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INSURANCE CONTRACTS AND JUDICIAL DECISIONS
OVER WHETHER INSURERS MUST DEFEND
INSURED THAT VIOLATE CONSTITUTIONAL AND
CIVIL RIGHTS: AN HISTORICAL AND EMPIRICAL
REVIEW OF FEDERAL AND STATE COURT
DECLARATORY JUDGMENTS 1900–2000

Willy E. Rice

I. INTRODUCTION

During the late nineteenth century, the U.S. Congress enacted several statutes to help prevent and arrest the adverse effects of racial discrimination.¹ Over the latter part of the twentieth century, Congress determined that pervasive irrational² discrimination continued against the

1. Civil Rights Act of 1866 [42 U.S.C. § 1982]; Civil Rights Act of 1870 [42 U.S.C. § 1981]; Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1985]; and Civil Rights Act of 1875 [18 U.S.C. § 243].

2. See David K. Bowsher, *Cracking the Code of United States v. Virginia*, 48 DUKE L.J. 305, 307 (1998) (“The Constitution in enjoining the equal protection of the laws upon [s]tates precludes irrational discrimination as between persons or groups of persons in the incidence of a law.”); Note, *Section 5 and the Protection of Nonsuspect Classes After City of Boerne v. Flores*, 111 HARV. L. REV. 1542, 1554 (1998) (“[T]he ADEA validly targets ‘arbitrary and irrational age discrimination,’ which constitutes a violation of the Fourteenth Amendment, and does not unconstitutionally encroach on state prerogatives.”); Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 705–06 (1997) (“Discrimination, therefore, ‘is irrational and unjust because it denies the individual what is due him or her under society’s agreed upon standards of merit.’ Disregarding racial or sexual differences protects human

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disabled,³ in the workplace,⁴ within financial and educational institutions,⁵ and in housing and public places.⁶ Laws were enacted to target and eradicate discriminatory practices based on ethnicity, ancestry, gender, religion, national origin, marital and familial status, age, and disability.⁷ Similarly, every state and American territory has amended its constitution or has

dignity and equality, and guarantees meritocratic decision making, free from the distorting effects of racial and sexual stereotypes.”).

3. *E.g.*, Americans with Disabilities Act of 1990 [42 U.S.C. § 12101]. The congressional findings for the Act state that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem,” that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous,” and that discrimination “costs the United States billions of dollars in unnecessary expenses resulting from dependency and non productivity.” *Id.* § 12101(a)(2), (9). The purpose of the Act is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” *Id.* § 12101(b)(1)–(2).

4. *See, e.g.*, Linda Maher, *Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation After Aramco and the Civil Rights Act of 1991*, 9 CONN. J. INT’L L. 1, 11 (1993) (“The dissent found sufficient evidence that Congress intended Title VII to have a broad goal of eradicating discriminatory practices against United States citizens, even when that discrimination is carried out on foreign soil.”); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 1050 (1990) (“Congress found that ‘the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe under representation of minorities in the media of mass communications.’”) (citing H.R. CONF. REP. No. 765, 97th Cong., 2d Sess. 43 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2287).

5. *See, e.g.*, Kaija Clark, *School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers*, 66 GEO. WASH. L. REV. 353, 371 (1998) (“After looking at the legislative history, the court determined that Congress enacted Title IX to address gender discrimination in federally funded educational programs that neither Title VII nor Title VI covered.”).

6. *See, e.g.*, *Seniors Civil Liberties Ass’n v. Kemp*, 965 F.2d 1030, 1035 (11th Cir. 1992) (Congress discovered that housing discrimination against families was a pervasive national problem).

7. *See* National Housing Act of 1937, as amended [12 U.S.C. § 1735f–5]; Federal Property and Administrative Services Act of 1949 [40 U.S.C. § 476]; Fair Labor Standards Act of 1938 [29 U.S.C. §§ 201 *et seq.*]; Equal Pay Act of 1963 [29 U.S.C. § 206(d)]; Title II of the Civil Rights Act of 1964 [Equal Access to Public Accommodations, 42 U.S.C. § 2000a]; Title VI of the Civil Rights Act of 1964 [Equal Access to Federal Funds, 42 U.S.C. § 2000d]; Title VII of the Civil Rights Act of 1964 [Equal Access to Employment, 42 U.S.C. §§ 2000e *et seq.*]; Title VIII of the Civil Rights Act of 1968 [Fair Housing Act, 42 U.S.C. §§ 3601, 3602(a), 3604, 3605, and 3606]; Age Discrimination in Employment Act of 1967 [29 U.S.C. §§ 621 *et seq.*]; Community Development Act [42 U.S.C. § 5309]; Title IX of the Education Amendments Act of 1972 [20 U.S.C. §§ 1681 *et seq.*]; Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. §§ 701 *et seq.*]; Job Training Partnership Act [29 U.S.C. § 1577]; Equal Credit Opportunity Act [15 U.S.C. §§ 1691 *et seq.*]; Civil Rights Restoration Act of 1987 [20 U.S.C. § 1687]; Employee Polygraph Protection Act of 1988 [29 U.S.C. §§ 2001 *et seq.*]; Civil Rights Act of 1991 [42 U.S.C. § 1981a]; Americans with Disabilities Act of 1990 [42 U.S.C. §§ 12101 *et seq.*]; Cable Television Consumer Protection and Competition Act of 1992 [47 U.S.C.A. § 554]; Family and Medical Leave Act of 1993 [29 U.S.C. §§ 2611 *et seq.*]; Worker Adjustment and Retraining Notification Act [29 U.S.C. §§ 2101 *et seq.*].

enacted civil rights statutes to eliminate and help remedy the negative consequences associated with various forms of irrational discrimination.⁸

These antidiscrimination laws have created an abundance of individual rights and remedies, leading to thousands of antidiscrimination suits each year.⁹ Employment discrimination suits, for example, have increased substantially¹⁰ since the passage of Title VII of the Civil Rights Act of 1967

8. See, e.g., ALA. CODE § 24-8-4 (1975); ALASKA STAT. § 18.80.210 (Michie 1999); ARIZ. REV. STAT. § 41-1463 (1999); ARK. CODE ANN. § 16-123-107 (West 1997); CAL. GOV. CODE § 12955 (West 1999); COLO. REV. STAT. ANN. § 24-34-601 (1998); CONN. GEN. STAT. ANN., CONST. ART. 1, § 20 (1965); DEL. CODE ANN. tit. 6, § 4501 (1998); D.C. CODE ANN. § 1-2515 (1981); FLA. STAT. ANN. § 760.01 (West 1999); GA. CODE ANN. § 8-3-203 (1999); HAW. REV. STAT. ANN., CONST. ART. 1, § 5 (Michie 1999); IDAHO CODE § 18-7301 (1998); 20 ILL. COMP. STAT. ANN. 1510/50 (West 1999); IND. CODE ANN. § 22-9-5-19 (West 1999); IOWA CODE ANN. § 216.6 (1999); KAN. STAT. ANN. § 44-1001 (1953); KY. REV. STAT. ANN. § 207.150 (Banks-Baldwin 1999); LA. CIV. CODE ANN., CONST. ART. 1, § 12 (West 1974); ME. REV. STAT. ANN. tit. 5, § 4552 (West 1998); MD. CODE ANN. COM. LAW, § 12-305 (1998); MASS. GEN. LAWS ANN. ch. 151B, § 1 (West 1998); MICH. COMP. LAWS ANN., CONST. ART. 1, § 2 (1963); MINN. STAT. ANN. § 181.59 (West 1999); MISS. CODE ANN. § 43-33-723 (1972); MO. ANN. STAT. § 213.055 (West 1999); MONT. CODE ANN., CONST. ART. 2, § 4 (1999); NEB. REV. STAT. § 20-134 (1943); NEV. REV. STAT. § 613.330 (1999); N.H. REV. STAT. ANN. § 354-A:1 (1999); N.J. STAT. ANN. § 10:5-4 (West 1999); N.M. STAT. ANN. § 28-1-7 (Michie 1978); N.Y. EXEC. § 296 (McKINNEY 1999); N.C. GEN. STAT. § 143-422.2 (1999); N.D. CENT. CODE § 14-02.4-16 (1998); OHIO REV. CODE ANN. § 4112.02 (Banks-Baldwin 1999); OKLA. ST. ANN. tit. 25, § 1302 (1999); PA. CONS. STAT. ANN. tit. 35, § 1680.402a (West 1999); P.R. LAWS ANN. tit. 29, § 146 (1995); R.I. GEN. LAWS § 34-37-5.4 (1956); S.C. CODE ANN. § 31-21-60 (Law Co-op 1976); S.D. CODIFIED LAWS § 20-13-10 (Michie 1968); TENN. CODE ANN. § 4-21-606 (1998); TEX. LABOR CODE ANN. § 21.001 (West 1999); UTAH CODE ANN. § 34A-5-106 (1953); VT. STAT. ANN. tit. 8, § 1211 (1998); V.I. CODE ANN. tit. 10, § 3 (1998); VA. CODE ANN. § 36-96.4 (Michie 1950); WASH. REV. CODE ANN. § 49.60.010 (West 1998); W. VA. CODE, § 5-11A-6 (1966); WIS. STAT. ANN. § 111.321 (West 1999); WYO. STAT. ANN. § 27-9-105 (Michie 1977).

9. The passage of federal and state antidiscrimination laws is not the sole reason for this increase. See Derek Reveron, *New Laws Trigger a Flood of Suits on Discrimination*, MIAMI HERALD, Feb. 9, 1992, at 1K ("[W]orkers are increasingly aware of their rights and, in turn, are more likely to seek legal satisfaction. News reports about the new laws have contributed to this awareness. An intense spotlight also was focused on sexual discrimination and harassment issues during the televised congressional hearings into the nomination of Clarence Thomas for the Supreme Court. In addition, layoffs and job cutbacks are increasingly a factor. . .").

10. See *Frivolous Lawsuits Legal Reforms Would Help Judges Keep Michigan's Trial Lawyers in Line*, DETROIT FREE PRESS, Mar. 22, 1996, at 11A ("The number of discrimination lawsuits has skyrocketed by more than 2,200 percent over the past 20 years. They now account for an estimated one-fifth of all civil suits filed in the United States."); Neal R. Peirce, *Japanese Business Begets Japanese Philantropy*, BALT. MORN. SUN, Sept. 23, 1991, at 7A ("There are now Japanese manufacturing plants in 500 American communities. The Southeast has 280 of them with Nissan, in Tennessee, the largest. Georgia alone has 300 Japanese businesses and 7,000 Japanese residents in the state. . . . But the Japanese have a special problem. There's widespread resentment of their massive buyouts of U.S. interests [and] Japanese firms get hit with high numbers of discrimination suits by minority and female employees."); Derek Reveron, *New Laws Trigger a Flood of Suits on Discrimination*, MIAMI HERALD, Feb. 9, 1992, at K1 ("There were 158 lawsuits filed in U.S. District Court in Miami in 1991, up from 112 in 1990. There were also 112 filed in 1989. The increase is the tip of the iceberg because there is often a lag of months between when a job is lost and when a suit is filed. There are many suits being prepared. . .").

and have doubled¹¹ since the enactment of the 1991 Civil Rights Act.¹² In addition, a surprising number of religion-based discrimination suits have been filed in recent years. According to the Equal Employment Opportunity Commission,¹³ “[t]he number of lawsuits claiming religious discrimination by employers has risen steadily—from 1,192 in 1991 to 1,786 in 1998. . . .”¹⁴

During the past ten years, thousands of complainants have initiated individual or class-action suits, claiming discrimination based on either ethnicity,¹⁵

11. See FEMINIST NEWS, May 12, 1997 <www.femist.org/news/newsbyte/may97/0512.html> (“As a result of new laws and new attitudes concerning on the job bias, employment discrimination suits more than doubled over the past four years. . . . The increase in suits . . . can largely be attributed to the law, especially in the area of sex discrimination. Sex discrimination suits have risen the fastest, with 15,432 complaints [filed] with the EEOC in 1996. In 1990, before . . . Anita Hill [testified] that U.S. Supreme Court [n]ominee and eventually Justice Clarence Thomas sexually harassed her, 6,427 sex discrimination suits were filed.”); but see Kerri S. Smith, *Early Mediation New Goal—EEOC Seeks to Nip Reliance on Lawsuits*, DENVER POST, Oct. 26, 1997, at B1 (“Colorado workers filed 2,149 complaints with the EEOC last year, a 10 percent increase. It is a sharp contrast to national figures where lawsuits dropped almost 11 percent in 1996. The Colorado numbers are in sharp contrast to national figures, which indicate that job discrimination overall dropped almost 11 percent in 1996.”).

12. 42 U.S.C. § 1981a (1994). See also Lyle Denniston, *Clinton Seeks to Reverse Bush Bias Rule: Hundreds of Cases Could Be Affected*, BALT. MORN. SUN, May 1, 1993, at 3A (“The Clinton administration, making its first sharp break with Bush administration policy on civil rights, urged the Supreme Court . . . to salvage hundreds of lawsuits for past race and sex bias on the job. All of those claims for money by workers would be wiped out if they [were] not able to take advantage of new antidiscrimination protection contained in the 1991 Civil Rights Act.”).

13. Hereinafter EEOC.

14. See Jillian Lloyd, *Religious Practices vs. Work Demands*, CHRISTIAN SCI. MONITOR., Dec. 31, 1998, at 2 (“From the federal government to corporate businesses, employers are being asked to accommodate the country’s growing religious diversity. . . . A frequent point of conflict is the clothing worn by workers for religious reasons. . . . Being forced to work on a holy day is another frequent complaint among employees. . . . Under Title VII of the Civil Rights Act of 1964—which disallows religious discrimination and harassment—employers are obliged to ‘reasonably accommodate’ the religious practice of workers.”); see also *Two Religious-Bias Suits Are Filed by the EEOC*, WALL ST. J., Oct. 1, 1998, at B14 (“One suit alleges that Unico Service Co., a Boston security services company, . . . denied employment to people in its Chicago office who wear [Muslim] headdress[.]. . . . The EEOC also filed a suit against Mayer, Brown & Platt, a Chicago law firm, alleging that Mayer Brown fired a temporary worker because she wore a [Muslim] head scarf, or hijab.”).

