 14, 2008, Edgar County and McFatridge tendered the defense of the *Steidl* and *Whitlock* Lawsuits to White Mountains' predecessor under the Imperial Policies. [SA:79-80]. By letter dated May 14, 2008, White Mountains agreed to defend McFatridge under a reservation of rights, but denied coverage for Edgar County. [SA:149-156].

Following the issuance of the *McFatridge I* decision, National Casualty demanded that White Mountains assume the defense of Edgar County and McFatridge and reimburse it for all defense costs expended from the date that White Mountains was on notice of the *Steidl* and *Whitlock* Lawsuits. [SA:86-89]. By letter dated June 4, 2010, White Mountains withdrew from the defense of McFatridge based on the reasoning and holdings in the *McFatridge I* decision. [SA:90-91]. While National Casualty was paying for the defense of McFatridge, White Mountains made a defense cost reimbursement payment to National Casualty in an amount exceeding $200,000. [SA:91].

White Mountains Policy Affords Coverage Only for Wrongful Acts Arising Out of Edgar County Sheriff's Department's and Edgar County's Law Enforcement Activities Occurring During the Policy Period.

The White Mountains Policy was issued to the Edgar County Sheriff's Department and Edgar County and incorporates the LEL 6 (8-83) form as modified by General Policy Updating Endorsement [LEL 5 (6-84)], which collectively provide, in part:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as civil damages because of ***wrongful acts arising ou[t] of Law Enforcement activities***, as follows:
>
> Coverage A - Personal Injury
> Coverage B - Bodily Injury
> Coverage C - Property Damage
> Coverage D - Punitive Damage
> (Where permitted by law)
>
> To which this policy applies and the Company shall have the right and duty to defend any claim or suit against the Insured seeking damages on account of such wrongful acts, even if the allegations of the claim or suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient. However, the Company shall not be obliged to pay any claim or judgment or defend any suit, after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

[SA:139, 145].

The White Mountains Policy includes the following definitions:

DEFINITIONS

PERSONAL INJURY Means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, assault and battery, libel, slander, defamation of character, discrimination, mental anguish, wrongful entry or eviction, violation of property or deprivation of any rights, privileges or immunities secured by the Constitution and Laws of the United States of America or in the State for which the Named Insured may be held liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress. However, no act shall be deemed to be or result in personal injury ***unless committed in the regular course of duty by the Insured*** **[*Emphasis added*]**;

BODILY INJURY Means damage to or destruction of tangible property, including loss of use thereof;

WRONGFUL ACT Means only or all of the following: Actual or alleged error, misstatement or misleading statement, omission, neglect or breach of duty by the Insured individual or collectively, while acting or failing to act within the scope of his employment or official duties ***pertaining to the law enforcement functions of the Insured*** **[*Emphasis added*]**;

PUNITIVE DAMAGE Means only those damages that are punitive in nature and are assessed as damages against the Insured because of personal injury, bodily injury or property damage;

> **OCCURRENCE** Means an incident, including continuous or repeated exposure to conditions, which results in bodily injury, personal injury or property damage[2]; and
>
> **NAMED INSURED** Means the law enforcement agency named in Item 1 of the declarations;
>
> **INSURED** Means (A) Named Insured and all paid or full time employees; (B) unpaid volunteers or reserves while performing law enforcement functions for the Named Insured at the Insured's request; (C) the political subdivision in which the Named Insured is located, should such subdivision be named in any action or suit against the Named Insured or any employee for any act, error or omission for which this policy affords protection, and elected or appointed officials or other personnel or units of the political subdivision of which the Named Insured is a unit thereof, with respect to their responsibilities to law enforcement.
>
> * * *

[SA:140].

The White Mountains Policy additionally includes the following policy provisions:

> **POLICY PERIOD**
>
> This policy applies only to acts committed or alleged to have been committed during the policy period stated in the declarations.

[2] As modified by the General Policy Updating Endorsement [LEL 5 (6-84)]. [SA:145].

* * *

A. LIMITS OF LIABILITY:
Regardless of the number of (1) Insureds under this policy; (2) persons or organizations who sustain damages payable under this policy; or (3) claims made or suits brought on account of insurance afforded by this policy, the Company's liability is limited as follows: the limit of liability stated in the declarations is the limit of the Company's liability for all damages combined under Coverages A, B, C, and D, sustained by any one person, or by two or more persons, as a result of any one occurrence.

* * *

[A:141].

With respect to the calculation of premiums, the White Mountains Policy provides, in relevant part, that:

J PREMIUMS:

All Premiums for this policy shall be computed in accordance with the Company's rules, rates, rating plans, premium and minimum premium where applicable to the insurance afforded herein. … The final premium shall be based on the average number of all employees of the Named Insured, full and part time, plus those additional personnel and or Insureds identified by endorsement hereto, during the policy year determined as follows: … .

[A:142].

SUMMARY OF THE ARGUMENT

In its August 31, 2011 Order on Motions for Summary Judgment, the District Court held that White Mountains has a duty to defend and pay the defense costs of McFatridge and Edgar County in the *Steidl* and *Whitlock* lawsuits and ordered White Mountains to reimburse National Casualty for all defense fees and costs expended concerning McFatridge and Edgar County since White Mountains was put on notice of the underlying claims. This decision rests principally on findings by the District Court of certain ambiguities in the White Mountains Policy and its conclusion that the analysis and coverage decisions reached by this Court in *McFatridge I* are inapplicable to the coverage issues at hand.

Contrary to well-settled Illinois law, the District Court read ambiguities into the White Mountains Policy that do not exist. And, far from being inapplicable, this Court's reasoning and conclusions in *McFatridge I* are directly relevant to the interpretation of the White Mountains Policy. A proper application of the unambiguous language of the White Mountains Policy and the reasoning and conclusions of *McFatridge I* precludes coverage for McFatridge and Edgar County under the White Mountains Policy.

Specifically, the District Court found that, pursuant to the definition of an insured in the White Mountains Policy, McFatridge is an insured because coverage is available for Edgar County under the White Mountains Policy. In other words, the only way McFatridge could be found to be an insured is if coverage exists for Edgar County for the *Steidl* and *Whitlock* lawsuits.

As is clear from the language of the definition of an insured, the focus of the White Mountains Policy is on *Edgar County employees*. Nothing related to the definition of who is an insured under the terms of the policy suggests that White Mountains, Edgar County Sheriff's Department and Edgar County were contemplating coverage of state employees such as McFatridge when the White Mountains Policy was issued. By forcing this interpretation on the definition of "insured" clause, the District Court has, contrary to Illinois law, extended coverage to an extent not contracted for by the parties.

Even if the District Court was correct in its finding of ambiguity in the White Mountains Policy so as to extend coverage to McFatridge, which it was not, Edgar County still would not be entitled to coverage under the White Mountains Policy because

Edgar County's liability for McFatridge's actions arises out of operation of law, as determined in *McFatridge I,* and not through an occurrence covered by the White Mountains Policy. And, without a duty to defend Edgar County, White Mountains has no obligation to reimburse National Casualty for Edgar County's defense costs.

National Casualty made payments to both McFatridge and Edgar County for their defense pursuant to a reservation of rights while it contested coverage. In *McFatridge I,* this Court upheld the District Court's ruling that National Casualty had no duty to defend either McFatridge or Edgar County. In its August 31, 2011 Order, the District Court reasoned that National Casualty's payments to McFatridge and Edgar County unjustly enriched White Mountains. However, because National Casualty was fulfilling its own legal obligation regarding National Casualty's duty to defend, National Casualty cannot meet the requirements for a sustainable claim of unjust enrichment against White Mountains.