15. See, e.g., Nikhil Deogun, *A Race Bias Suit Tests Coke—Can the Real Thing Do the Right Thing?*, WALL ST. J., May, 18, 1999, at B1 (“In a complaint filed in federal court . . . , four current and former Coca Cola employees allege[d] disparities between white and black employees at the company, in term of pay, promotions, performance evaluation and dismissals.”); Louise Lee, *Dillard’s Is Meeting with Minorities to Talk Diversity: Years of Silence End as Store Chain Acts to Resolve Race Bias Allegations*, WALL ST. J., Apr. 8, 1998, at B6 (Dillard’s “has been sued for racial bias in Texas, Florida, and its home state of Arkansas as well as many times in the Kansas City area.”); Ernest Holsendolph, *Norfolk Southern Railroad Faces Race Discrimination Suits*, ATLANTA CONST., Mar. 30, 1997, at D2 (“In a class action lawsuit . . . , black employees of Norfolk Southern allege[d] that customs and practices by the railroad have held down promotions of African-Americans over the years.”); Nancy Rivera Brooks, *California Group of Black Employees Sues UPS—Litigation: Class Action Alleges Racial Bias*, L.A. TIMES, May 5, 1997, at D2, 1997 WL 2206647 (“The class action suit . . . alleges that . . . UPS is more

gender,¹⁶ age,¹⁷ or disability.¹⁸ A considerable number of fair housing,¹⁹ racial harassment,²⁰ and sexual harassment²¹ actions also have been filed in state and federal courts.

likely to promote white employees and give them better delivery routes, hours and pay.”); *Workers at Texaco Venture Claim Race Discrimination*, WALL ST. J., Feb. 5, 1997, at A6 (“Six black employees of a Texaco Inc. refining venture with Saudi Arabia’s state oil company . . . filed a lawsuit claiming the venture . . . discriminated against them based on their race.”); *Avis to Cut Off Outlets Accused in Race Discrimination Lawsuit*, L.A. TIMES, Nov. 27, 1996, at D3 (“Avis Inc. has been instructed by its parent company to terminate five outlets owned by a franchisee who is accused in a class action lawsuit of race discrimination. . . .”); *Giant Food Inc.: Chain Reacts to Charges of Racial Discrimination*, WALL ST. J., Sept. 9, 1996, at B2 (“Giant Food Inc. . . . fired a warehouse supervisor and demoted two other supervisors for alleged race discrimination. . . . [O]ne of the workers’ attorneys . . . said that a lawsuit is still under consideration, and that if it is filed it will seek . . . a class action [status for] black employees companywide.”); Margaret A. Jacobs, *Law Firm Loses Race Discrimination Case*, WALL ST. J., Mar. 25, 1996, at B2 (“A jury awarded a black former associate at the law firm [of] Katten Muchin & Zavis \$2.5 million in damages for race discrimination. . . . The plaintiff . . . claimed that the Chicago-based firm failed to consider him for partnership as required by firm policy and paid him less than white associates with similar experience.”); *Shell Employees File Suit, Allege Race Discrimination*, WALL ST. J., June 6, 1995, at B7 (“The lawsuit claims . . . Shell ‘created and maintained a systemwide policy of race-based discriminatory employment practices’ and illegally failed to promote blacks into executive level jobs.”); *Nordstrom Inc.: Lawsuit Accuses Retailer of Racial Discrimination*, WALL ST. J., Apr. 22, 1992, 1992 WL-WSJ 655936, at *1 (“Seven current and former employees of Nordstrom Inc. filed a racial discrimination complaint against the retailer . . . alleging . . . that the . . . company denied African-American employees promotions and hired less qualified white applicants . . . [T]he plaintiffs are seeking class action status. . . .”).

16. See, e.g., Charles Gasparino & Ann Davis, *Morgan Stanley Case Illustrates Less Tolerance in Bias Claims*, WALL ST. J., Sept. 14, 1999, at C1 (“Christian Curry, a young black man who had been fired after appearing in a gay men’s magazine, sued Morgan for racial bias. . . .”); *Crown Central Is Sued for Alleged Gender, Race Discrimination*, WALL ST. J., July 1, 1997, at C23 (“Eight black and female employees sued Crown Central Petroleum Corp. alleging widespread race and gender discrimination at the oil refining and marketing company. The suit filed. . . in federal court in Beaumont, Texas, seeks class action status on behalf of more than 200 employees. . . .”); Eugene L. Meyer, *Md. Trooper Alleges Sex Discrimination in Suit Over Family Leave*, WASH. POST, Apr. 29, 1995, at B3 (“[A] 38-year-old Maryland state trooper, a flight paramedic, applied for extensive parental leave to care for his infant daughter. . . . He was told that only a mother can be a ‘primary child care provider,’ and his request was denied. . . . [H]e filed a lawsuit in federal court. . . . In his suit, [the trooper] contends he was discriminated against because he is a man, in violation of the equal protection clause of the 14th Amendment and the Maryland equal rights amendment. The suit seeks 12 weeks of parental leave with pay.”); Toni Locy, *Class Action Suit Filed Against NAACP—2 Female Ex-Employees Allege Pattern of Sexual Discrimination*, WASH. POST, Mar. 28, 1995, at A7 (“Two female employees of the NAACP . . . filed a class action lawsuit against the civil rights organization, accusing it of perpetuating a pattern of sexual discrimination against female professional employees. . . . The amended complaint alleges that the NAACP was run by a group of men, or ‘a boys’ club,’ whose members were typically paid as much as 50 percent more than women doing equivalent or greater amounts of work.”); *Chevron Accused in Bias Suit—Female Workers Allege Sexual Discrimination*, SAN FRAN. CHRON., Aug. 27, 1992, at A19 (“A group of female employees have accused Chevron Corp. of discriminating against women in promotions and pay raises and of failing to discipline male managers who sexually harass women workers. In a class action lawsuit filed in San Francisco Superior Court, the women employees claim that ‘Chevron’s policies and practices both intentionally discriminate against women and have a disparate impact on women.’”).

17. See *Nynex Corp.: New York Phone Managers Join Age Discrimination Suit*, WALL ST. J.,

Many antidiscrimination suits are admittedly frivolous. Some “[a]ttorneys routinely file bogus claims even after [claims] have been in-

Jan. 14, 1993, at B4 (“More than 140 former New York Telephone Co. middle managers . . . joined in a lawsuit alleging that the company unfairly targeted older employees in staff reduction. . . . Two separate lawsuits were filed in federal court . . . seeking class action status.”); Jane Bryant Quinn, *New Rules on Age Bias*, DETROIT FREE PRESS, Feb. 7, 1991, at 3E (“It’s illegal to fire someone solely on account of age. The law protects everyone 40 and up. Yet in 1989, the Equal Employment Opportunity Commission brought only 133 age discrimination suits, exceeding, for the first time, the number brought in 1986. [It is expected that] the number of lawsuits will balloon as the baby boomer generation ages.”); Gertha Coffee, *Voices of Experience: Some Seasoned Workers Say Age a Drawback*, ATLANTA CONST., Aug. 19, 1991, at E1 (“The Equal Employment Opportunity Commission . . . received about 15,000 complaints of age discrimination last year. That number is expected to jump this year, the agency says. . . . Recently, the EEOC sued the National Football League to end what it said is a widespread practice of discriminating against its older referees.”); Kenneth J. Cooper, *Charges of Age Bias Increasing: On the Job Experts Describe Shift from Race, Sex Cases*, MIAMI HERALD, June 15, 1987, at 1A (“[EEOC] reports that complaints about age discrimination have increased considerably in recent years, enough to rival race or sex bias as a fairness issue in the American workplace. The EEOC received an annual average of 17,000 age-based complaints between 1983 and 1986, a 60 percent jump over the 10,500 average for the three previous years. . . . [In 1986], the EEOC filed a record 109 lawsuits, a fourth of its new cases, under the Age Discrimination in Employment Act of 1967.”).

18. See, e.g., Andrea F. Siegel, *Center for Disabled Hit with Discrimination Suit; Black Workers Allege Bias at the Providence Center*, BALT. MORN. SUN, Jan. 13, 1999, at 3B (“A group of former and current employees has charged a prestigious Anne Arundel County organization that provides work and job training for disabled adults with discriminating against its black workers. Helped by the Anne Arundel chapter of the [NAACP], seven blacks filed suit against the Providence Center in U.S. District Court in Baltimore . . . with hopes of turning it into a class action suit that could affect more than 100 employees of the Arnold-based agency.”); Anne Burke, *Lawsuit Claims Housing Rental Bias Last in Series Accuses Owners of Discrimination Against Blacks, Children, Disabled*, L.A. DAILY NEWS, Dec. 7, 1993, at N3 (“The last in a series of housing discrimination lawsuits were filed in Los Angeles Superior Court Monday against apartment owners who attorneys claim turned away African-American applicants or assigned them to units in the rear of their buildings. . . . Attorneys said the class action lawsuits against [the] . . . defendants exposes one of the worst cases of housing discrimination in the country. . . . The suit accuses officials at Walnut Glen of discriminating against a man with epilepsy.”); Alison F. Orenstein, *Group Home Backers Sue Voorhees—The Town Is Accused of Discriminating Against Facilities for the Mentally Disabled*, PHILADELPHIA INQUIRER, Apr. 7, 1993, at S1 (“A statewide advocacy group for the mentally disabled has sued the township, alleging that the township code discriminates against group homes for mentally retarded citizens.”).

19. See Edie Gross, *Lawsuit Charges Condo Association with Housing Discrimination*, ST. PETERSBURG TIMES, Dec. 18, 1998, at 8 (“Robert Barash hurt his back and could no longer push his quadriplegic brother in a wheelchair. Barash bought a dog and had him trained to do the work. But the American Staffordshire terrier was bigger than the Deer Hollow Condominium Association allowed, so the association told Barash, a resident of the condominium complex in East Lake, that his dog must go. . . . Barash sued the association . . . in federal court in Tampa. The lawsuit says the condo association violated the U.S. Fair Housing Act by not allowing him to keep the dog. . . .”); Judy Pasternak, *Hispanics Feel Unwelcome in America’s Suburbs—Lawsuit Accuses Town of Housing Discrimination*, PHOENIX GAZETTE, Sept. 4, 1995, at A24 (“The Germans came, the Greeks came, the Italians came, the Poles came. Generations of immigrants followed the lure of steady jobs to this factory town [Addison, Ill.] of 32,000 people. . . . For 15 years now, it has been the Mexicans’ turn to make their way here. . . . But with their numbers growing rapidly in Addison, Hispanics are beginning to feel distinctly

investigated and dismissed by the [EEOC]. Of the roughly 51,500 cases fully investigated by the EEOC in 1993, only 11,000 of them—21 percent—

unwelcome. Addison has been accused in a class action lawsuit and by the U.S. Justice Department of trying to bulldoze Hispanics out of town.”); *Discrimination Suits in Housing on the Rise*, SAN JOSE MERCURY NEWS, July 4, 1992, at A6 (“Complaints of housing discrimination have soared over the past three years and the Justice Department is filing 10 times as many lawsuits annually since Congress passed a law making bias against families with children and handicapped people illegal. . . .”); William Kleinknecht, *New Focus on Housing Bias Results in More Lawsuits*, DETROIT FREE PRESS, Dec. 30, 1992, at A1 (“With new support from the federal government, the Fair Housing Center of Metropolitan Detroit filed 29 discrimination suits in 1992, double its usual number.”); Jim Zook & R.A. Dyer, *Apartments Are Hit By Fair Housing Suit: Houston Complex Accused of Trying to Evict Couple Because They Had Baby*, HOUS. CHRON., Feb. 15, 1990, at P1 (“In one of the first such lawsuits in Texas under a revised federal fair housing law, prosecutors have sued a Houston apartment complex accused of trying to evict a couple because they had a baby. . . . The action is based on revisions to the Fair Housing Act in 1988 [which] . . . prohibit[s] discrimination against families with children. . . . Justice Department spokeswoman Deborah Burstion-Wade said there has been a number of discrimination lawsuits since the amendments went into effect.”).

20. See Frances A. McMorris, *Employers Face Greater Liability in Race Cases*, WALL ST. J., July 1, 1999, at B1 (“Employers are having a tougher time persuading judges to dismiss race harassment cases. . . . The change comes as the number of race harassment claims is rising. [In 1998], 9,908 were filed with the [EEOC] and state agencies, versus 4,910 in 1991.”); Nancy Bartley & Christine Clarridge, *Woman Sues for Racial Harassment*, SEATTLE TIMES, Mar. 25, 1999, at B2 (“Lisa Phair’s voice quivers when she talks about going inside a Federal Way Texaco station to clear up a question about her bill and being ordered out by an employee who shouted racial slurs and told her to ‘go back to Africa.’ . . . The verbal exchange was caught on the store’s security tape. The audio portion was provided to Phair’s attorneys and played at a news conference. . . . where Phair and her attorneys announced a racial harassment lawsuit against the Redondo Texaco and Video Rental and an unnamed assistant manager. . . .”); Glenn Burkins, *Freddie Mac Accused by EEOC of Discrimination Against Blacks*, WALL ST. J., Sept. 3, 1998, at B8 (“[EEOC] accused Freddie Mac of . . . fostering a hostile work environment for its black employees. . . . [T]he EEOC said African-American workers at the secondary mortgage lender were routinely subjected to racial . . . harassment. Those instances included offensive racial jokes [and] hate messages. . . . The findings stem from a 1996 complaint filed by Tony Morgan, Freddie Mac’s former director of executive corporate relations. . . . Mr. Morgan filed a complaint with the EEOC in late 1996 on behalf of himself and other current and former Freddie Mac employees. He also has filed a \$15 million civil lawsuit against the company.”); Hugo Kugiya, *Ex-Cashier Files Bias Suit—Black Man Claims Racial Harassment at McDonald’s*, SEATTLE TIMES, June 26, 1998, at B3 (“An African-American man has filed a racial-discrimination suit against McDonald’s, alleging he was subjected to hostile and demeaning working conditions at the Federal Way restaurant where he was employed for seven months. The lawsuit, filed in U.S. District Court by Dale Simmons, 18, claims he was once hosed down with cold water while on duty by a white co-worker and subjected to other forms of harassment because of his race.”); William Canterbury, *Akron Man Sues Firm for Racial Harassment, Former Worker Seeks \$400,000 in Suit Alleging Abuse at Hudson Company*, AKRON BEACON J., Mar. 20, 1997, at C7 (“Kenneth Greer . . . recently filed [a] federal suit against Truform Rubber Products Inc., where he worked as a press operator . . . , and where he said a supervisor harassed him by using racial epithets and statements. Greer contends that Delores Usner, a company supervisor, racially harassed and abused him and other African-American employees on a continual basis—something that violated company policy forbidding racial discrimination—and also threatened to fire him for racial reasons.”); Frank Manning, *Agency Sued in Racial Harassment*, L.A. TIMES, Jan. 27, 1996, at 5, 1996 WL 5235265

were found to have [a] reasonable cause for action.”²² But whatever the merit of such lawsuits, defendants or their insurers must spend large sums of money²³ responding to and defending against them.

Who should bear the financial burden associated with settling, mediating, defending, and indemnifying an antidiscrimination action? Should the alleged civil rights violator pay all damages and litigation fees? Should the alleged civil rights violator’s liability carrier defend the action and pay any

(“Two minority employees of the Las Virgenes Municipal Water District . . . filed a lawsuit against the agency, alleging that they were subjected for at least three years to racial . . . harassment by co-workers and supervisors. . . . [A]n African-American man . . . and . . . a Vietnamese man . . . allege[d] that they were . . . subjected to racial slurs.”); *Deputy Sheriff Sues Over Racial Harassment*, WASH. TIMES, Oct. 14, 1995, at A12 (“A multimillion-dollar racial harassment lawsuit has been filed by a Prince George’s sheriff’s deputy against a former colleague. Cpl. Laura Byrd, an eight-year veteran of the force, filed the \$39 million lawsuit in Baltimore after allegedly receiving threats in the form of hate mail from former Deputy Robert Lee Colgan Jr.”).

21. See, e.g., *TWA Faces Sexual Harassment Lawsuits*, ATLANTA CONST., June 11, 1998, at C3 (“TWA managers at Kennedy International Airport made lewd comments and sexual propositions, fondled employees and exposed themselves, according to two lawsuits filed Wednesday. The Equal Employment Opportunity Commission charged that employees at the New York airport were subjected to sexually offensive conduct since 1988.”); Laura Johannes, *Astra’s U.S. Unit Faces Lawsuit by Woman on Sexual Harassment*, WALL ST. J., May 2, 1996, at B2 (“A former employee of Astra USA Inc. has sued the company, claiming that she was fired after repeatedly refusing to have sex with a male supervisor. The suit also alleges that Astra management fostered an environment in which harassment occurred. . . . Astra USA, which has 1,475 employees, has had 16 complaints of sexual harassment since 1981.”); *Philip Morris Unit Faces Sexual Harassment Suit*, WALL ST. J., May 3, 1996, at A7D (“The lawsuit filed by five women . . . in Jefferson Circuit Court is the third since 1994 that alleged that the plant is plagued by a sexually charged atmosphere.”); Carlos Campos, *Barrett Faces Yet Another Lawsuit, Ex-Employee Alleges Sexual Harassment*, ATLANTA CONST., Sept. 5, 1996, at H4 (“Fulton County Sheriff Jackie Barrett has again found herself the target of a federal lawsuit. Former sheriff’s office employee Gina Anderson . . . filed a lawsuit . . . against Fulton County, Barrett and her chief deputy, Gregory Henderson. The lawsuit alleges [the white female employee] ‘was subjected to unwelcome sexual demands, sexual harassment and intimidation by Henderson.’ . . . Barrett [is] the nation’s first black female sheriff. . . .”); Pam Schmid, *Class Action Sexual Harassment Suit Filed: Female Miners Sue in Minnesota in First Case of Its Kind*, PHILADELPHIA INQUIRER, Feb. 29, 1992, at A3 (“A federal judge has ruled that a sexual harassment lawsuit filed by three women who work at Eveleth Mines, operator of several of the mines, can proceed on behalf of all women who work for the company. Eveleth Mines denies the allegations. It’s the first class action sexual harassment lawsuit ever allowed in a federal court. . . .”).

22. *Frivolous Lawsuits Legal Reforms Would Help Judges Keep Michigan’s Trial Lawyers in Line*, DETROIT FREE PRESS, Mar. 22, 1996, at 11A.

23. See, e.g., Kerri S. Smith, *Early Mediation New Goal—EEOC Seeks to Nip Reliance on Lawsuits*, DENVER POST, Oct. 26, 1997, at B1 (“But workplace experts say it takes an average of \$40,000 to \$50,000 and two years to get a job discrimination complaint resolved through the courts.”); Jeffrey M. Starsky, *Liability Policies Cover Costs for Legal Defense*, SACRAMENTO BEE, July 13, 1997, at E3 (“One of President Clinton’s insurers . . . agreed to pay \$900,000 in defense costs incurred by his lawyers in defending sexual harassment allegations.”); Stuart Silverstein, *Edison Will Pay \$18.25 Million to Settle Racial Bias Class Action*, L.A. TIMES, Oct. 2, 1996, at D1 (“The court approved settlement . . . , one of the largest ever in a race discrimination case, also calls for Edison to pay \$7 million to the plaintiffs’ lawyers.”).

damages? Or should litigation expenses and third-party damages be divided equally between the insured and the insurer?

These questions, of course, hinge in the first instance on the language of the policy itself, i.e., the contract between the insurer and the insured. It is from the policy that the scope and extent of coverage, as well as conditions, limitations, and exclusions, must be determined as an initial matter.

Increasingly, carriers are offering coverage against third-party antidiscrimination suits.²⁴ When liability carriers defend third-party suits, they

24. See, e.g., *The St. Paul Offers Stand-Alone Policy for Employment Practices Liability*, May 25, 1999 (visited June 2, 1999) <www2.stpaul.com/spc/corp/sp.html> ("St. Paul Fire and Marine Insurance Company . . . introduced a stand-alone or single policy for customers who face exposures related to employment practices such as sexual harassment, wrongful termination or discrimination in the workplace. . . . The policy also offers flexible coverage options that can be tailored to meet the needs of the customer. Some of those options include coverage for *duty to defend or indemnification*, employees, leased employees and independent employees and punitive or exemplary damages where insurable by law.") (emphasis added); Pamela Sebastian, *A Special Background Report on Trends in Industry and Finance*, WALL ST. J., Mar. 21, 1996, at A1 ("Sexual harassment, job discrimination and other employee lawsuits are covered by a novel insurance policy from Marsh & McLennan Global Broking and X.L. Insurance Co., Bermuda. Employers now typically use overlapping policies to build such protection. The new 'broad form' policy has coverage of as much as \$100 million, with a deductible of \$5 million.").

25. See, e.g., Sandy Banisky, *When Scientific Evidence Wavers, Courts Apply Their Own Standards*, BALT. MORN. SUN, Aug. 13, 1994, at 1A ("[C]ompanies are wary of long trials with the possibility of expensive verdicts. And that sometimes prompts large settlement offers. 'Juries don't always get things right.' . . . So there's a strong incentive to settle In the class action concerning breast implants, the companies have offered to settle most of the suits, rather than watch tens of thousands of women go to court.").

26. See, e.g., *Pennzoil Set to Pay \$6.75 Million to Settle Racial Bias Lawsuit*, WALL ST. J., Nov. 12, 1998, at B11 ("Pennzoil Co. said it agreed to pay \$6.75 million to about 700 current and former black employees to settle a lawsuit alleging racial discrimination in the company's employment practices."); *Donnelley & Sons, Jackson Meet on Race Bias Charges*, WALL ST. J., Dec. 3, 1996, at B2 ("Top officials at R.R. Donnelley & Sons Co. met with civil rights activist Rev. Jesse Jackson to discuss racial discrimination charges leveled against the company. After the meeting, Rev. Jackson contended there is evidence Donnelley discriminated on the basis of race, age and sex. . . . 'Donnelley's case is worse than Texaco,' he contended. Texaco Inc. recently agreed to settle a race discrimination case for \$176.1 million; Rev. Jackson was a prominent critic of the oil company in that case."); *U.S., Denny's Settle Bias Lawsuits*, BALT. MORN. SUN, May 24, 1994, at 1A ("Denny's, one of the best-known national restaurant chains, has been targeted in a number of racial discrimination lawsuits by black customers. Flagstar has since moved aggressively to improve Denny's image. As part of that effort, Flagstar promised the [NAACP] in July 1993 that it would spend \$1 billion during the next seven years to hire more minority-owned contractors, award Denny's franchises to 53 more minority owners by 1997 and enforce antidiscrimination."); *Hope Hamashige, Housing Council Settles Its Biggest Discrimination Suit*, L.A. TIMES, Aug. 2, 1994, at B1 ("The Fair Housing Council of Orange County has settled the largest housing discrimination lawsuit in its 30-year history for \$775,000. . . . [The] owner of four apartment complexes . . . agreed . . . to pay the [money] to settle the 1993 lawsuit, which accused him of . . . refusing to rent apartments . . . to members of racial minorities."); *Stuart Silverstein, Edison Will Pay \$18.25 Million to Settle Racial Bias Class Action*, L.A. TIMES, Oct. 2, 1996, at D1 ("A racial discrimination suit brought by African-America workers against Southern California Edison has been settled with a pact requiring the utility to pay \$11.25 million to as many as 2,500 current and former employees."); *Hechinger Company Settles Suits Alleging Race, Age Discrimination*, WALL ST. J., Aug. 14,

often settle,²⁵ especially in actions involving race,²⁶ gender,²⁷ age,²⁸ and disability²⁹ discrimination and for suits claiming both racial³⁰ and sexual³¹

1995, at B6 ("Last year, 49 Hechinger employees filed two discrimination complaints against the company . . . seeking a total of \$250 million in damages. Employees claimed the company discriminated against black employees . . . as part of a restructuring.").

27. See, e.g., Randall Smith, *Merrill to Start Settlement Talks, Seek More Information on Some Bias Claims*, WALL ST. J., June 7, 1999, at B16 ("Merrill Lynch & Co. plans to start settlement talks with more than 50 of the 900 past and present women brokers who filed complaints about gender-based discrimination earlier this year."); *Home Depot Inc.: Judge Approves Settlement of Sex Discrimination Suit*, WALL ST. J., Dec. 8, 1997, at B4 ("Home Depot Inc., Atlanta, said a federal district court judge has approved its previously announced \$65 million settlement of a class action sex discrimination lawsuit. . . . The original lawsuit charged Home Depot with discriminating against female employees by limiting advancement and promotion opportunities."); *Publix Agrees to Pay \$81.5 Million to Settle Sex Discrimination Suit*, ATLANTA CONST., Jan. 25, 1997, at E1 ("Publix Super Markets agreed Friday to pay \$81.5 million to settle a class action lawsuit from 150,000 women who accused the chain of relegating them to dead-end, low-paying jobs."); Arthur M. Louis, *Safeway Settles Sex Discrimination Suit, Supermarket Giant to Pay Millions to Current and Former Women Employees*, SAN FRAN. CHRON., Apr. 4, 1994, at D1 ("Safeway Inc., the Oakland-based supermarket giant, said . . . it will pay \$7.5 million to settle a long-standing class action lawsuit alleging it discriminated against women employees at its Northern California stores.").

28. See, e.g., *Westinghouse Electric, Northrop Settle Suits on Age Discrimination*, WALL ST. J., Nov. 3, 1997, at A8 ("Westinghouse Electric and Northrop Grumman Corp. settled two age discrimination lawsuits with the [EEOC] for \$14 million. The lawsuits involved claims by 259 employees of Westinghouse's defense and electronic business. . . . Northrop Grumman is assuming partial financial responsibility because it purchased Westinghouse's defense and electronic business in March 1996."); Greg Jaffe & Rochelle Sharpe, *First Union to Pay \$58.5 Million to Settle Age Discrimination Suit by Ex-Workers*, WALL ST. J., Oct. 23, 1997, at B4 ("About 90 of the fired employees filed a separate complaint against First Union, saying that the bank also discriminated on the basis of race. The settlement . . . resolved those charges, as well."); *Boston Edison Co.—Utility Settles Litigation Over Age Discrimination*, WALL ST. J., Dec. 20, 1996 at B5 ("[The company] settled . . . by agreeing to pay 34 former employees a total of \$2.25 million.").

29. See, e.g., Judith Evans, *2 Realty Firms Settle Bias Suits, Discrimination Alleged Over Race, Disability*, WASH. POST, Dec. 7, 1996, at E1 ("Two local real estate firms have agreed to settle separate lawsuits in which a black Naval officer and a woman confined to a wheelchair accused the companies of discriminating. Yarmouth Management Co. has agreed to pay the Fair Housing Council of Greater Washington and Navy Petty Officer Pamela Hendrickson \$150,000 to end a two-year-old case in which the Capitol Hill-based property management firm was accused of violating fair housing and civil rights laws. Additionally, a real estate partnership that owns Springhill Lake Apartments in Greenbelt has agreed to pay the housing council and Vivian Voss \$80,000 plus lawyers' fees for allegedly refusing to rent her an apartment, in violation of the fair housing law and another law that protects the rights of the disabled."); Hedgpeth, *Deaf Woman and State Better Business Bureau Reach Settlement in Disability Discrimination Suit*, BALT. MORN. SUN, June 18, 1996, at 2B ("A deaf woman and the Better Business Bureau of Greater Maryland Inc. have settled a disability discrimination lawsuit she filed against a former company president. . . . Joann Bryant had asked for \$100,000 in damages and a court order to restore her to a job in keeping with her experience.").