In addition, even if this Court decides that White Mountains has a duty to defend McFatridge and Edgar County in the *Steidl* and *Whitlock* lawsuits, it is the State of Illinois, and not White Mountains, that is primarily liable for the McFatridge-related defense costs such

that it is the State of Illinois, and not White Mountains, that has the obligation to reimburse National Casualty.

STANDARD OF REVIEW

Where a party challenges entry of summary judgment, review is *de novo*. *Del Monte Fresh Produce N.A., Inc. v. Transp. Ins. Co.*, 500 F.3d 640, 643 (7th Cir. 2007). In performing that review, this Court must accept the factual allegations in the complaint as true, drawing all reasonable inferences in plaintiff's favor. *May v. Sheahan,* 226 F.3d 876, 882-83 (7th Cir. 2000). An appellate court reviews a district court's construction of an insurance policy *de novo. BASF AG v. Great Am. Assurance Co.,* 522 F.3d 813, 819 (7th Cir. 2008).

ARGUMENT

The District Court's decision rejecting the White Mountains cross-motion for summary judgment seeking a declaration that it does not afford coverage to McFatridge and Edgar County concerning the *Steidl* and *Whitlock* lawsuits rests principally on two flawed conclusions: (1) certain ambiguities in the White Mountains Policy create coverage for McFatridge and, consequently, Edgar County; and (2) the language of the White Mountains Policy is sufficiently different from the language in the National Casualty policy addressed by this Court in *McFatridge I* such that the analysis and coverage decisions reached by this Court in *McFatridge I* are inapplicable to the White Mountains' Policy. [R:52; A:7-8].

In *McFatridge I,* this Court affirmed the District Court's prior summary judgment decision in a related declaratory judgment action involving McFatridge, Edgar County, and National Casualty, ruling that National Casualty had no duty to defend or indemnify McFatridge or Edgar County. In reaching its decision, this Court reviewed National Casualty policy terms substantially similar to those found in the White Mountains Policy.

As explained below, the District Court erroneously read ambiguities into the White Mountains Policy which do not exist. And, far from being inapplicable, this Court's reasoning and conclusions in *McFatridge I* are directly applicable to the interpretation of the White Mountains Policy. Properly applying the clear language of the White Mountains Policy and the conclusions of *McFatridge I* precludes coverage for McFatridge and Edgar County under the White Mountains Policy.

Concurrent with the lack of duty to pay the defense costs of McFatridge and Edgar County, White Mountains has not been unjustly enriched by National Casualty's payments to McFatridge and Edgar County in fulfillment of National Casualty's own obligations.

I. Former Illinois State's Attorney McFatridge is Not an Insured Under the White Mountains Policy Because He Was Not Employed by Edgar County to Perform Law Enforcement Activities.

An insurance policy is a contract between an insurer and an insured and the rights and obligations of an insurer are primarily determined by the terms of that contract. *Country Mut. Ins. Co. v. Teachers Ins. Co.*, 195 Ill.2d 322, 328, 746 N.E.2d 725, 728, (Ill. 2001). In

reaching its decision finding coverage for McFatridge, the District Court held that McFatridge, while not a named insured, should be considered an insured under the terms of the White Mountains Policy. [R:52; A:7-8]. The District Court made its determination based on its analysis of the following language in clause C in the definition of an "insured" contained in the White Mountains Policy:

> **INSURED** Means (A) … (B) …; (C) the political subdivision in which the Named Insured is located, should such subdivision be named in any action or suit against the Named Insured or any employee for any act, error or omission for which this policy affords protection, and elected or appointed officials or other personnel or units of the political subdivision of which the Named Insured is a unit thereof, with respect to their responsibilities to law enforcement. [SA:140].

The District Court concluded that McFatridge is an insured under the White Mountains Policy because coverage is available to Edgar County. [R:52; A:7]. In other words, the only way McFatridge could be found to be an insured is if coverage exists for Edgar County for the *Steidl* and *Whitlock* complaints. This conclusion ignores clear precedent from *McFatridge I*, which found McFatridge to be a State of Illinois employee. *McFatridge I*, 604 F. 3d at 342. [SA:135]. Moreover, the District Court's decision, finding ambiguity in policy language where none exists, stretches the plain meaning of

the White Mountains Policy provisions beyond all reasonableness in contravention of the clear intentions of the contracting parties and Illinois law. *See, e.g., First Ins. Funding Corp. v. Federal Ins. Co.*, 284 F.3d 799, 804 (7th Cir. 2002) (under Illinois law, a court's primary function in interpreting an insurance agreement is to "ascertain and give effect to the true intentions of the contracting parties.")

A. The District Court Erred by Finding Ambiguity in the White Mountains Policy Where None Exists.

A provision in an insurance policy is deemed ambiguous if it is subject to more than one reasonable interpretation. *Economy Fire & Casualty Co. v. Bassett,* 170 Ill. App. 3d 765, 769, 525 N.E.2d 539 (Ill. App. 1988). However, an ambiguity must be real and not the result of a court's strained interpretation of policy language. *Bruder v. Country Mutual Insurance Co.,* 156 Ill. 2d 179, 193, 620 N.E.2d 355 (Ill. 1993) (an ambiguity exists if the relevant portion of the policy is subject to more than one reasonable interpretation, not if creative possibilities can be suggested); *See also Sims v. Allstate Ins. Co.,* 365 Ill. App. 3d 997, 1002, 851 N.E.2d 701 (Ill. App. 2006), *citing Miller v. Madison County Mutual Automobile Insurance Co.,* 46 Ill. App. 2d 413, 417, 197 N.E.2d 153 (Ill. App. 1964) (the rule construing ambiguous

provisions strictly against the insurer will not permit perversions of plain language to create an ambiguity where none in facts exists). Unambiguous terms are assigned their plain and ordinary meaning. *First Ins. Funding Corp.,* 284 F.3d 799 at 804.

The District Court's initial analysis as to whether Edgar County is an insured appeared to be answered in the negative when it correctly concluded "… the County is not a Named Insured; only the Sheriff's Department is a Named Insured...[and] [w]hether the County is an Insured is also resolved by the policy definitions." [R:52; A:6]. Applying the terms of clause C,[3] the District Court reasoned that while the Edgar County had been named as a party to the *Steidl* and *Whitlock* lawsuits, the underlying "…suits are not against the Sheriff's Department or an employee of the Sheriff's Department or the County." *Id.* Having reached these obvious conclusions, the District Court should have ended its analysis and entered a finding of no coverage in favor of White Mountains. Erroneously, the District Court continued the development of its decision in such a manner that it was necessary for it to find

[3] "INSURED Means … (C) the political subdivision in which the Named Insured is located, should such subdivision be named in any action or suit against the Named Insured or any employee for any act, error or omission for which this policy affords protection …" [SA:140].

ambiguities in the White Mountains Policy as applied to McFatridge in order to find coverage for Edgar County.

Regarding the subdivision of clause C addressed above [*see fn.* 3, *supra*], the District Court stated, "This phrase of clause C does not clearly include, or exclude, coverage for acts of state employees such as McFatridge." *Id.* While this phrase clearly does not *exclude* coverage for state employees such as McFatridge, there is nothing on the face of the White Mountains Policy or intrinsic to the insurance contract that suggests that coverage should be *extended* to state employees such as McFatridge.

As is clear from the language of clause C, the focus of the policy is on *Edgar County employees*, such as the Sheriff's Department and its employees, or elected and appointed officials of Edgar County. Nothing related to the definition of who is an insured under the terms of the White Mountains Policy suggests that White Mountains or Edgar County were contemplating coverage for State of Illinois employees when the policy was issued.