30. See, e.g., Martha Irvine, *Pizza Hut Settles Suit in Racial Harassment*, RECORD (Northern New Jersey), Dec. 30, 1998, at B1 ("In a precedent-setting case, Pizza Hut settled a lawsuit filed by [17] black family members who said they were harassed, threatened with a mop handle, and taunted with racial slurs at a restaurant in 1995. The settlement follows a federal judge's ruling last summer that companies can be held liable if their employees commit hate crimes. The amount of the settlement was not disclosed."); *GM Settles Racial and Sexual*

harassment.³² Nevertheless, many liability carriers simply refuse to have anything to do with resolving the third-party action, and when this happens, disgruntled insureds often file declaratory judgment suits.³³

Assuming that coverage is within, or arguably within, the scope of the policy, should liability insurers be forced to defend policyholders that allegedly discriminate on the basis of race, gender, age, or disability? Does the answer turn on whether the alleged discrimination was intentional or incidental? Should the type of harassment, whether sexual or racial, influence whether declaratory relief is awarded?

Before answering these questions, consider a high-profile race discrimination case involving Morgan Stanley Dean Witter, Inc.,³⁴ the largest se-

Harassment Suit, KANSAS CITY STAR, June 17, 1998, at B2 ("General Motors Corp. will pay \$150,000 to three black auto workers in St. Louis who accused a white union official of racial and sexual harassment. . . . General Motors will pay \$60,000 each to Larry Jefferies and Perry Golden and \$30,000 to a woman whose name was not made public."); *Miller Brewing Co. Settles Racial Harassment Lawsuit*, BUFFALO NEWS, Dec. 5, 1994, at A13 ("Miller Brewing Co. will pay \$2.7 million to settle a racial harassment class action lawsuit in which black workers said they were subjected to racist slurs broadcast over a brewery's public address system. Miller admitted no wrongdoing in reaching the settlement, which will be paid to 97 former workers at the brewery in Fulton. . . .").

31. See, e.g., Kirstin Downey Grimsley & Frank Swoboda, *Mitsubishi, EEOC Settle Lawsuit, Estimated \$10 Million Award Would Be Largest in Sexual Harassment Case*, WASH. POST, June 11, 1998, at C1 ("The EEOC had alleged in its 1996 lawsuit that almost 300 women at the company's auto plant in Normal, Ill., were groped, grabbed, threatened, propositioned, and subjected to offensive language and insults by co-workers, and that Mitsubishi executives did little to stop those things."); *Panel Rules Salomon Must Pay \$750,000 in Harassment Case*, WALL ST. J., Mar. 18, 1998, at B3 ("A New York Stock Exchange arbitration panel has ordered Travelers Group, Inc.'s Salomon Smith Barney Inc. to pay about \$750,000 to settle same sex sexual harassment and other claims made by a former employee of the firm."); *Lew Lieberbaum Says It Will Pay to Settle Sex Harassment Case*, WALL ST. J., Apr. 9, 1998, at B9 ("[The company] agreed to pay \$1,750,000 to settle [EEOC's] allegations that the Garden City, N.Y., brokerage firm and investment bank created a hostile work environment for women."); *EEOC Settles Lawsuit on Sexual Harassment for Record Amount*, WALL ST. J., Apr. 10, 1997, at B6 ("The [EEOC] settled the largest sexual harassment lawsuit in its history . . . against Management Recruiters International. The EEOC said the Cleveland company agreed to pay \$1.3 million to 17 women who worked for Robert Hammer, a former Minneapolis sales manager. Mr. Hammer, the EEOC charged, created a 'sexually intimidating, hostile or offensive working environment.'").

32. See Derek Reveron, *New Laws Trigger a Flood of Suits on Discrimination*, MIAMI HERALD, Feb. 9, 1992, at 1K ("Most discrimination suits are settled before they go to trial."); Bob Howard, *New Form of Insurance Guards Against Employee Suits*, BUSINESS PRESS, Jan. 22, 1996, at 5, 1996 WL 12822659 ("Companies throughout the country have paid huge . . . out-of-court settlements in recent years as a result of suits claiming sexual harassment, wrongful termination or racial or sexual discrimination.").

33. See Part IX, *infra*, which outlines the number and percentages of declaratory actions filed between 1900 and 2000.

34. See *Morgan Stanley Profit Climbs in Quarter*, Los Angeles Time Archives & Professional Research (visited June 6, 1999) <www.latime.com/cgi-bin/arch/html> ("Morgan Stanley Dean Witter & Co.'s earnings soared beyond analyst estimates on strong trading activity, fees from mergers and acquisitions, and growth in its Discover credit card unit. The biggest U.S. securities firm said its net income jumped 50 percent to \$1.04 billion from \$691 million a year earlier. . . .").

curities investment firm in the United States, and Christian Curry, a former junior financial analyst. Morgan Stanley fired Curry, a handsome, twenty-five-year-old African-American, shortly after his photos appeared in a pornographic gay magazine.³⁵ Alleging that he was fired because of racism and homophobia,³⁶ Curry filed a \$1.35 billion discrimination suit against the company in a New York state court.³⁷ In his complaint, Curry alleged "that he suffered from bigotry and harassment for nearly a year until he was fired."³⁸

"The matter began in April 1998 when Morgan Stanley dismissed Mr. Curry, who had worked in the firm's real estate department. Though he was fired shortly after nude pictures of him were published, Morgan Stanley's official reason for his firing was that he abused his expense account."³⁹ More important, two senior Morgan Stanley in-house lawyers⁴⁰ believed that Curry was going to "break into Morgan Stanley's e-mail system and send out racist messages that Mr. Curry could use to support his discrimination suit. . . ."⁴¹ Therefore, the lawyers allegedly approved and paid a

35. See *Morgan Stanley Hit with \$1 Billion Suit*, SAN JOSE MERCURY NEWS, May 20, 1999, at 3C ("A former Morgan Stanley analyst filed a \$1.35 billion racial and sexual discrimination lawsuit Wednesday alleging the brokerage paid an informant to tip police leading to his arrest on phony forgery charges. Christian Curry, who is [African-American], was fired by Morgan Stanley in April 1998 and arrested by police in August for allegedly plotting to plant racist and homophobic e-mail messages on the firm's computer system. Police said at the time he was trying to plant evidence to strengthen a discrimination case in which he claimed he was fired from his entry level job because explicit photographs of him had appeared in Playguy, an adult magazine for homosexual men.")

36. *Id.* See also Laurie P. Cohen, *Securities Firm Suspends Two in Curry Case*, WALL ST. J., May 28, 1999, at C1; Laurie P. Cohen, *Morgan Stanley Says Curry Had Over 150 False Expense Claims*, WALL ST. J., June 8, 1999, at C1.

37. *Id.* ("Asked to explain the \$1.35 billion figure, Curry's lawyer, Benedict Morelli, said: 'When you punish someone who is worth \$45 billion, you don't sue for a million.'")

38. See *Morgan Stanley Sued for \$1.35B* (visited on June 3, 1999) <<http://aol.com/mynews/new/story.adp/cat/html>>.

39. Cohen, *Securities Firm Suspends Two in Curry Case*, *supra* note 39, at C1 ("Mr. Curry has denied abusing his account. In his lawsuit filed in a New York state court, he is asking for hundreds of millions of dollars in damages.")

40. *Id.* ("Morgan Stanley Dean Witter & Co. . . . suspended two senior in-house lawyers and said it is investigating its payment of \$10,000 to a police informant who helped lead to the arrest of a former employee. . . . Though the securities firm didn't identify the two [lawyers], individuals with knowledge of the matter said they are Monroe Sonnenborn, a managing director who oversees litigation and regulatory matters, and Carol Bernheim, a senior attorney who specializes in employment law.")

41. *Id.* See also Laurie P. Cohen, *Morgan Stanley's Motivation May Lie in Early Case*, WALL ST. J., June 3, 1999, at C1 ("A key to understanding why Morgan Stanley[s] [attorneys] responded so aggressively lies in its history of previous litigation over racist internal electronic mail. . . . Morgan Stanley, which took a public relations battering as that earlier case dragged on for two years, was alarmed when . . . told . . . a fired employee Christian Curry, who is [African-American], planned to break into the firm's e-mail system and plant phony racist messages. Six months earlier, Morgan Stanley settled a lawsuit filed by two [African-American] employees alleging discrimination after they learned of an e-mail message distributed within the firm in October 1995 that included jokes that played on stereotypes about African-

criminal informant \$10,000 to plan a sting operation to capture Curry.⁴² The sting was successful and Curry was arrested. Later, however, the prosecutor dropped charges because Morgan Stanley's in-house attorney did not disclose the \$10,000 payment to the informant.⁴³ As of this writing, Morgan Stanley is fighting the suit⁴⁴ and recently asked its indemnity insurer for reimbursement.⁴⁵

Assume that Morgan Stanley's current indemnity insurer, like a previous carrier,⁴⁶ refuses to pay legal expenses, damages, or both, and that there is

American speech patterns."); Francis A. McMorris, *Morgan Stanley Employees File Suit, Charging Race Bias Over E-Mail Jokes*, WALL ST. J., Jan. 13, 1997, at B8 ("Two [African-American] employees of Morgan Stanley & Co. are suing the investment banking firm for race discrimination, saying they shouldn't have been subjected to racist jokes sent via electronic mail."); *Morgan Stanley Settles Suit by Two Black Employees*, WALL ST. J., Mar. 2, 1998, at B8 ("Morgan Stanley, Dean Witter Discover & Co. agreed to settle a lawsuit filed by two [African-American] employees complaining about an e-mail message disseminated at the firm's predecessor Morgan Stanley & Co.").

42. See Cohen, *supra* note 44 ("The . . . case began unfolding . . . when the informant, Charles Joseph Luethke, came to Morgan Stanley with a tip that Mr. Curry . . . planned to break into the firm's e-mail system. . . . Mr. Luethke's tip—and his participation in a sting operation engineered by New York City police last August—led to Mr. Curry's arrest. Prosecutors charged Mr. Curry with paying \$200 to an undercover policeman to break into Morgan Stanley's e-mail system and send out racist messages. But last month, the New York County district attorney's office dropped the charges, saying that there were credibility problems with both the witness, Mr. Luethke, and the victim, Morgan Stanley. Prosecutors learned of the payment last fall, after Mr. Luethke was arrested in a separate matter and told them about it."); *Execs Suspended for Arranging Sting Fired, Employee Files Lawsuit Against Firm*, CINCINNATI POST, May 29, 1999, at 10B ("Adding spice to the story was the September arrest of Luethke by the district attorney on a misdemeanor charge of harassing Curry's girlfriend and a felony charge of possessing a false identification card that showed him holding the rank of lieutenant colonel in the Army.").

43. *Id.*

44. See Andrew Cave, *Morgan to Fight \$1.3bn "Race" Case*, DAILY TELEGRAPH (LONDON), June 9, 1999, at 31 ("Morgan Stanley has gone on the offensive to fend off a \$1.35 billion (£844 million) race bias lawsuit from former analyst Christian Curry. . . . Papers lodged by the bank at Manhattan Federal Court allege that half [of] Mr. Curry's expense claims were bogus.").

45. *Cf. Morgan Stanley Group, Inc. v. New England Ins. Co.*, 36 F. Supp. 2d 605, 607 (S.D.N.Y. 1999) ("In [the] underlying litigations, [the third-party complainants] claimed . . . that Morgan Stanley had committed fraud, had been negligent, and had breached a fiduciary duty. . . . Morgan Stanley defended itself in the underlying litigations and ultimately settled both for [\$5.8] million. In addition, Morgan Stanley [reported that it] incurred more than \$4.3 million in legal fees defending those actions. . . . At the time the . . . lawsuits were filed, Morgan Stanley was covered by an 'Investment Counselors Errors and Omissions and Fiduciary Liability Insurance' policy provided by . . . New England Insurance Company and ITT New England Management Company, Inc. . . . The policy provided that New England would indemnify Morgan Stanley for: Loss which the Insured shall become legally obligated to pay, from any claim made against the Insured during the Policy Period, by reason of any actual or alleged negligent act, error or omission committed in the scope of [Morgan Stanley's] duties as investment counselors.").

46. *Id.* ("After settlement, Morgan Stanley sought payment from New England of its legal expenses and settlements costs. New England refused to pay, claiming that the underlying litigations [were] not covered by the policy because Morgan Stanley was not acting as an 'investment counselor.'").

an arguable basis for coverage in the policy. Morgan Stanley then files a declaratory judgment action. Should the court force the insurer to reimburse Morgan Stanley? If the answer is yes, does that encourage Morgan Stanley and other investment bankers to practice race discrimination and homophobia? Critics would argue that Morgan Stanley should be punished and the liability insurer therefore must not indemnify the company, even though Morgan Stanley has paid premiums for coverage.

Should extralegal factors, such as the third-party victim's ethnicity, gender, socioeconomic status, level of education, real or perceived sexual orientation, and criminal record, influence whether Morgan Stanley receives declaratory relief? Or should attributes about the alleged civil rights violator influence the ruling? If the answer to these questions is no, what methodology should be used to ensure a declaration that is fair, reasonable, and void of prejudices about either the alleged civil rights violator or the alleged victim of irrational discrimination?

These are not simply academic questions. As noted above, a sizable number of liability insurers and insureds ask courts to declare whether insurers must defend and/or indemnify policyholders that are accused of discriminating against innocent third parties. There is more than enough evidence to suggest that judges themselves discriminate.⁴⁷ Whether they are likely to order a legal defense and/or indemnification often depends upon whether insureds are single individuals, small businesses, larger corporations, professionals, or professional organizations.

Empirical findings reported in Part IX of this article suggest that geographic location is a factor in judicial declarations. Depending upon the jurisdiction, certain courts appear more inclined to award declaratory relief to national liability insurance companies while others appear more inclined to rule in favor of insureds. There is support for an even more disturbing conclusion: Federal and state jurists permit extralegal factors, such as the ethnicity, gender, disability, perceived sexual orientation, and age of third-party victims, to influence their decision as to whether liability carriers must defend or reimburse the costs of defending various types of discrimination lawsuits.

The public policy of Florida,⁴⁸ Massachusetts,⁴⁹ Oregon,⁵⁰ and the ma-

47. See Part X, *infra*.

48. See, e.g., *Stockett v. Tolin*, 791 F. Supp. 1536, 1558-59 (S.D. Fla. 1992) ("There can be no doubt . . . that both the State of Florida and the Federal Government have committed themselves strongly to outlawing and eliminating sexual discrimination . . . including the related evil of sexual harassment. . . . Indeed, Florida's public policy against sexual harassment has been characterized as 'overwhelming.'").

49. See, e.g., *Banafato v. Conductron Corp.*, 1993 WL 818568, at *4 (Mass. Super. Ct. (Middlesex) 1993) ("Under Massachusetts law, the public policy against age discrimination is already comprehensively addressed by remedial legislative schemes.").

50. See, e.g., *Robinson v. Multnomah County School Dist.*, 759 P.2d 1116, 1118 n.2 (Or. Ct. App. 1988) (outlining Oregon's public policy against various forms of discrimination).

majority of states⁵¹ prohibits all forms of irrational discrimination, including both unintentional and intentional conduct. This policy also includes punishing, or at least not rewarding, discriminatory conduct by insureds.⁵² However, among cases involving allegedly discriminatory housing practices, state courts are split over whether insurers must defend and/or indemnify insureds. Or stated differently, in this author's view, they are divided over whether discriminatory practices by the insureds should be rewarded or punished.

For example, in *Clinton v. Aetna Life & Surety Co.*,⁵³ a Connecticut landowner refused to allow two females, one African-American and the other white, to reside as joint tenants under an apartment lease in Florida. The African-American sued, accusing the landlord of practicing intentional racial discrimination.⁵⁴ The landowner asked the insurer to defend the underlying civil rights action. The insurer refused on the basis that "Florida's public policy prohibit[ed] the [insured] from being indemnified for a loss resulting from an intentional act of discrimination."⁵⁵ The superior court disagreed, stating that the case involved the duty to defend rather than the duty to indemnify and that "[i]nterposing a defense to a racial discrimination claim does not violate the public policy of Florida."⁵⁶

In *Ranger Insurance Co. v. Harbour Club, Inc.*,⁵⁷ the district court reached a similar conclusion. In that case, a Jewish couple who were denied membership in the Bal Harbour Club sued, claiming that they were victims of intentional religious discrimination.⁵⁸ The club asked the insurer to defend and indemnify costs associated with defending and settling the discrimination suit. The insurer provided a legal defense, but refused to indemnify. According to the insurer, Florida's public policy condemns intentional acts

51. See *supra* note 7 and accompanying text.

52. See, e.g., *Harbour Club, Inc.*, 509 So. 2d at 949 nn.1-3 ("The insurer says the public policy prohibits enforcement of the contract. . . . The acts allegedly committed by the insured are prohibited by the Constitution, statutes, and ordinances, and thus clearly run afoul of strong public policy."); *University of Illinois v. Continental Cas. Co.*, 599 N.E.2d 1338 (Ill. App. Ct. 1992) ("The *Solo Cup* court considered whether insuring such claims violated the public policy against employment discrimination. The court . . . stated: "This rule is based on the simple principle long ago stated by Judge Cardozo, that "no one shall be permitted to take advantage of his own wrong." ' ' (quoting *Messersmith v. American Fidelity Co.*, 133 N.E. 432 (N.Y. 1921))).

53. 594 A.2d 1046 (Conn. App. Ct. 1991).

54. *Clinton*, 594 A.2d at 1047 "[The insured landlord] initiated a summary process action against her tenant . . . for possession of an apartment claiming . . . that [the tenant] allowed [a] person not in the original lease to reside on the premises. [An African-American] residing with the [white tenant] filed a counterclaim . . . and, as a consequence, the [insured landlord] was liable for damages under the United States Civil Rights Act, 42 U.S.C. § 1982, and the Florida antidiscrimination statute, FLA. STAT. § 760.23 (1985)."]

55. *Id.* at 1049.

56. *Id.*

57. 509 So. 2d 945 (Fla. Dist. Ct. App.) (1987).

58. *Harbour Club, Inc.*, 509 So. 2d at 949 nn.1-3.

of discrimination and, therefore, prohibits indemnification under the insurance contract.⁵⁹

The court disagreed: "While the public policy of this state condemns intentional acts of discrimination, . . . prohibiting insurance coverage for such discriminatory acts will have an adverse impact upon a competing public policy by frustrating recovery for damages suffered by the victims of such discrimination."⁶⁰ Arguably, the declarations in both *Clinton* and *Harbour Club* sanctioned and would continue to encourage discriminatory acts by the insureds.

The lower courts in *Boston Housing Authority (BHA) v. Atlantic International Insurance Co.*⁶¹ and in *Grosbong v. Mutual of Enumclaw Insurance Co.*,⁶² however, refused to adopt the positions stated in the former cases. In *BHA*, the NAACP sued the housing authority for intentionally discriminating against African-Americans and other racial minorities.⁶³ The BHA asked its insurer to indemnify the costs associated with defending the suit. The insurer declined, claiming that intentional discrimination violated the public policy of Massachusetts.⁶⁴ The district court agreed: "Given the blatant violation of public policy . . . , the [c]ourt rules that [Massachusetts's statute] bars insurance coverage for the defense of the BHA's conduct."⁶⁵

In *Grosbong*, the insured owned an apartment building and refused to rent a unit to a prospective tenant, who belonged to a racial minority.⁶⁶ The third-party victim sued, arguing that the insured intentionally violated

59. *Id.*

60. *Id.* at 946. *But see* *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1008-09 (Fla. 1989) ("Florida has a long-standing policy of opposing religious discrimination. . . . [T]he legislature has passed numerous laws banning religious discrimination in various practices. . . . Whatever victim compensation takes place under these acts is secondary to deterring discrimination. . . . The Club implies that if intentional discrimination were not to be held insurable many victims of discrimination would be unable to collect on their damage awards. We disagree. . . . [W]e hold that the public policy of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination.").

61. 781 F. Supp. 80 (D. Mass. 1992).

62. 923 P.2d 1280 (Or. Ct. App. 1996).

63. *Boston Housing Authority*, 781 F. Supp. at 81 ("The NAACP Complaint alleged that the BHA engaged in [intentional] racially discriminatory practices in housing in violation of 42 U.S.C. § 1981, 42 U.S.C. § 1982, [and] 42 U.S.C. § 1983. . . . [T]he complaint recounted a HUD's investigation which concluded that 'the BHA maintained segregated housing and that minorities waited longer for, and received inferior housing [more often] than nonminorities.'").

64. *Id.* at 82 ("The insurer refused to defend the BHA against the NAACP and the BHA provided its own defense in that suit. The BHA settled the case and is now obligated to pay damages to the NAACP. The defendants . . . refuse[d] to reimburse the BHA for its attorney's fees or to indemnify the BHA for the damages which it owes the NAACP as a result of the settlement. The BHA contends that the defendants' policies provided coverage for racial discrimination claims. . . . The defendants contend, however, that Mass. Gen. L. ch. 175, § 47, cl. 6(b), the doctrine of 'known loss' and the policy language itself dictate that the defendants had no duty to either indemnify or defend the BHA in its suit with the NAACP.").

65. *Id.* at 84.

66. *Grosbong*, 923 P.2d at 1281.

federal fair housing laws.⁶⁷ The defendant asked its insurer to defend and indemnify the expenses associated with the case. The insurer declined, stating that Oregon's public policy "precludes insurers from defending and indemnifying . . . insureds against claims for intentional discrimination."⁶⁸

The insured petitioned the court for declaratory relief. The court, however, accepted the insurer's argument and stated:

[The insured's rental] policy was not framed in facially neutral terms, such as refusing to rent to persons who presented safety or noise concerns. Instead, the [rental] policy was applied, without distinctions for individual circumstances, to all persons falling within a statutorily protected class. That is the essence of "disparate treatment" discrimination. Because public policy precludes insurance coverage of such discrimination, defendant cannot be liable for failing to defend or indemnify plaintiffs against [the insured's] claims.⁶⁹

To further appreciate the confusion over whether insurers must defend and/or indemnify discriminatory conduct by insureds, one need only examine what is happening in California. First, in *City of Moorpark v. Superior Court*, the California Supreme Court reaffirmed that public policy, as outlined in the California Fair Employment and Housing Act,⁷⁰ prohibits all forms of impermissible discrimination.⁷¹ But the supreme court also stated correctly that "'public policy' as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care. . . ."⁷² However, the supreme court has done little to discourage lower courts from considering public policy when deciding whether insurers must defend or indemnify alleged civil rights violators.

As a result of the confusing signals from the state's highest court, some lower courts in California cite the state's policy against all forms of irrational discrimination and harassment and order insurers to defend and/or indemnify insureds only when third-party victims fall into a certain protected category.⁷³ Other courts cite that same public policy and reach the

67. *Id.* at 1286 ("The discriminatory actions of the defendants were intentional, willful, and taken in disregard for the rights of Mary Sifuentes.' . . . The policy, on its face, applies only to the class the law is designed to protect: people with children who need housing. In that regard, plaintiffs' policy is no different than a policy of refusing to rent to women or Jews or Native Americans. By adopting and enforcing the policy, plaintiffs engaged in intentional discrimination.").

68. *Id.* at 1284.

69. *Id.* at 1287.

70. CAL. GOV. CODE §§ 12940 *et seq.* Hereinafter FEHA.

71. *City of Moorpark v. Superior Court*, 77 Cal. Rptr. 2d 445, 452 (Cal. 1998) ("In *Gantt*, we reaffirmed *Shoemaker* and . . . concluded that 'the . . . compensation bargain' cannot encompass conduct, such as sexual or racial discrimination, 'obnoxious to the interests of the state and contrary to public policy and sound morality.'").

72. *Id.* at 455.

73. *See, e.g., Melugin v. Zurich Canada*, 57 Cal. Rptr. 781, 788 (Cal. Ct. App. 1996) (disregarding the antidiscrimination public policy—outlined in the California FEHA—which

opposite finding, when a third-party victim falls into a different protected group.⁷⁴ If either Morgan Stanley or its liability insurer were to petition a California court for declaratory relief in the matter surrounding the defense of the Christian Curry case, predicting the outcome would be difficult. This uncertainty is consequential: a consistent public policy against impermissible discrimination should not produce unpredictable declaratory results if public confidence in the judiciary is to be maintained.

What causes these intra- and interjurisdictional splits? Do the types of insurance contracts, whether liability or indemnity policies, cause these conflicting declarations? Does the geographic location of the jurisdictions cause the split? How much of a factor is the third-party victim's ethnicity, gender, religion, marital status, age, or familial status? As previously mentioned, preliminary findings show that certain extralegal factors do play a role. The next question is whether they should. This article addresses these and other questions about the efficacy of using the declaratory judgment action to decide whether insurers must defend or indemnify insureds that allegedly violated state and federal civil rights and constitutional provisions that prohibit irrational discrimination.

Part II of this article presents a brief discussion of state and federal declaratory judgment statutes and of the public policy behind liability and indemnification insurance contracts. Part III examines the origin and scope of insurers' duty to defend, duty to pay legal expenses, and duty to reimburse litigation costs when third-party victims sue policyholders. Courts

discourages intentional discrimination and ordering the commercial general liability insurer to defend the insured employer, who allegedly intentionally sexually harassed and discriminated against a pregnant, white female employee); *Paperplains, Inc. v. Atlantic Mutual Ins. Co.*, 67 F.3d 308, 1995 WL 574650, *2 (9th Cir. Sept. 28, 1995) (unpublished) (ignoring FEHA's antidiscrimination public policy—which discourages intentional discrimination—and ordering the liability insurer to defend the employer, who allegedly intentionally sexually harassed and discriminated against a white female employee); *Republic Indemnity Co. v. Superior Court of Los Angeles*, 273 Cal. Rptr. 331, 334 n.1, and 336 (Cal. Ct. App. 1990) (ignoring FEHA's antidiscrimination public policy and ordering the liability insurer to defend the employer, who allegedly intentionally discriminated against a white male employee and cancer victim).

74. See, e.g., *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal. App. 4th 1595, 1602–14 (1993) (citing FEHA's antidiscrimination public policy, which discourages intentional discrimination, and refusing to order the liability insurer to defend the employer, who allegedly intentionally sexually harassed and discriminated against a white female employee); *Lipson v. Jordache Enterprises, Inc.*, 9 Cal. App. 4th 151, 154, 158–61 (1992) (citing FEHA's antidiscrimination public policy, which discourages intentional discrimination, and refusing to order the liability insurer to defend the employer, who allegedly intentionally harassed and discriminated against a white male employee); *B&E Convalescent Center v. State Compensation Ins. Fund*, 8 Cal. App. 4th 78, 85, 97–99 (1992) (citing FEHA's antidiscrimination public policy, which discourages intentional discrimination, and refusing to order the liability insurer to defend the employer, who allegedly intentionally discriminated against “a woman over sixty years of age and of English national origin and [who] was replaced by a man, younger than she and of Filipino descent”).

use a variety of legal doctrines to help decide whether declaratory relief should be awarded. Part IV outlines those legal principles and argues that extralegal variables are significantly more likely than state and federal legal doctrines to influence whether courts order insurers to defend alleged civil rights violators. More specifically, Part IV reports that courts are hopelessly split over whether a legal defense or indemnification is warranted when the allegation concerns “disparate treatment” and “disparate impact” discrimination.