The intent of the parties to limit coverage to Edgar County employees is additionally evident through the method used to

calculate premiums. According to the Premiums clause of the White Mountains Policy,

> **PREMIUMS:** All Premiums for this policy shall be computed in accordance with the Company's rules, rates, rating plans, premium and minimum premium where applicable to the insurance afforded herein … The final premium shall be based on the average number of all employees of the Named Insured, full and part time, plus those additional personnel and or Insureds identified by endorsement hereto, during the policy year determined as follows: …"

[SA:142].

The Named Insured is the Sheriff's Department and there are no endorsements in the White Mountains Policy extending coverage to state employees such as McFatridge. Additionally, the Rating Classifications contained in the White Mountains Policy provide for the following covered employees:

- 24 Class A employees: All officers armed and/or with arrest powers;
- 1 Class C employee: all personnel of the department who are not police officers and do not have arrest powers (clerical, stenos, etc.);
- 12 Class D employees: auxiliary police working less than 8 hours weekly, class B police armed and with arrest powers (on a prorata basis of a 40 hour week.

[SA:143]. None of these Ratings Classifications apply to McFatridge.

Based on the White Mountains Policy's clear language, to read into clause C the *possibility* of extending coverage to a state employee such as McFatridge is erroneously finding an ambiguity where none exists.

After finding a possibility of coverage, the District Court conclusively found that McFatridge is an insured by focusing on the following phrase in clause C:

> *and elected or appointed officials or other personnel or units of the political subdivision of which the Named Insured is a unit thereof …*

Applying this phrase to McFatridge, the District Court reasoned that it could be interpreted either as (i) "*elected … officials …of the political subdivision…*" or (ii) "*elected … officials … or units of the political subdivision*." The District Court concluded that "[u]nder the second interpretation, and possibly the first, McFatridge would be an insured." [R:52; A:7].

Reading this clause in the manner of the second interpretation is a more egregious example of finding an ambiguity where none exists. The District Court's reasoning stretches the plain meaning of policy provisions beyond all reasonableness in contravention of the

clear intentions of the contracting parties. Under this interpretation there is no limit to the number and type of "elected officials" covered under the White Mountains Policy. All contextual meaning related to Edgar County has been eliminated. By forcing this interpretation on clause C, the District Court has, contrary to Illinois law, extended coverage to where it was never contemplated. *See, e.g., First Ins. Funding Corp*, 284 F.3d 799 at 804 (although a court liberally interprets in favor of the insured provisions that limit or exclude coverage, it may not read an ambiguity into a policy to provide coverage for the insured where none exists).

The clear modifier in this phrase is "*of the political subdivision of which the Named Insured is a unit thereof.*" This modifier logically clarifies that it is the "*elected or appointed officials,*" "*other personnel*" and "*units*" of Edgar County, which is the "political subdivision of which the Sheriff's Department is a unit thereof," which are insured, not state officials such as McFatridge. For the District Court to read this phrase in any other manner creates coverage where none was anticipated and is a clear error.

Finally, the District Court concluded that "[i]f McFatridge is an insured, and a suit against McFatridge also names the County,

both McFatridge and the County potentially fall within the definition of an insured," *"with respect to their responsibilities to law enforcement."* [R:52; A:7]. Continuing, the District Court noted that, unlike the policy language considered by this Court in *McFatridge I,* the Sheriff's Department needs not be involved in McFatridge's law enforcement activities. *Id.* Finally, the District Court concluded that "[t]he Seventh Circuit did not foreclose the possibility that McFatridge acted in furtherance of law enforcement." *Id.*

Initially, while this Court did not foreclose "the possibility that McFatridge acted in furtherance of law enforcement," neither did it endorse the proposition. In fact, this Court never considered the issue in *McFatridge I*. However, this Court did conclude that McFatridge's prosecution of Steidl had nothing to do with Edgar County's or the Edgar County Sheriff's Department's duties to provide law enforcement activities. *McFatridge I*, 604 F.3d at 342. [SA:135]. Ultimately, because a court cannot reach the conclusion that McFatridge is an insured without creating ambiguities in the White Mountains Policy that do not exist, it is irrelevant whether McFatridge's activities relate to law enforcement or not. While the requirement that McFatridge's activities have to be with respect to

law enforcement would be a necessary condition for coverage, if it existed, it is not a sufficient condition to provide coverage that otherwise does not exist.

B. There is No Coverage for Edgar County Under the White Mountains Policy Because Edgar County's Liability for McFatridge's Actions Arises Out of Operation of Law, Not Through a Covered Act.

Even if the District Court was correct in its finding of ambiguity in the White Mountains Policy so as to extend coverage to McFatridge, which it was not, Edgar County still would not be entitled to coverage under the White Mountains Policy because Edgar County's liability for McFatridge's actions arises out of operation of law and not through an occurrence covered by the policy.

Relying on *Carver v. Sheriff of LaSalle County*, 203 Ill. 2d 497, 787 N.E.2d 127 (Ill. 2003), this Court in *McFatridge I* rejected Edgar County's argument that indemnifying the Illinois State's Attorney's office for its liability means that it would be "legally obligated to pay damages because of 'personal injury'." *Id*. at 345. The court noted that the obligation to pay a Local Governmental and Governmental

Employees Tort Immunity Act, *745 Ill. Comp. Stat. 10/9-102*, judgment does not mean Edgar County itself is liable to the underlying plaintiff. "Rather, the county is only a necessary party to the suit so that, as an insurer or backstop for the independent official, it may 'veto improvident settlements'." *Id.*, citing *Carver*, 324 F.3d at 948. This Court further held that Edgar County's liability arises from operation of law, which is not an occurrence:

> Even though personal injury liability may be the original source of an official's liability, a county's obligation to indemnify that official for that liability arises by operation of law and is not an occurrence. The county's obligation to pay judgments against McFatridge or the state's attorney's office under *§ 10/9-102* is *not an occurrence or accident as defined by the policies* and the insurers have no duty to defend or indemnify the county. (emphasis added)

Id.

When the White Mountains Policy is read as a whole, it is clear that it only affords coverage for "acts committed or alleged to have been committed during the policy period stated in the declarations." The insuring agreement states that "The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as civil damages because of

wrongful acts arising out of Law Enforcement activities … ." (Emphasis added.) [SA:139]. The White Mountains Policy additionally provides the following relevant definitions:

> **OCCURRENCE** Means an incident, including continuous or repeated exposure to conditions, which results in bodily injury, personal injury or property damage[4];
>
> **PERSONAL INJURY** Means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, assault and battery, libel, slander, defamation of character, discrimination, mental anguish, wrongful entry or eviction, violation of property or deprivation of any rights, privileges or immunities secured by the Constitution and Laws of the United States of America or in the State for which the Named Insured may be held liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress. However, no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the Insured;
>
> **WRONGFUL ACT** Means only or all of the following: Actual or alleged error, misstatement or misleading statement, omission, neglect or breach of duty by the Insured individual or collectively, while acting or failing to act within the scope of his employment or official duties pertaining to the law enforcement functions of the Insured.

[SA:140].

Jointly applying these provisions makes it clear that the "wrongful acts" define the occurrence that triggers coverage during

[4] As modified by the General Policy Updating Endorsement [LEL 5 (6-84)]. [SA:145].

the policy period. Since Edgar County's obligation to indemnify McFatridge, if any, arises by operation of law, there is no "act" or "occurrence" that gives rise to White Mountains' obligation to defend or indemnify Edgar County.

In rejecting White Mountains' argument that liability stemming from an operation of law is not an occurrence that triggers coverage, the District Court stated that it "cannot overlook the language stating that the County has coverage for lawsuits arising from law enforcement activity undertaken by others." [R:52; A:7]. But, as explained above, the unambiguous language of the policy does not extend that activity to State of Illinois officials such as McFatridge. To hold otherwise creates an ambiguity where none exists.