Parts V through VIII discuss whether insurers must defend or indemnify the costs of defending specific types of discriminatory conduct. For instance, Part V highlights the intra- and interjurisdictional conflicts over whether insurers must defend or indemnify the cost of defending suits involving housing discrimination. As that discussion shows, types of occupants, whether current or prospective tenants, unexpectedly shape whether courts award declaratory relief to insureds or to insurers. Parts VI, VII, and VIII present analyses of the intra- and interjurisdictional conflicts over whether insurance companies must defend and/or pay legal expenses associated with gender-based discrimination, sexual harassment, and racial harassment suits, respectively. In Parts VI, VII, and VIII, it is demonstrated that insureds and insurers are more likely to receive favorable declarations depending on whether courts categorize the alleged discrimination in the underlying suit as “disparate treatment” or “disparate impact.”

Finally, Part IX presents an empirical investigation of duty-to-defend and duty-to-indemnify declaratory judgments in state and federal courts between the years 1900 and 2000. The reported findings give credence to the argument that these tribunals are significantly more likely to award declaratory relief depending upon whether the insureds discriminated against ethnic minorities or whites, women or men, and upon whether the insured is alleged to have practiced sexual or racial harassment. In this author’s view, courts permit nonlegal factors to influence when and to whom they will award declaratory relief. Stated differently, the reported data suggest that judges’ subtle biases and notions about who should receive the financial benefits flowing from liability coverage lead to highly conflicting, convoluted, and unfair declarations.

The article concludes therefore by encouraging alleged civil rights violators to ponder the merit of petitioning federal and state courts to determine whether third-party insurers must defend and/or indemnify the costs associated with defending various discrimination lawsuits. Instead, insureds and their third-party accusers should try to settle or mediate the conflict. They also should ask state legislatures to amend their insurance codes to provide that when a third-party complainant accuses an insured of practicing any form of irrational discrimination or of violating any federal or

state antidiscrimination statute, the insured's liability company must mediate or settle the claim, or provide a legal defense for the insured, in a timely manner. If the insured provides its own legal defense, the insurer should be required to indemnify in a timely fashion the costs of defending the actions and all settlement costs. Neither the insured nor the insured's liability carrier should commence a declaratory judgment action in federal and state courts to determine whether an insurance carrier has either a duty to defend or a duty to indemnify.

II. SYNOPSIS OF FEDERAL AND STATE DECLARATORY JUDGMENT STATUTES

There is significant case law and legal commentary about the Uniform Declaratory Judgments Act of 1922,⁷⁵ the Federal Declaratory Judgments Act of 1934,⁷⁶ and the stated purposes of each Act. The author recently reviewed both Acts and highlighted their stated goals,⁷⁷ and another elaborate exposition of these statutes will not appear here. Instead, this section outlines the most salient features of each Act.

During the early part of the twentieth century, the American Bar Association and the National Conference of Commissioner on Uniform State Laws proposed a model for judges to follow when deciding declaratory judgment actions. The Uniform Declaratory Judgments Act of 1922 gives state courts "power to declare rights, status, and other legal relations."⁷⁸ To achieve those specific ends, courts must interpret and construe the Act to effectuate its general purpose: "[To] make uniform the law of those [s]tates which enact [the Act] . . . and to harmonize [state and] . . . federal laws and regulations on the subject of declaratory judgments and decrees."⁷⁹ Most states have either enacted the entire Act or implemented close variations.⁸⁰

The Uniform Declaratory Judgments Act states in relevant part:

Any person interested under a . . . written contract or other writings constituting a contract, or whose rights . . . are affected by a . . . contract, . . . may [ask a trial judge to determine] any question of construction or validity arising

75. See UNIF. DECLARATORY JUDGMENTS ACT, 12-12A U.L.A. 309 (1998). See also the extensive list of law review and journal commentaries appearing at the end of § 1.

76. See 28 U.S.C. § 2201 (1994) and the extensive list of texts, treatises, law reviews, and law journals in which this Act is discussed.

77. See Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: An Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900–1997*, 47 AM. U. L. REV. 1131, 1142–45 nn.55–72 (1998).

78. *Id.*; UNIF. DECLARATORY JUDGMENTS ACT § 1, *supra* note 75.

79. *Id.* § 15.

80. See Rice, *supra* note 77, at 1145 nn.59–60.

under the . . . contract . . . and obtain a declaration of rights, status or other legal relations. . . .⁸¹

Judges may refuse to award declaratory relief if they think that such relief “would not terminate the uncertainty or controversy giving rise to the proceeding.”⁸² The decision is subject to review under the abuse-of-discretion standard.⁸³ If declaratory relief is likely to affect any interested parties, those persons must be parties to the action, and “no declaration shall prejudice the rights of persons not parties to the proceedings.”⁸⁴ For example, if an insurer obtains declaratory relief against its insured, the judgment is not binding on a third-party claimant who was not party to the declaratory judgment action.⁸⁵

Under the Federal Declaratory Judgments Act of 1934, the authority of a federal judge is specific:

In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.⁸⁶

The federal act vests federal courts with much authority and discretion to award declaratory relief.⁸⁷ Additionally, federal district judges may not permit their personal biases, idiosyncrasies, or another court’s ruling to influence whether they will entertain an action for declaratory relief.⁸⁸

81. *Id.*; UNIF. DECLARATORY JUDGMENTS ACT § 2, *supra* note 75.

82. *Id.* § 6.

83. *See, e.g.*, *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985) (“The grant or denial of attorney’s fees in a declaratory judgment action lies within the sound discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing that it abused that discretion.”); *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 286 (Cal. 1985) (“The award of declaratory or injunctive relief is entrusted to the sound discretion of the trial court and will not be disturbed absent a clear abuse of that discretion.”).

84. UNIF. DECLARATORY JUDGMENTS ACT § 11, *supra* note 75.

85. *See, e.g.*, *Independent Fire Ins. Co. v. Paulekas*, 633 So. 2d, 1111, 1113 (Fla. Dist. Ct. App. 1994).

86. 28 U.S.C. § 2201 (1999).

87. *See, e.g.*, *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (“It is well established in this circuit that a court need not provide declaratory judgment relief on request, as this is a matter left to the district court’s sound discretion.”).

88. *See, e.g.*, *Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981) (“In the exercise of their sound discretion to entertain declaratory actions the district courts may not decline on the basis of whim or personal disinclination; but they may take into consideration the speculativeness of the situation before them and the adequacy of the record for the determination they are called upon to make, as well as other factors, such as whether there is a pending procedure in state court in which the matters in controversy between the parties may be fully litigated.”). *See also* *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1217 (7th Cir. 1980) (concluding that a court of appeals, in deciding whether jurisdiction should be taken in a declaratory action, does not defer to the judgment of the district court, but must exercise its own sound discretion).

However, once judges decide to hear an action, they may weigh a number of factors before deciding to award or deny declaratory relief. For example, when a judge attempts to declare rights and obligations under an insurance contract, a declaration will depend upon: (1) whether the declaratory relief will delay the resolution of the underlying third-party action; (2) whether the insured or insurer filed the declaratory judgment action in good faith or in a timely manner; and (3) whether the insurer filed the action for declaratory relief only as an attempt to preempt the resolution of a coverage issue in the underlying liability suit.⁸⁹ Some additional influences are: "(1) the likelihood that the declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in a settlement of the uncertainty of obligation; and (4) the availability and relative convenience of other remedies."⁹⁰

"There is a prevailing view among jurists and practitioners that a declaratory judgment action is an efficient, effective, and equitable method of helping litigants determine legal relations, rights, and obligations, especially under liability insurance contracts."⁹¹ Unfortunately, this universal view still persists without serious challenge or analysis. Although federal and state court declarations may be speedy, efficient, and effective,⁹² declaratory judgments as an aggregate are often unjust or unfair.

Declaratory judgments should be equitable. Courts may consider a number of factors to help decide whether to award declaratory relief but "[t]he

89. See *Travelers Indemnity Co. v. McKin Co.*, 884 F.2d 629, 640-41 (1st Cir. 1989).

90. See *Terra Nova Ins. Co. Ltd. v. 900 Bar Inc.*, 887 F.2d 1213, 1224 (3d Cir. 1989). See also *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942) (U.S. Supreme Court presented several additional factors to guide district courts in the exercise of their discretion under the Act: "A district court . . . should ascertain whether the questions in controversy between the parties . . . can better be settled in the proceeding pending in state court. This may entail inquiry into the scope of the proceeding pending in the state court and the nature of the defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether such parties are amenable to process in that proceeding, etc.").

91. See Rice, *supra* note 77, at 1140 nn.51-53 and accompanying text.

92. See, e.g., Andrea Hungerford, "Custom and Culture" Ordinances: Not a Wise Move for the Wise Use Movement, 8 TULSA ENVTL. L.J. 457, 498 (1995) (arguing that a "declaratory judgment is the quickest, most efficient way to strike [an] ordinance off the books"); Terrence L. Shen, *Tax Consequences for a Tax-Driven Plan of Reorganization under Section 1129(D) of the Bankruptcy Code and Section 269 of the Internal Revenue Code*, 1994 COLUM. BUS. L. REV. 267, 284 ("Congress intended the declaratory judgment to be a quick and [an] effective way to enable parties to eliminate uncertainties in their legal and business relations. . . ."); Lawrence M. Sung, *Intellectual Property Protection or Protectionism? Declaratory Judgment Use by Patent Owners Against Prospective Infringers*, 42 AM. U. L. REV. 239, 249-50 (1992) ("The general purpose of the declaratory judgment is to promote the efficient resolution of disputes. . . . In cases in which a wronged party has not yet sued for relief, declaratory judgment . . . facilitates early adjudication of rights and obligations."); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1675 (1970) (adopting the view that "the declaratory judgment [is] a recognized effective remedy. . . .").

determinative factor [must be] whether the declaratory action will . . . result in a just . . . determination of the entire controversy."⁹³ Trial judges must balance efficiency, the individual interests of litigants, and fairness before deciding whether to award declaratory relief.⁹⁴ Nevertheless, these guidelines are often ignored, especially in actions involving insurance-related matters.⁹⁵

Therefore, we ask again: If unfair or unjust (although speedy and efficient) declarations are likely, is it wise to encourage litigants to petition courts for declaratory relief? In the author's view, the answer is no.

III. AN OVERVIEW OF LIABILITY AND INDEMNITY INSURANCE CONTRACTS

Both liability and indemnity policies are called third-party insurance because consumers purchase such contracts for the ultimate benefit of third-party victims or complainants.⁹⁶ However, the contractual rights and ob-

93. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 100, at 716 (1994). See also *Union Federal Savings Bank v. Chantilly Farms, Inc.*, 556 N.E.2d 9, 11 (Ind. Ct. App. 1990) ("The Declaratory Judgments Act was not intended to reward the winner of a race to the courthouse. Rather, declaratory judgment actions should be allowed only if they 'result in a just and more expeditious and economical determination of the entire controversy.'"); *Volkswagenwerk, A.G. v. Watson*, 390 N.E.2d 1082, 1085 (Ind. Ct. App. 1979) ("In determining the propriety of declaratory relief, the test to be applied is whether the issuance of a declaratory judgment will effectively solve the problem, whether it will serve a useful purpose, and whether . . . another remedy is more effective or efficient. . . . Thus a court may refuse to entertain an action for a declaratory judgment where the relief sought would not terminate the controversy between the parties. . . . The determinative factor is whether the declaratory action will result in a just and more expeditious and economical determination of the entire controversy. . . .").

94. Cf. *Riva v. Massachusetts*, 61 F.3d 1003, 1012 (1st Cir. 1995) ("Though the declaratory judgment context may serve to relax a federal court's storied obligation to exercise the jurisdiction given to it by Congress, . . . the decision not to exercise jurisdiction must still be based on a careful balancing of efficiency, fairness, and the interests of both the public and the litigants."); *Tri-share Investment Corp. v. Township of Oak Grove*, 1993 WL 183757, at *2 (Minn. Ct. App. July 15, 1993) ("When a party challenges a city's action in denying a permit in a declaratory judgment action, the district court must establish the scope and conduct of its review by considering 'the nature, fairness and adequacy of the proceeding at the local level and the adequacy of the factual and decisional record of the local proceeding.' . . . Where the proceeding has not been fair . . . , the parties are entitled to a trial. . . .").

95. Cf. *American States Ins. Co. v. Tahoe Boat Co.*, 15 F.3d 142, 144 (9th Cir. 1994) ("The Supreme Court, [*Brillhart*, 316 U.S. at 491], has provided guidance for the exercise of the district court's discretionary decision whether to entertain declaratory relief. . . . Essentially, the district court 'must balance concerns of judicial administration, comity, and fairness to the litigants,' " quoting *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991); *Allstate Ins. Co. v. Dixon*, 1991 WL 79549, at *3 (Tenn. Ct. App. May 17, 1991) ("[T]he trial court is afforded very wide discretion in determining whether to render a declaratory judgment. We will not disturb the trial court's determination unless the trial court's refusal was arbitrary. . . . A primary factor in determining whether to grant a declaratory judgment is whether such judgment would result in a just and more expeditious and economical determination of the controversy.").