In *McFatridge I*, this Court resolved that McFatridge's liability does not arise out of "Law Enforcement activities" directly related to Edgar County and its Sheriff's Department, the principal insureds under the White Mountains Policy. *McFatridge I,* 604 F.3d at 339-342. [SA:133-135]. Specifically, this Court concluded that: "When McFatridge investigated, charged and prosecuted Steidl, he engaged in activity arising out of his duties as state's attorney as defined by

Illinois law, not as part of the activities of the County of Edgar Sheriff's Department." *Id.* at 340-341. [SA:134-135]. This Court additionally determined that McFatridge, in acting as a state's attorney, was not an employee of Edgar County, and that McFatridge's prosecution of Steidl had nothing to do with duties of either the county or its sheriff's department to provide law enforcement activities." *Id.* at 342. [SA:135]. In reaching this conclusion, this Court correctly reasoned that:

> The best characterization of the state's attorney is that he is a state constitutional official with jurisdiction in the county in which he is elected. He can serve as an agent of the county when representing county officers in suits brought against them or on their behalf. *55 Ill. Comp. Stat. 5/3-9005(a)(3), (4)*. But his primary duty is prosecuting criminal actions--a function he fulfills as a state employee. *55 Ill. Comp. Stat. 5/3-9005(a)(1)*. The government of the county in which the state's attorney is elected has neither the power to direct, oversee nor control these prosecutions; the state's attorney is not its employee. Further, Illinois law explicitly holds that the state's attorney is a state, and not a county employee. [Citations omitted.] . . . It is true, as the county points out that the state's attorney can be characterized a county agent at various times. But when McFatridge investigated, charged and prosecuted Steidl, he acted on behalf of the state and was not . . . even an employee at all.

Id at 341. [SA:135].

Consequently, regardless of the status of McFatridge under the White Mountains Policy, Edgar County is not entitled to coverage under the White Mountains Policy because Edgar County's liability for McFatridge's actions arises out of operation of law and not through an occurrence that would trigger coverage under the terms of the White Mountains Policy.

II. The District Court Erred in Holding that White Mountains Must Reimburse National Casualty for All Defense Fees and Costs it Has Expended to Date.

In its August 31, 2011 Order on appeal, the District Court ordered White Mountains: (1) to immediately begin paying all costs of defense in the *Steidl* and *Whitlock* lawsuits; and (2) to reimburse National Casualty for all defense fees and costs expended since White Mountains was put on notice of the underlying claims. [R:52; A11]. The bases for this order is the District Court's decision that White Mountains owes a duty to defend McFatridge and Edgar County in the *Steidl* and *Whitlock* lawsuits and that White Mountains was unjustly enriched by payments National Casualty made to McFatridge and Edgar County pursuant to its own reservation of rights. *Id.*

The District Court's Order regarding these defense payments should be vacated, however, because: (1) as explained above, pursuant to the unambiguous language of the White Mountains Policy and this Court's analysis and decisions in *McFatridge I*, White Mountains does not owe a duty to defend either McFatridge or Edgar County; (2) White Mountains was not unjustly enriched by payments made by National Casualty in fulfillment of National Casualty's own liability to McFatridge and Edgar County; and (3) even if this Court decides that White Mountains has a duty to defend, it is the State of Illinois, and not White Mountains, that is primarily liable for the McFatridge-related defense costs, such that it is the State of Illinois, and not White Mountains, that has the duty to reimburse National Casualty.

A. White Mountains Has Not Been Unjustly Enriched By National Casualty's Payments to McFatridge and Edgar County.

A claim for unjust enrichment under Illinois law exists when a defendant: (1) receives a benefit; (2) to the plaintiff's detriment; and (3) the defendant's retention of that benefit would be unjust. *TRW Title Ins. Co. v. Sec. Union Title Ins., Co.*, 153 F.3d 822, 828 (7th Cir. 1998). To prevail on a claim for unjust enrichment, the defendant's

retention of the benefit must "violate the fundamental principles of justice, equity, and good conscience." *Wiegel v. Stork Craft Mfg., Inc.*, 780 F. Supp. 2d 691, 695 (7th Cir. 1998). Where the elements of the transactions in question do not offend equity and good conscience, a party is not entitled to relief under principles of unjust enrichment. *Sea-Land Servs., Inc. v. Pepper Source,* 993 F.2d 1309, 1312 (7th Cir. 1993).

National Casualty made payments to both McFatridge and Edgar County for their defense pursuant to a reservation of rights while it contested coverage. In *McFatridge I,* this Court upheld the District Court's ruling that National Casualty had no duty to defend either McFatridge or Edgar County. *See, generally, McFatridge I.* [SA:132-138]. As a result, the District Court reasoned that National Casualty's payments unjustly enriched White Mountains. [R:52; A10] However, because National Casualty was fulfilling its own legal obligation, it cannot meet the requirements for a claim of unjust enrichment and, therefore, the District Court Order should be vacated.

Under Illinois law, an insurer's duty to defend its insured is much broader than its duty to indemnify its insured. *See, e.g.,*

Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125, 607 N.E.2d 1204 (Ill. 1992). An insurer may not justifiably refuse to defend an action unless it is clear from the face of the underlying complaint that the allegations set forth in that complaint fail to state facts that bring the case within or potentially within the insured's policy coverage. *See*, *e.g.*, *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73, 578 N.E.2d 926, 161 (Ill. 1991). When the underlying complaint against the insured alleged facts within or potentially within the scope of policy coverage, the insurer taking the position that the complaint is not covered by its policy must defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. *See*, *e.g.*, *State Farm Fire & Casualty Co. v. Martin,* 186 Ill. 2d 367, 371, 710 N.E.2d 1228 (Ill. 1999). Guided by this precedent, National Casualty agreed to defend McFatridge and Edgar County and filed a declaratory judgment action seeking a determination of its duties to McFatridge and Edgar County. [SA:157-167]. Consequently, the defense payments National Casualty made to McFatridge and Edgar County were in fulfillment of its own legal obligations.

As the above authorities related to unjust enrichment make clear, there are three elements that must be met before a claim for unjust enrichment can be sustained. It could be argued that National Casualty has met its burden regarding the first two elements of its claim. However, because National Casualty was fulfilling its own legal obligations with its defense payments for McFatridge and Edgar County, whatever benefit White Mountains allegedly received from those payments is not unjust.

The Seventh Circuit addressed an analogous situation of a party claiming unjust enrichment as a result of fulfilling its own legal obligation in *Nat. Am. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co.,* 2000 U.S. App. LEXIS 16235 (7th Cir. 2000) (unpublished) [SA:168-170]. In *Lumbermans.*, plaintiff insurers issued performance bonds to a construction company. When the construction company defaulted, plaintiffs sued the defendant bond issuers on the theory of unjust enrichment seeking to recover the amounts defendants had been repaid by the construction company. This Court rejected plaintiffs' claim as a matter of law, because the benefit enjoyed by the defendant was a necessary consequence of legally required payments made by a third party, and therefore, the defendant's

enrichment did not violate "fundamental principles of justice, equity, and good conscience." [SA:170].

The United States Court of Appeals for the Sixth Circuit in *US v. Goforth,* 465 F. 3d 730 (6th Cir. 2006) found the reasoning in *Lumbermens* persuasive when it likewise held that there was no unjust enrichment because the defendant's benefit was a "consequence of contractually obligated payments." *Id.* at 735.