96. See, e.g., *In the Matter of the Estate of Martin Cohen*, No. 1996 WL 264651, at *2 (Del. Ch. 1996) ("A contract of insurance is a third-party beneficiary contract, that is, a contract between the contracting parties for the benefit of a third-party who does not par-

litigations of insurers under liability and indemnity contracts are quite different. Typically, a liability policy contains a right-to-settle⁹⁷ and a duty-to-defend clause.⁹⁸ Certainly, from an insured's point of view, the duty-to-defend clause is the most important provision. After a third-party victim files, for example, a civil rights complaint or lawsuit against the insured, the policy's notice-of-claim⁹⁹ provision requires the insured to communicate all material information about the underlying claim to the liability carrier in a timely manner.¹⁰⁰ The duty-to-defend clause, however, requires

participate in the making of the contract and who assumes no obligations under the contract.”); *Southern Guaranty Ins. Co. v. Preferred Risk Mut. Ins. Co.*, 359 S.E.2d 665 (Ga. 1987) (stressing that compulsory liability insurance coverage is required not only for the benefit of the insured, but also to ensure compensation for innocent victims of negligent motorists); *Flattery v. Gregory*, 489 N.E.2d 1257, 1260–61 (Mass. 1986) (holding that injured highway travelers are third-party beneficiaries of automobile liability insurance); *Shingleton v. Bussey*, 223 So. 2d 713, 715 (Fla. 1969) (concluding that a direct cause of action inures to a third party beneficiary against insurer in motor vehicle liability insurance coverage as matter of public policy); *Evans v. Grange Mut. Cas. Co.*, 230 N.E.2d 751, 753 (Ohio 1964) (ruling that a liability insurance policy is actually a contract for the direct benefit of the aggrieved third party as well as for the protection of the negligent party).

97. See, e.g., *Commerce & Industry Ins. Co. v. North Shore Towers Management Inc.*, 162 Misc. 2d 778, 784, 617 N.Y.S.2d 632, 637 (NYC Civil Ct. 1994). The pertinent language of the policy is as follows:

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily” injury or “property damage” to which this insurance applies. No other obligation or liability SUPPLEMENTARY PAYMENTS—COVERAGES A AND B. . . . We will have the right and duty to defend any “suit” seeking those damages. But (1) The amount we will pay for damages is limited as described in SECTION III—LIMITS OF INSURANCE; (2) We may investigate and settle any claim or “suit” at our discretion.

98. See *Bradley Corp. v. Zurich Ins. Co.*, 984 F. Supp. 1193, 1199 (E.D. Wis. 1997) (“The parties point to only one area of policy language that would bring the [third-party] complaint within the policy’s coverage: ‘We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal injury” or “advertising injury” to which this coverage part applies. We will have the right and duty to defend any “suit” seeking those damages. . . .’”).

99. See, e.g., *Shaheen, Cappiello, Stein & Gordon, P.A. v. Home Ins. Co.*, 719 A.2d 562, 565 (N.H. 1998) (“The notice provision in [the] policy provides:

“Condition VII. Notice of Claim or Suit:

Upon the Insured becoming aware of any act or omission which would reasonably be expected to be the basis of a claim or suit covered hereby, written notice shall be given by or on behalf of the insured to the Company or any of its authorized agents as soon as practicable, together with the fullest information obtainable. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representatives.”).

100. See *Aetna Cas. & Sur. Co. v. Allsteel, Inc.*, 709 N.E.2d 680, 685 (Ill. App. Ct. 1999) (“A notice requirement in an insurance policy enables an insurer to make a timely and thorough investigation of a claim. . . . Notice provisions in insurance policies are considered valid conditions precedent to coverage and not mere technical requirements.”).

the carrier to perform some specific activities if it decides not to settle the case.

Among other obligations, a liability carrier typically must thoroughly investigate the case; hire competent legal counsel¹⁰¹ to represent and defend the insured's interests; stay abreast of administrative hearings and/or the trial; hire experts and other professionals to help protect the insured's interests; pay court and administrative costs, routine bills, and legal expenses as they occur; and abstain from engaging in any activity that would critically undermine or destroy the insured's interest.¹⁰² Essentially, the duty-to-defend clause forces the liability insurer to take complete control of the case and provide a good-faith defense to its insured.¹⁰³

If the insurer thinks that the contract does not cover or excludes the third-party claim, the insurer must report the same to the insured in a reservation-of-rights letter.¹⁰⁴ Afterward, the liability carrier can sue for declaratory relief. But the liability insurer, assuming that a duty to defend is included in the coverage, must still assemble, monitor, and pay for a competent legal defense.¹⁰⁵

Under an indemnity insurance contract, the insurer has fewer responsibilities.¹⁰⁶ Since the contract has no duty-to-defend clause, the indemnity insurer does not have to provide an extensive and expensive array of services and legal experts from the beginning to the conclusion of the third-party action.¹⁰⁷ The indemnity contract, however, does contain a duty-to-pay

101. To review a discussion of attorneys' contractual duties and fiduciary obligations, see Rice, *supra* note 77, at 1158 nn.143-46 and accompanying text.

102. See *id.* at 1157 nn.133-38 and accompanying text.

103. *Id.* at 1157 nn.131-32 and accompanying text.

104. See *Transportation Ins. Co. v. Heiman*, 1999 Tex. App. LEXIS 3083 (Tex. App. Dallas Apr. 26, 1999) (unpublished) ("An insurer who 'wrongfully refuses to defend' an insured is precluded from (1) insisting on compliance with certain policy conditions, and (2) collaterally attacking the reasonableness of an agreed judgment entered into between an insured and a third-party. . . . For this type of 'waiver' to occur, however, the insurer's refusal to defend must be erroneous. . . . An insurer faced with the dilemma of whether to defend a proffered claim has four options: (1) completely decline to assume the insured's defense; (2) seek a declaratory judgment as to its obligations and rights; (3) defend under a reservation of rights or a nonwaiver agreement; or (4) assume the insured's unqualified defense. . . . When an insurer assumes an insured's defense without obtaining a reservation of rights or nonwaiver agreement and with knowledge of facts indicating noncoverage, all policy defenses, including those of noncoverage, are waived and the insurer may be estopped from raising them.")

105. *Id.*

106. See, e.g., *Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 545 N.E.2d 1156 (Mass. 1989) ("[A]n insurance company's duty to defend is broader than its duty to indemnify. An insurer must indemnify its insured when a judgment within its policy coverage is rendered against the insured. The duty to defend, however, is antecedent to, and independent of, the duty to indemnify.")

107. See, e.g., *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.*, 12 Cal. App. 4th 501, 539 (Cal. Ct. App. 1993) ("Aside [from] technical distinctions between liability policies and indemnity policies, it is clear enough that the D & O policy in this case differed from an orthodox liability insurance policy at least in that it imposed on National Union not

clause.¹⁰⁸ From the insured's perspective, the duty-to-pay, the duty-to-reimburse, or the duty-to-indemnify clause is the most essential provision appearing in an indemnity policy. Typically, the insured provides the legal defense and pays the costs associated with defending a third-party action. The policyholder is later reimbursed for its legal expenses by the indemnity carrier.

If the indemnity contract covers the third-party claim and the insured provides a legal defense, the indemnity insurer must pay covered litigation

a duty to defend Toreson and Hoebich but only a duty to pay for their defense. National Union's practice, consistent with the policy language and with industry practice, was to permit the insured to select counsel and to control the defense.")

108. *See, e.g., Little v. Magic Indemnity Corp.*, 836 F.2d 789, 792-93 (3d Cir. 1987). The following are likely to appear in most indemnity policies:

[T]he Insurer agrees: (A) With the Directors and Officers of the Association that if, during the policy period, any claim or claims are made against the Directors and Officers, individually or collectively, for a Wrongful Act, the Insurer will pay, in accordance with the terms of this policy, on behalf of the Directors and Officers or any of them, their heirs, legal representatives or assigns all Loss which the Directors and Officers or any of them shall become legally obligated to pay.

.....
SECTION 1—DEFINITIONS

.....
(D) The term "Loss" shall mean any amount which the Directors and Officers are legally obligated to pay . . . for a claim or claims made against the Directors and Officers for Wrongful Acts and shall include but not be limited to damages, judgments, settlements, costs (exclusive of salaries of officers or employees), and defense of legal actions, claims or proceedings and appeals therefrom and cost of attachment or similar bonds. . . .

.....
SECTION 3—EXCLUSIONS

(A) [T]he Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers:

.....
(5) brought about or contributed to by the dishonesty of the Directors or Officers. However, notwithstanding the foregoing, the Directors and Officers shall be protected under the terms of this policy as to any claims upon which suit might be brought against them, by reason of any alleged dishonesty on the part of the Directors or Officers, unless a judgment or other final adjudication thereof adverse to the Directors or Officers shall establish that acts of active and deliberate dishonesty committed by the Directors or Officers with actual dishonest purpose and intent were material to the cause of action so adjudicated.

.....
SECTION 5—COSTS, CHARGES AND EXPENSES

(A) No costs, charges and expenses shall be incurred or settlements made without the Insurer's consent which consent shall not be unreasonably withheld; however, in the event such consent is given, the Insurer shall pay . . . such costs, charges and expenses.

.....
(C) The Insurer may at its option and upon request, advance on behalf of the Directors or Officers, or any of them, expenses which they have incurred in connection with claims made against them, prior to disposition of such claims, provided always that in the event it is finally established that Insurer has no liability hereunder, such Directors and Officers agree to repay to the Insurer, upon demand, all monies advanced by virtue of this provision.

costs once the insured submits an itemized list of expenses.¹⁰⁹ Conversely, if the insurer thinks that the indemnity contract excludes the claim or that the insured breached a condition or warranty under the policy, the insurer must still pay the costs of defending the underlying suit and send a reservation-of-rights letter to the insured. That letter must clearly outline the insurer's disagreements and contractual rights.¹¹⁰ Later, the indemnity carrier, like a liability insurer, may file a declaratory judgment action in federal or state court, asking for a favorable declaration.

The duty-to-pay provision has generated as much litigation as the duty-to-defend clause.¹¹¹ Disputes may arise over reimbursement for the costs of settlement or damages, or about when the company must reimburse funds spent defending third-party suits,¹¹² or about a refusal to reimburse when certain types of persons are third-party victims. As discussed in later sections of this article, both state and federal courts are divided over whether indemnity companies must reimburse insureds when insureds are accused of race, sex, age, and other forms of irrational discrimination.

IV. STATE AND FEDERAL JUDICIAL DOCTRINES AND THEIR INFLUENCE ON WHETHER COURTS AWARD DECLARATORY RELIEF TO INSURED OR INSURERS UNDER LIABILITY AND INDEMNITY CONTRACTS

A. *The Use of State Court Principles to Determine Whether Insurers Have a Duty to Defend or to Indemnify*

Insureds and insurers are likely to ask courts to employ one of the following principles to determine rights and duties: (1) traditional rules of contract construction;¹¹³ (2) the doctrine of plain meaning;¹¹⁴ (3) contra profere-

109. *See id.*

110. *See, e.g., Michaelian*, 58 Cal. Rptr. 2d at 143 (“[T]he insurer can avoid being bound by the judgment against the insured if it secures a nonwaiver agreement from the insured or makes an adequate reservation of rights.”); *Getty Oil Co. v. Catalytic, Inc.*, 472 A.2d 33, 36 (Super. Del. 1983) (“Catalytic contends that the language of the indemnity clause is not clear, does not affirmatively obligate Catalytic to indemnify Getty for Getty’s own negligence, and, therefore, should be declared unenforceable. In *Marshall v. Maryland, D. & V. Ry. Co.*, 112 A. 526 (Del. Super. Ct. 1921), it was recognized that indemnity agreements, which provide that the indemnitee will be held harmless for the consequences of his own negligence, are enforceable. Such indemnity agreements, however, must be unmistakably clear.”).

111. *See Rice, supra* note 77, at 1159–62 nn.47–62 and accompanying text.

112. *Id.*

113. *See, e.g., Thompson v. Continental Ins. Co.*, 351 S.E.2d 904 (S.C. Ct. App. 1986) (an insurance policy is simply a contract between the insurer and the insured; therefore, it is subject to general rules of contract construction); *Yarborough v. Phoenix Mut. Life Ins. Co.*, 225 S.E.2d 344, 348–49 (S.C. 1976) (the “contract must be read as a whole, giving appropriate weight to all provisions”).

114. *See, e.g., Dora Township v. Indiana Ins. Co.*, 400 N.E.2d 921 (Ill. App. Ct. 1980) (“An insurance policy [must] be read as any other contract, that is, according to the plain and

tem;¹¹⁵ (4) the doctrine of adhesion;¹¹⁶ and (5) the doctrine of reasonable expectation.¹¹⁷ Courts may use one or a combination of these doctrines to resolve a single controversy under an insurance contract.

But how do these principles compare, as influencing factors, with the public policy that discourages any form of irrational discrimination? That public policy would hold that courts' declaratory rulings should never sanction or reinforce impermissible discrimination. In theory, we should never expect to find courts ordering insurers to defend or reimburse expenses associated with any third-party discrimination suit, regardless of the legal doctrine employed. Of course, these outcomes never appear in practice. Some courts simply ignore the public policy against discriminatory conduct, apply a particular doctrine, and force insurers to defend or indemnify.

For example, California public policy forbids all forms of irrational discrimination¹¹⁸ and implicitly encourages all branches of state government

ordinary meaning of its terms. In order to ascertain the intent of the parties, the court should not examine the policy in a vacuum but should look to the circumstance surrounding the issuance of the policy, such as the situation of the parties and the purpose for which the policy was obtained.").

115. See *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947) ("[T]he canon *contra proferentum* [sic] is more rigorously applied in insurance than in other contracts, in recognition of the difference between the parties in their acquaintance with the subject matter. . . . Insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion."); *Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398, 400 (Del. Super. Ct. 1978) (concluding that to the extent that ambiguity does exist, "the doctrine of *contra proferentum* [sic] requires that the language of an insurance contract be construed most strongly against the insurance company that drafted it").

116. See, e.g., *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of New York*, 528 A.2d 76, 80 (N.J. Super. Ct. App. Div. 1987) ("[O]ur Supreme Court has stated that while insurance policies are contractual in nature, they are not ordinary agreements but 'contracts of adhesion between parties who are not equally situated.' It has been said that '[c]ourts apply the adhesion doctrine because of the unequal bargaining power of the parties.' Insurance contracts have thus been described as 'unipartite in character.' Such contracts 'are prepared by the company's experts, [people] learned in the law of insurance,' and therefore it is not unfair that the insurer 'bear the burden of any resulting confusion.' These circumstances long ago fathered the principle that doubts as to the existence or extent of coverage must generally be resolved in favor of the insured.").