Similarly, National Casualty's payments concerning the defense of McFatridge and Edgar County were in fulfillment of its own legal obligation to its insureds.[5] Both National Casualty and White Mountains contested coverage pursuant to Illinois law. Consequently, any alleged benefit that White Mountains received from the National Casualty payments were only as a consequence of National Casualty's legal obligations. As in *Lumbermens* and *Goforth,* such "benefit" does not violate "fundamental principles of justice, equity, and good conscience," and hence White Mountains has not been unjustly enriched. Therefore, the District Court's Order requiring White Mountains to reimburse National Casualty for all

[5] As noted by the District Court, White Mountains made defense payments of slightly more than $200,000 to National Casualty for McFatridge's defense pursuant to White Mountains' own reservation of rights. [R:52; A9].

defense fees and costs expended since White Mountains was put on notice of the underlying claims should be vacated.

B. Because White Mountains Does Not Have a Duty to Defend McFatridge or Edgar County, It Does Not Have an Obligation to Pay Defense Costs in the *Steidl* and *Whitlock* Lawsuits.

As explained above, pursuant to the unambiguous language of the White Mountains Policy and this Court's analysis and conclusions in *McFatridge I*, White Mountains does not owe a duty to defend either McFatridge or Edgar County. Consequently, White Mountains has no duty to continue to pay McFatridge's or Edgar County's defense costs. Therefore, the District Court's Order requiring White Mountains to immediately begin paying all costs of defense in the *Steidl* and *Whitlock* lawsuits should be vacated.

C. Even if White Mountains has a Duty to Defend McFatridge or Edgar County, It Does Not Have an Obligation to Pay Defense Costs Because it is a State of Illinois Obligation.

Even if this Court upholds the District Court's decision that White Mountains has a duty to defend McFatridge and Edgar County in the *Steidl* and *Whitlock* lawsuits, it is the State of Illinois, and not White Mountains, that is primarily liable for the McFatridge-related defense costs. The State of Illinois, and not

White Mountains, has the obligation to reimburse National Casualty.

In August 2010, McFatridge and Edgar County filed a complaint for *mandamus* relief, seeking an order directing defendant Lisa. M. Madigan, the Illinois Attorney General, to approve payment of reasonable litigation expenses incurred in the defense of the *Steidl* and *Whitlock* lawsuits. On December 14, 2011, the Appellate Court of Illinois, Fourth District, issued an Opinion reversing the trial court's order granting the Attorney General's motion to dismiss McFatridge's *mandamus* complaint, holding that the State of Illinois is obligated to pay McFatridge's reasonable court costs, litigation expenses, and attorney fees. *McFatridge v. Madigan,* 962 N.E. 2d 1113 (Ill. App. 2011).[6]

In reaching its decision, the Illinois Appellate Court focused on sections 2(a) and 2(b) of the State Employee Indemnification Act, 5 ILCS 350/2 (2008) ("Act"). Section 2(a) of the Act states:

> In the event that any civil proceeding is commenced against any State employee arising out of any act or omission occurring within the scope of the employee's State employment, the

[6] On May 30, 2011, the Illinois Supreme Court granted *certiorari* on the appeal of the State of Illinois of the Illinois Appellate Court's decision. *See McFatridge v. Madigan,* 2012 Ill. LEXIS 755 (Ill. 2012).

> Attorney General *shall,* upon timely and appropriate notice to him by such employee, appear on behalf of such employee and defend the action. (emphasis added)

Section 2(b) of the Act provides the occasions when the Attorney General shall decline to represent a state employee. This section further provides that if the State declines to represent the employee, the employee "may employ his own attorney to appear and defend, in which event *the State shall pay the employee's court costs, litigation expenses and attorneys' fees* to the extent approved by the Attorney General as reasonable, as they are incurred." (emphasis added) *Id.* at 2(b).

According to the Illinois Appellate Court,

> the plain language of the second paragraph of section 2(b) provides McFatridge with a clear, affirmative right to reimbursement of his legal costs as they are incurred, … Accordingly, the State is obligated to pay McFatridge's court costs, litigation expenses, and attorney fees…

Madigan, 962 N.E. 2d at 1122. The Attorney General has no discretion outside of reasonableness to deny reimbursement. *Id.* at 1124.

Under Illinois law, an insurer cannot recover paid defense costs from its insured absent an express provision in the insurance

contract. *General Agents Ins. Co. of America, Inc. v. Midwest Sporting Goods Co. et al.,* 828 N.E. 2d 1092, 1104 (Ill. 2005). As noted by the District Court in its decision ordering White Mountains to reimburse National Casualty, defense cost reimbursement is not being sought from the insured. [R:52; A11].

Consequently, because the State of Illinois is likely primarily responsible for payment of the McFatridge-related defense costs per statute, any reimbursement to National Casualty should come from the State, not White Mountains. This Court should reverse the District Court order that White Mountains must reimburse National Casualty for the McFatridge-related defense costs it expended.[7]

CONCLUSION

For these reasons, White Mountains respectfully requests that this Court reverse the District's Court's summary judgment order [R:52; A2-11] and vacate the District Court's August 31, 2011 Final Judgment Order [R:53; A1] in its entirety and remand this action to the District Court for entry of a final judgment declaring no coverage in favor of White Mountains.

[7] If the Illinois Supreme Court upholds the Illinois Appellate Court's Decision, White Mountains is likely to seek reimbursement from the State of Illinois for any defense costs it expended in the defense of McFatridge.

Dated: July 2, 2012

Respectfully submitted,

BY: s/ Lawrence D. Mason

Lawrence D. Mason (IL #6201602)
John A. Lee (IL#6256264)
Segal McCambridge Singer & Mahoney, Ltd.
233 South Wacker Drive, Suite 5500
Chicago, Illinois 60606
(312) 645-7909 (Direct Phone)
(312) 645-7711 (Facsimile)
lmason@smsm.com
jlee@smsm.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Defendant-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,173 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii). The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 97-2003 in 13 point Book Antiqua style font.

/s/ Lawrence D. Mason
Lawrence D. Mason

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Lawrence D. Mason
Lawrence D. Mason

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2012, the Brief of Defendant-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system:

Carrie A. Hall
MICHAEL BEST
& FRIEDRICH, LLP
180 North Stetson Avenue
Suite 2000
Chicago, Illinois 60601

James L. Craney
BROWN & JAMES
20th Floor
1010 Market Street
St. Louis, Missouri 63101

Janis M. Susler
PEOPLE'S LAW OFFICE
1180 North Milwaukee Avenue
3rd Floor
Chicago, Illinois 60642

Michael E. Raub
HEYL, ROYSTER, VOELKER
& ALLEN
102 East Main Street
P.O. Box 129
Urbana, Illinois 61803

/s/ Lawrence D. Mason
Lawrence D. Mason

APPENDIX

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UNITED STATES DISTRICT COURT

for the
Central District of Illinois

NATIONAL CASUALTY CO.; SCOTTSDALE INDEMNITY CO.; and SCOTTSDALE INSURANCE CO.; Plaintiffs,	)	
v.	)	
	)	No. 09-2278
WHITE MOUNTAINS REINSURANCE COMPANY OF AMERICA, a/k/a FOLKSAMERICA REINSURANCE CO. OF AMERICA, as successor in interest to IMPERIAL CASUALTY AND INDEMNITY COMPANY; MICHAEL McFATRIDGE; THE COUNTY OF EDGAR; GORDON RANDY STEIDL; and HERBERT WHITLOCK; Defendants.	)	

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1. White Mountains owes a duty to defend McFatridge and Edgar County in the Steidl and Whitlock lawsuits;

2. That this duty to defend exists under White Mountains' 1986 Policy (83LE 006626);

3. That White Mountains must immediately begin paying all costs of defense in the Steidl and Whitlock lawsuits; and

4. That White Mountains must reimburse National Casualty for all defense fees and costs expended since White Mountains was on notice of the underlying claims.

Dated: August 31, 2011

s/ Pamela E. Robinson
Pamela E. Robinson
Clerk, U.S. District Court

E-FILED
Wednesday, 31 August, 2011 02:58:27 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

NATIONAL CASUALTY CO.; SCOTTSDALE INDEMNITY CO.; and SCOTTSDALE INSURANCE CO.;	)	
	)	09-2278
Plaintiffs,	)	
v.	)	
WHITE MOUNTAINS REINSURANCE COMPANY OF AMERICA, a/k/a FOLKSAMERICA REINSURANCE CO. OF AMERICA, as successor in interest to IMPERIAL CASUALTY AND INDEMNITY COMPANY; MICHAEL McFATRIDGE; THE COUNTY OF EDGAR; GORDON RANDY STEIDL; and HERBERT WHITLOCK;	)	
Defendants.	)	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Gordon Randy Steidl ("Steidl") and Herbert Whitlock ("Whitlock") have filed complaints against Michael McFatridge ("McFatridge") and Edgar County ("the County") (collectively, the "County defendants"), and others. Steidl and Whitlock allege that their constitutional rights were violated by McFatridge and others during the wrongful investigation, prosecution, conviction, and incarceration for murder. *See Steidl v. City of Paris et al.*, 05-2127 (C.D. Ill.), and *Whitlock v. City of Paris et al.*, 08-2055 (C.D. Ill.). At the time, McFatridge was the County's state's attorney. Steidl and Whitlock were released from prison after decades-long imprisonments.

National Casualty Company, Scottsdale Indemnity Company, and Scottsdale Insurance Company (collectively, "National Casualty"), issued various liability insurance policies to the County during the relevant time period, including Commercial General Liability, Public Entity Liability, and Law Enforcement Liability policies. National Casualty defended the County defendants in the Steidl and Whitlock lawsuits under a reservation of rights and filed a declaratory judgment action (Case No. 07-2056, C.D. Ill.). National Casualty argued that it did not owe a duty to defend or indemnify the County defendants under any of the policies. This court agreed. The County defendants appealed, and on April 28, 2010, the Seventh Circuit Court of Appeals affirmed. *National Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010) ("*McFatridge I*"). While awaiting that decision, the County contacted White Mountains Reinsurance Company of America a/k/a Folksamerica Reinsurance Company of America, as

successor in interest to the Imperial Casualty and Indemnity Company ("White Mountains") and tendered the County's defense of the Steidl and Whitlock lawsuits.

National Casualty has filed this action, seeking a declaratory judgment, equitable contribution, and equitable subrogation. It claims that White Mountains issued four professional liability insurance policies with effective dates of May 25, 1985; May 25, 1986 (the "1986 Policy"); May 25, 1987; and May 25, 1988. The coverage ended on May 25, 1989. After the County tendered its defense, White Mountains agreed to share in the defense of McFatridge under one or more of the four policies, while reserving certain other rights. In view of the courts' rulings in National Casualty's favor, it now seeks reimbursement from White Mountains for the sums it paid to defend the County defendants.

White Mountains filed an answer [28], denying the allegation that it has not assumed payment of defense costs or reimbursed National Casualty for any defense costs it paid, and denying that the amount allegedly owed to National Casualty is correct. White Mountains also filed a counterclaim against National Casualty [30] and a crossclaim against the County defendants [31]. National Casualty filed an answer to the counterclaim [37], and the County defendants answered the crossclaim [38].

The County defendants filed a motion for summary judgment on White Mountains' crossclaim [39]. White Mountains filed a combined response in opposition and cross-motion[1] for summary judgment against the County defendants and the plaintiffs [42], and the County defendants filed a reply [43]. National Casualty also filed a response in opposition [44] to White Mountains' cross-motion, and White Mountains filed a reply to National Casualty's response [50]. National Casualty also filed its own cross-motion for summary judgment [45], to which White Mountains filed a combined reply in support of its motion for summary judgment and response in opposition to National Casualty's motion [48] and additional combined replies/responses [49, 50] that appear to duplicate the arguments in other responses and replies. This thicket of filings has led to three cross-motions that are now pending.

ANALYSIS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any discrepancies in the factual record should be evaluated in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The party moving for summary judgment must show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to be a "genuine" issue, there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

[1] Combining a response and a motion into a single document, docketed as response, is not the procedure to use. When a motion is docketed, automatic response deadlines are set. When a motion is docketed as a response, the electronic filing system does not establish deadlines.

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

The construction of an insurance policy is a question of law. *Premcor USA, Inc. v. American Home Assurance Co.*, 400 F.3d 523, 527 (7th Cir. 2005).

> The primary objective in construing the language of the policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. If the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, but if the terms are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. Courts will not strain to find ambiguity in an insurance policy where none exists.

Commonwealth Ins. Co. v. Stone Container Corp., 351 F.3d 774, 777 (7th Cir. 2003) (*quoting McKinney v. Allstate Ins. Co.*, 722 N.E.2d 1125, 1127 (Ill. 1999)).

> An insurer's duty to defend its insured is broader than its duty to indemnify. If an insurer has no duty to defend, it has no duty to indemnify. [The court] determine[s] whether an insurer has a duty to defend by examining the underlying complaint and the language of the insurance policy. Any doubts as to whether particular claims fall within the policy are resolved in favor of coverage. So if the complaint asserts facts within or potentially within policy coverage, an insurer is obligated to defend its insured. On the other hand, an insurer may refuse to defend an action in which, from the face of the complaint, the allegations are clearly outside the bounds of the policy coverage.

McFatridge I, 604 F.3d at 338 (internal citations omitted). To survive summary judgment, the County defendants need only show that the allegations in the underling complaints fall within, or potentially within, the 1986 Policy's coverage.

Where, as here, the court is presented with cross-motions for summary judgment, the court must consider each motion separately and draw all inferences in favor of the nonmovant for the motion under consideration. *Edwards v. Briggs & Stratton Retirement Plan*, 639 F.3d 355, 359 (7th Cir. 2011); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998).

Steidl and/or Whitlock's complaints allege against McFatridge a violation of their due process right to a fair trial, malicious prosecution, intentional infliction of emotional distress, and/or conspiracy. Against the County they assert claims of *respondeat superior* and/or contribution under state law.

Relevant to all motions is a discussion of *McFatridge I* as it pertains to this case. The court has reviewed that opinion and each of the parties' motions and memoranda. White Mountains claims that despite language differences between the two policies, *McFatridge I* is

directly applicable to this case and forecloses coverage. National Casualty asserts that *McFatridge I* provides guidance on issues presented in this case. The County defendants argue that *McFatridge I* does not control the outcome of this case.

Several aspects of *McFatridge I* apply to this case. McFatridge, as state's attorney, was not a County employee; he was a state employee. *McFatridge I*, 604 F.3d at 342. The policy in *McFatridge I* required an "occurrence" to trigger coverage. *McFatridge I*, 604 F.3d at 338. The Seventh Circuit determined that the County's liability arose by operation of law (the Local Governmental and Governmental Employees Tort Immunity Act, 745 Ill. Comp. Stat. 10/9-102) and not an occurrence. *McFatridge I*, 604 F.3d at 345. The Seventh Circuit also ruled that the County was not a Named Insured on the policy. The Named Insured was "Edgar County S.D.," and the Seventh Circuit found persuasive the fact that the address of the Named Insured was the address of the Sheriff's Department. *McFatridge I*, 604 F.3d at 340.

With this authority in mind, the court addresses each motion in turn.