117. See, e.g., *St. Paul Mercury Ins. Co. v. Corbett*, 630 A.2d 28, 30 (Pa. Super. Ct. 1993) ("This court has held that the proper focus regarding issues of coverage under insurance contracts is the reasonable expectations of the insured. In determining the reasonable expectations of the insured, courts must examine the totality of the insurance transaction involved. However, while reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous. Like every other contract, the goal of interpreting an insurance contract is to ascertain the intent of the parties.").

118. See, e.g., CAL. GOV. CODE § 12920 (West 1999) ("It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age. . . . Further, the practice of discrim-

to help eradicate such conduct. However, in *City of Pomona v. Employers' Surplus Lines Ins. Co.*,¹¹⁹ the court ignored public policy concerns altogether. In *Pomona*, Hispanic and African-American voters accused the city of practicing racial discrimination.¹²⁰ The city asked its insurers to reimburse litigation expenses and money spent to pay damages. The insurers refused, stressing that the liability contract unambiguously excluded "damages."¹²¹ The City of Pomona, however, argued that the term was unclear; therefore, "it must be construed against the insurers in favor of coverage."¹²² The California Court of Appeal for the Second District adopted Pomona's contra proferentem argument and ordered the insurers to reimburse the city.¹²³

Four years later, the California Court of Appeal for the First District reached a different conclusion in *Moore v. Continental Insurance Co.*¹²⁴ Citing California's public policy against discrimination and sexual harassment, a female employee, in the underlying civil rights action, sued her former employer. The employer notified its insurer and asked for a legal defense. The insurer refused, arguing that the employee's claims involved "wilful" sexual harassment and employment discrimination. From the insurer's perspective, the state's public policy against discrimination, as restated in the California Insurance Code, prevented coverage for any allegedly "wilful" or intentional discriminatory acts.¹²⁵

The court cited the doctrine of contra proferentem, stating that claims in an underlying suit must be "liberally construed in favor of potential

ination because of race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability in housing accommodations is declared to be against public policy. It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices. This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state."

119. 5 Cal. Rptr. 2d 910 (Cal. Ct. App. 1992).

120. *City of Pomona*, 5 Cal. Rptr. 2d at 912 ("The [third-party complainants] alleged that [Pomona's] existing at large . . . system of electing members of the city council violated their civil rights [and] that the method unconstitutionally diluted the voting strengths of Hispanic and [African-American] voters . . . [in violation of] Section 2 of the Voting Rights Act of 1965, as amended, . . . the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.")

121. *Id.* at 918 ("Somewhat more complex is the question of whether the complaint encompassed 'damages' within the meaning of the policies. . . . Defendants . . . argue that the attorneys' fees are not 'damages' within the meaning of their policies nor can they ever be 'damages' where the complaint seeks only equitable relief.")

122. *Id.* at 918.

123. *Id.* at 925 ("The insurers did not prove as a matter of law that the term 'damages' as used in the policies unambiguously excluded coverage for the claims in the underlying action.")

124. 51 Cal. Rptr. 2d 176 (Cal. Ct. App. 1996).

125. *Moore*, 51 Cal. Rptr. 2d at 178 ("Insurance Code section 533, which states that an insurer is not liable for 'the wilful act of the insured' and which is an implied exclusionary clause in all policies, precludes coverage. . . . This rule has been persuasively interpreted to preclude coverage for claims of sexual harassment . . . and tortious termination of employment in violation of public policy. . . .")

coverage."¹²⁶ Instead of construing the ambiguity about coverage and "wilful" discrimination in favor of the insured, the court declared that the insurer had no duty to defend. According to the court, "nothing in [California's] strong public policies against sexual harassment and . . . employment termination suggests that coverage should be available in cases where unlawful harassment and discrimination have created working conditions which are intolerable to any reasonable employee."¹²⁷

Such inconsistency is not limited to declarations appearing in California. Highly incongruous rulings have also appeared in Texas. For instance, in *Canutillo Independent School District v. National Union Fire Ins. Co.*,¹²⁸ the insurer refused to reimburse school officials who had settled a Title IX gender discrimination suit.¹²⁹ The insurer maintained that the school's errors and omissions policy excluded "any claim arising out of bodily injury to . . . any person." The insured insisted that its allegedly discriminatory conduct did fall under this heading, or, in the alternative, that the clause was unclear.

The U.S. District Court for the Western District of Texas used the doctrine of *contra proferentem*, stating that "[a]ny intent to exclude coverage must be expressed in clear and unambiguous language. . . . Exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured."¹³⁰ Without even mentioning the state's public policy against encouraging gender discrimination,¹³¹ the court ordered the insurer to reimburse the school district. The court declared that the Title IX gender discrimination claim "arises out of the inactions of Canutillo[;] thus the exclusion does not apply."¹³²

Conversely, the U.S. District Court for the Northern District of Texas made a decidedly different ruling in *Old Republic Insurance Co. v. Comprehensive Health Care Associates, Inc.*¹³³ In *Comprehensive Health Care*, the insurer did not defend an employer against a third-party sexual harassment suit.¹³⁴ After the third party's success at trial, the insurer refused to reim-

126. *Id.* at 179.

127. *Id.* at 184.

128. 900 F. Supp. 844 (W.D. Tex. 1995).

129. See Education Amendment of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688 (1997). See also *Canutillo*, 900 F. Supp. at 847 ("Title IX forbids schools receiving federal funds from discriminating against a student on the basis of gender. . . . Only the conduct of the school board itself can give rise to Title IX liability. . . . [In this case], the suit allege[d] that Canutillo made an error or omission by failing to comply with Title IX.")

130. *Id.* at 846.

131. See, e.g., TEXAS CONST. art. 1, § 3 (Vernon's Ann.): "Equal rights: All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

132. *Canutillo*, 900 F. Supp. at 848.

133. 786 F. Supp. 629 (N.D. Tex. 1992).

134. *Comprehensive Health Care*, 786 F. Supp. at 630-31 ("[The] declaratory judgment

burse the employer for court costs, damages, and attorneys' fees. According to the insurer, sexual harassment is an intentional act; therefore, it was not an insurable "occurrence" under the liability contract. But the insured correctly argued that the policy only excluded "(1) bodily injury in the course of employment, (2) sexual abuse, (3) claims arising from the employment relationship[,] and (4) employment discrimination."¹³⁵ The insured argued, therefore, that the insurer had a duty to defend and pay.

Although observing that "[a]n ambiguous policy . . . must be construed in favor of the insured and permits recovery,"¹³⁶ the court adopted the insurance company's position. More remarkably, even though the policy did not mention intentional or willful acts, the court stated that "identical or substantial definitions of 'occurrence' have been consistently interpreted as excluding coverage for intentional acts."¹³⁷

On the basis of these few cases, it certainly appears that courts are allowing extralegal factors, rather than legal doctrines or public policy, to influence whether they award declaratory relief to insureds or insurers.

B. *The Use of Federal Civil Rights Principles to Determine Whether Insurers Have a Duty to Defend or to Indemnify*

Title VII of the Civil Rights Act of 1964 prohibits irrational employment discrimination.¹³⁸ A Title VII plaintiff may establish a violation under either a "disparate treatment" or a "disparate impact" theory. In *International Brotherhood of Teamsters v. United States*,¹³⁹ the U.S. Supreme Court discussed the difference between the two approaches:

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . . [C]laims that stress "disparate impact" . . . involve employment practices that are facially neutral in

action [arose] out of [a] state court sexual harassment suit. . . . [Three nurses] . . . claimed that Steve Tarris subjected them to sexual harassment that ultimately necessitated their resignation.").

135. *Id.* at 631 n.1.

136. *Id.*

137. *Id.* at 633.

138. Title VII states in relevant part: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)(2) (1998).

139. 431 U.S. 324 (1977).

their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . .¹⁴⁰

A Title VII complainant, however, cannot simply allege a disparate impact or disparate treatment violation. Rather, the aggrieved party must present prima facie evidence¹⁴¹ of employment discrimination. This burden can be substantial because a plaintiff must prove all elements of the case, whether he or she proceeds under a disparate impact¹⁴² or a disparate treatment¹⁴³ theory.

Over the past thirty years, courts have used disparate treatment and disparate impact analyses to help determine whether liability and indemnity insurers must defend or reimburse alleged civil rights violators. In fact, these two doctrines have been used excessively to declare the rights of insureds and insurers, not only where the underlying complaint alleged employment discrimination but also in disputes where third-party claims involved racial and sexual harassment and other types of irrational discrimination.¹⁴⁴ This is a major development, albeit one that should not be celebrated or encouraged.

140. *Teamsters*, 431 U.S. at 335–36 n.15.

141. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577–78 (1978) (“A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. . . . To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only ‘articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ ”).

142. See, e.g., *Lanning v. Southeastern Pennsylvania Transportation Auth.*, 181 F.3d 478 (3d Cir.) (“Under Title VII’s disparate impact theory of liability, plaintiffs establish a prima facie case of disparate impact by demonstrating that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern,” citing *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). “Once the plaintiffs have established a prima facie case, the burden shifts to the employer to show that the employment practice is ‘job related for the position in question and consistent with business necessity. . . .’ ” citing 42 U.S.C. § 2000e-2k. “Should the employer meet this burden, the plaintiffs may still prevail if they can show that an alternative employment practice has a less disparate impact and would also serve the employer’s legitimate business interest,” citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)), *cert. denied*, 120 S. Ct. 970 (2000).

143. See *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973) (“The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”).

144. See *infra* notes 282–414 and the accompanying text.

The application of a Title VII analysis to decide rights and obligations under duty-to-defend and duty-to-indemnify clauses essentially forces two proceedings. Courts must first attempt to determine whether the alleged discrimination was “disparate impact” or “disparate treatment.” Next, they must try to determine the meaning of words and phrases in coverage and exclusion clauses. Furthermore, when courts perform a Title VII analysis to interpret liability and indemnity contracts, they either focus too much attention on or assign too much weight to immaterial and unsubstantiated facts—those surrounding the underlying third-party civil rights claim. The plaintiff’s burden of proof under Title VII is clear: To prevail, a complainant must prove a prima facie violation under the federal statute using prima facie evidence. Among other conditions, the alleged victim must prove all elements associated with a particular civil rights cause of action and must establish his or her victimization by a preponderance of the evidence.¹⁴⁵

However, in declaratory judgment actions, especially those involving the interpretation of insurance provisions, district judges do not have to conform to rigorous Title VII requirements. The findings reported below suggest that they rarely do. In most situations, judges simply perform a cursory review of the facts outlined in the underlying civil rights complaint, compare those facts to controversial contract provisions, and conclude that a duty to defend is warranted or unwarranted.¹⁴⁶ Consequently, such su-

145. See, e.g., *Karnes v. SCI Colorado Funeral Services, Inc.*, 162 F.3d 1077, 1081 (10th Cir. 1998) (“In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Supreme Court concluded that an employer that has allowed a discriminatory motive to play a part in an employment decision has an affirmative defense to a Title VII claim if it establishes by a preponderance of the evidence that it would have made the same decision in the absence of discrimination. In rejecting the more stringent clear and convincing evidence standard, the plurality noted that ‘[c]onventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence.’ *Price Waterhouse*, 490 U.S. at 253 (internal quotation and citation omitted).”).

146. See *Rice*, *supra* note 77, at 1150–54 nn.95–115 and accompanying text. A judge’s discretion to review or consider certain facts is substantially different from requiring plaintiffs to prove a civil rights violation in court using credible evidence, “evidentiary facts,” “ultimate facts,” or both. See, e.g., *O’Connor v. City and County of Denver*, 894 F.2d 1210, 1225–26 (10th Cir. 1990) (“Parties may not stipulate the findings of fact upon which conclusions of law and the judgment of the court are to be based. Parties may by stipulation establish evidentiary facts to obviate the necessity of offering proof, but based thereon the court must itself find the ultimate facts upon which the conclusions of law and the judgment are based.”); *Humphrey v. Southwestern Portland Cement Co.*, 488 F.2d 691, 694 (5th Cir. 1974) (An African-American employee who had unsuccessfully bid for a special position filed a civil rights suit against his employer, seeking injunctive relief and damages based on claim of racial discrimination. The U.S. District Court for the Western District of Texas at Odessa-Midland awarded damages, and employer appealed. The Fifth Circuit held that it was impermissible for trial court to draw inference contrary to undisputed facts, that finding unsupported by any facts was clearly erroneous. “It is to be noted that these findings are in terms of ultimate facts and must depend for efficacy on underlying or subsidiary findings. There must be some support in the record for the ultimate facts found and, absent support, they are due to be set aside as clearly erroneous.”).

perfidious Title VII analyses have generated some highly questionable and arguably unfair declarations in duty-to-defend and duty-to-indemnify controversies.

In *Hazen Paper Co. v. Biggins*,¹⁴⁷ for example, the U.S. Supreme Court intimated that a disparate impact claim may not be viable under the Age Discrimination in Employment Act.¹⁴⁸ Yet, in *American Management Association v. Atlantic Mutual Insurance Co.*,¹⁴⁹ a New York lower court completely dismissed this fact, used a disparate impact analysis, and concluded that the insurer had a duty to defend the insured in the underlying age discrimination lawsuit.

American Management Association is disturbing for two reasons. First, the third-party victim and the insured settled the age discrimination claim;¹⁵⁰ therefore, a crucial Title VII prerequisite—findings of fact by a preponderance of the evidence in a trial—never materialized. Viewed from the insured's perspective, this deficiency was not a fatal flaw. The court simply assigned a considerable amount of weight to