I. The County defendants' motion

The County defendants argue that they are entitled to summary judgment because (1) prior Seventh Circuit case law does not control the outcome of this case; (2) the claims in the underlying suits fall within, or potentially within, the policy coverage; and, in any event, (3) White Mountains is estopped from asserting policy defenses because of its delay in seeking a determination of coverage.

The policy language in *McFatridge I* differs significantly from the 1986 Policy language, and the Seventh Circuit's holding was not on an overarching principle barring coverage under all policies and effective dates. However, its analysis is pertinent to various aspects of this case.

The County defendants argue that the allegations in the underlying complaints fall within, or potentially within, the coverage of the 1986 Policy. [2] The County defendants contend that the County is a Named Insured, a fact that White Mountains does not dispute. The court is not convinced. The 1986 Policy Declaration Page, Item 1, indicates that the "Named Insured and Address" is "Edgar County Sheriff's Department & Edgar County, 228 North Central Avenue, Paris, Illinois 61944." This is the address for the Sheriff's Department; the County has a different address. *McFatridge I*, 604 F.3d at 340. The declaration does not indicate that the County is a separately-named insured, although it easily could have; it has a space to designate "Additional Named Insureds." That space is blank.

The policy definitions shed light on this issue.

[2] Steidl's and Whitlock's complaints assert claims of false arrest, false imprisonment, malicious prosecution, and intentional infliction of emotional distress, which fall within the policy definition of personal injury.

NAMED INSURED Means the law enforcement agency named in Item 1 of the declarations. (Emphasis added.)

"Where an inconsistency arises between a clause that is general and one that is more specific, the latter prevails." *Alberto-Culver Co. v. Aon Corp.*, 812 N.E.2d 369, 380 (Ill. App. Ct. 2004). The declaration page is general; the definition is more specific. The County is not a law enforcement agency. Moreover, the address listed on the declaration is the Sheriff's Department address. Consequently, the County is not a Named Insured; only the Sheriff's Department is a Named Insured.

Whether the County is an Insured is also resolved by the policy definitions.

INSURED Means (A) Named Insured and all paid full or part time employees; (B) unpaid volunteers or reserves while performing law enforcement functions for the Named Insured at the Insured's request; (C) the political subdivision in which the Named Insured is located, should such subdivision be named in any action or suit against the Named Insured or any employee for any act for which this policy affords protection, and elected or appointed officials or other personnel or units of the political subdivision of which the Named Insured is a unit thereof, with respect to their responsibilities to law enforcement.

Only under clause C could the County be an Insured. That clause is construed as follows.

"[T]he political subdivision in which the Named Insured is located . . ."

The Named Insured (the Sheriff's Department) is located in the political subdivision of Edgar County.

"should such subdivision be named in any action or suit against the Named Insured or any employee for any act for which this policy affords protection . . . "

The County has been named in Steidl and Whitlock's lawsuits. However, their suits are not against the Sheriff's Department or an employee of the Sheriff's Department or the County. As noted in *McFatridge I*, McFatridge is a state employee. *McFatridge I*, 604 F.3d at 342.This phrase of clause C does not clearly include, or exclude, coverage for acts of state employees such as McFatridge.

"*and elected or appointed officials or other personnel or units of the political subdivision of which the Named Insured is a unit thereof . . .*"

McFatridge is an elected state official. As applied to him, this phrase could be interpreted at least two ways:

"*elected . . . officials . . . of the political subdivision . . .*"[3]
OR
"*elected . . . officials . . . or units of the political subdivision . . .* "

Under the second interpretation, and possibly under the first, McFatridge would be an insured.

Ambiguities in an insurance policy are narrowly construed against the insurer. *Stone Container*, 351 F.3d at 777. If McFatridge is an insured, and a suit against McFatridge also names the County, both McFatridge and the County potentially fall within the definition of an insured.

"with respect to their responsibilities to law enforcement."

In contrast to the policy language at issue in *McFatridge I*,[4] the Sheriff's Department need not be involved before the County's coverage is triggered. The wrongdoing need only be undertaken with respect to law enforcement. The Seventh Circuit did not foreclose the possibility that McFatridge acted in furtherance of law enforcement: "McFatridge's involvement arose out of his duty as state's attorney and the activities of the Paris police and the Illinois State Police." *McFatridge I*, 604 F.3d at 341.

The court agrees that the County defendants are covered under the 1986 Policy for the Steidl and Whitlock cases.

Having concluded that the 1986 Policy affords coverage, the court need not address whether White Mountains is estopped from denying coverage.

The County defendants' motion for summary judgment [39] is granted.

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[3] In their reply, the County defendants argue that McFatridge is an elected official of Edgar County, even though he is a state employee, because he was elected by the voters of Edgar County. The court does not disagree, but finds that determination unnecessary. The elected official need not be an official of the unit of the political subdivision (for example, a County board member). If only elected County officials (and not elected State officials serving in a county office) were covered by this language, the phrase would read "elected or appointed officials or other personnel <u>of</u> units of the political subdivision of which the Named Insured is a unit thereof, with respect to their with respect to their responsibilities to law enforcement."

[4] In *McFatridge I*, the policy language specified that the County is only an insured "with respect[] to liability arising out of the activities of the named insured," *i.e.*, the Sheriff's Department. *McFatridge I*, 604 F.3d at 340. In the absence of any law enforcement activity *by the Sheriff's Department*, "there was no covered 'occurrence.'" *McFatridge I*, 604 F.3d at 341 (emphasis added).

II. White Mountains' cross-motion against the County defendants and National Casualty

In its combined response/cross-motion for summary judgment against the County defendants and National Casualty, White Mountains makes three arguments: (1) McFatridge is not an insured under the 1986 Policy; (2) there is no coverage for the County because its liability arises out of operation of law rather than a covered act; and (3) White Mountains is not estopped from denying coverage. On this cross-motion, the court must draw all reasonable inferences in favor of White Mountains. *Edwards*, 639 F.3d at 359. However, clear and unambiguous terms must be given their ordinary meaning, and if the policy language is ambiguous, the language is construed against the insurer. *Stone Container*, 351 F.3d at 777.

White Mountains' first argument centers around the Seventh Circuit's reasoning in *McFatridge I*. In that case, the Edgar County Sheriff's Department was the Named Insured. *McFatridge I*, 604 F.3d at 340-41. The policy covered the Sheriff's Department's activities only. *McFatridge I*, 604 F.3d at 341. Because McFatridge did not perform law enforcement activity for the Sheriff's Department, "there was no covered occurrence." *McFatridge I*, 604 F.3d at 340-41. White Mountains concedes that the 1986 Policy language is different than in *McFatridge I*, but argues that the Seventh Circuit's reasoning still applies. The court disagrees. In contrast to *McFatridge I*, the 1986 Policy language does not limit coverage to Sheriff's Department law enforcement activities.

The Court in *McFatridge I* noted that the County was obligated to indemnify McFatridge through operation of law – specifically, the Local Governmental and Governmental Employees Tort Immunity Act, 745 Ill. Comp. Stat. 10/9-102, whereas policy coverage in that case was triggered by an "occurrence." The Seventh Circuit noted an operation of law "is not an occurrence or accident *as defined by the policies[.]*" *McFatridge I*, 604 F.3d at 345 (emphasis added). White Mountains urges the court to read the 1986 Policy as a whole, pointing out references to "acts" or "wrongful acts" and equating these to "occurrences" as in *McFatridge I*. Under Illinois law, courts must give effect "to each word, clause or term employed by the parties" to an insurance policy. *FSC Paper Corp. v. Sun Ins. Co. of New York*, 744 F.2d 1279, 1287 (7th Cir. 1984). The court cannot overlook the language stating that the County has coverage for lawsuits arising from law enforcement activity undertaken by others. The Seventh Circuit's discussion pertaining to operation of law is inapplicable to the 1986 Policy language.

Having rejected White Mountains' arguments on the first two grounds, the court need not determine whether White Mountains is estopped from asserting policy defenses.

White Mountains' motion for summary judgment [42] is denied.

III. National Casualty's motion for summary judgment

National Casualty moves for summary judgment, arguing that (1) White Mountains owes a duty to defend and indemnify the County defendants under the 1986 Policy; (2) National Casualty is entitled to reimbursement for all defense costs incurred by National Casualty based on (a) the doctrine of equitable subrogation, (b) the doctrine of equitable contribution, and (c) the

doctrine of unjust enrichment; and (3) White Mountains is estopped from asserting policy defenses.

For the reasons discussed above, the court has determined that White Mountains has a duty to defend and indemnify the County defendants under the 1986 Policy. As to the remaining arguments, White Mountains addresses the estoppel argument (which is moot in view of the court's finding that White Mountains has a duty to defend and indemnify), along with scant argument on the issues of equitable subrogation, and equitable contribution. White Mountains did not address the argument of unjust enrichment at all.

Steidl filed his lawsuit on May 27, 2005; Whitlock commenced his action on February 27, 2008. On March 14, 2008, the County tendered its defense in those cases to White Mountains. On May 14, 2008, White Mountains accepted the tender of defense as to McFatridge, subject to a reservation of rights. National Casualty and White Mountains each contributed to the County defendants' legal costs.

On June 4, 2010, White Mountains contacted the County's attorney, stating that in view of the recently issued decision in *McFatridge I*, it had concluded that it, also, had no duty to defend or indemnify the County. Consequently, it had asked its counsel to prepare a counterclaim against National Casualty (which had *no* liability pursuant to *McFatridge I*) and crossclaims against the County defendants, seeking a declaration of no coverage. Furthermore, it withdrew from its limited defense of McFatridge. As a courtesy, White Mountains stated that it would contribute 50% of the costs of McFatridge's defense from the date of the tender until the decision in *McFatridge I* (noting that it had reimbursed 50% of the defense costs through December 2009 for which it had paid National Casualty slightly more than $200,000). White Mountains also agreed to contribute 100% of the costs incurred from the date of the decision in *McFatridge I* through June 4, 2010. White Mountains also agreed not seek reimbursement from the County defendants for any costs previously paid or to be paid pursuant to the insurers' agreement.

Home Ins. Co. v. Cincinnati Ins. Co., 821 N.E.2d 269 (Ill. 2004), discusses the differences between contribution and subrogation. Contribution "is only available where concurrent policies insure the same entities, the same interests, and the same risks." *Home Ins.*, 821 N.E.2d at 276. "[W]hen two insurers cover separate and distinct risks there can be no contribution among them." *Home Ins.*, 821 N.E.2d at 276 (*citing* 15 Couch on Insurance § 218:3 (3d ed. 2011)). The differences in policy language show that National Casualty and White Mountains did not cover the same risks when viewed in the context of *Steidl* and *Whitlock*. National Casualty's policy covered only the Edgar County Sheriff's Department and its employees. White Mountains' policy covered a broader range of risks, including but not limited to the risks insured by National Casualty. The allegations by Steidl and Whitlock do not fall within the risks insured by National Casualty, but they do fall within the risks insured by White Mountains.

While equitable contribution requires an identity of *risk*, equitable subrogation requires an identity of *loss*. *Home Ins.*, 821 N.E.2d at 280-81. To prevail on a claim of equitable subrogation, National Casualty must show: (1) the defendant insurer is primarily liable to the insured for the

loss; (2) the plaintiff insurer is secondarily liable to the insured for the same loss; (3) the plaintiff insurer has discharged its liability to the insured and at the same time extinguished the liability of the defendant insurer. *Home Ins.*, 821 N.E.2d at 280. Here, defendant White Mountains is liable to the insured for the loss. Plaintiff National Casualty is not liable for any of the loss. *McFatridge I*, 604 F.3d at 345. National Casualty has no liability to discharge, but it has extinguished a portion of White Mountains' liability to its insureds. To rule that equitable subrogation applies where two or more insurers are concurrently liable, but not where one insurer has no liability but has shouldered most of the loss, would lead to an absurd result.

Nonetheless, National Casualty's claim of unjust enrichment is perhaps the best fit under these circumstances. "The concept of unjust enrichment can best describe the reasoning of some courts, as well as the legislative history behind the doctrine of subrogation[.]" 16 Couch on Insurance § 222:8. "Contribution between joint insurers generally involves the issue of whether one of two or more insurers of the same subject matter and insured is entitled to contribution from the others when it pays all, or greater than its share, of a loss." 15 Couch on Insurance § 218:33. "An insurer's liability for contribution . . . is founded on notions of equity and unjust enrichment." 15 Couch on Insurance § 217:4.

To prevail on a theory of unjust enrichment, "plaintiffs must show that defendants 'voluntarily accepted a benefit which would be inequitable for [them] to retain without payment.'" *Karimi v. 401 North Wabash Venture, LLC*, ____ N.E.2d ____, 2011 WL 3241928, at *3 (Ill. App. Ct. July 26, 2011). Here, White Mountains accepted the benefit of National Casualty's continued partial payment of the County defendants' legal costs. Now that the Seventh Circuit has conclusively determined that National Casualty had no liability toward the County defendants, it would be inequitable for White Mountains to benefit from National Casualty's early and costly participation in the defense of White Mountains' insureds.

White Mountains' half-hearted argument on these issues is unpersuasive. White Mountains argues that National Casualty has not discharged White Mountains' liability; it was discharging its own obligation to the County defendants and that, absent a provision in the insurance policy, an insurer cannot recover sums expended for the defense of its insured following the outcome of a declaratory judgment action. It cites *General Agents Ins. Co., Inc. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092 (Ill. 2005), which is factually and legally distinguishable; the dispute was between an insurer and insured. The Illinois Supreme Court determined that absent a provision in the insurance policy allowing the insurer to do so, the insurer could not unilaterally modify its contract with the insured through a reservation of rights. *General Agents*, 828 N.E.2d at 1102. In this case, National Casualty is not seeking reimbursement from the County defendants; it seeks reimbursement from White Mountains, with which it has no contract. The Illinois Supreme Court also noted, "[W]hen an insurer tenders a defense or pays defense costs pursuant to a reservation of rights, the insurer is protecting itself at least as much as it is protecting its insured. Thus, we cannot say that an *insured* is unjustly enriched when its insurer tenders a defense in order to protect its own interests, even if it is later determined that the insurer did not owe a defense." *General Agents*, 828 N.E.2d at 1103

(emphasis added). In this case, White Mountains, and not the insured, was unjustly enriched by National Casualty's early defense of the County defendants.

Again, having found that White Mountains has a duty to defend and indemnify the County defendants, and that it was unjustly enriched by National Casualty's early defense of the County defendants, the court need not address whether White Mountains is estopped from asserting policy defenses.

CONCLUSION

For the foregoing reasons, the County defendants' motion for summary judgment [39] is granted. National Casualty's motion for summary judgment [45] is also granted. White Mountains' cross-motion [42] is denied. The court declares as follows:

1. White Mountains owes a duty to defend McFatridge and Edgar County in the Steidl and Whitlock lawsuits;

2. That this duty to defend exists under White Mountains' 1986 Policy (83LE 006626);

3. That White Mountains must immediately begin paying all costs of defense in the Steidl and Whitlock lawsuits; and

4. That White Mountains must reimburse National Casualty for all defense fees and costs expended since White Mountains was on notice of the underlying claims.

Entered this 31st day of August, 2011.

\s\Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE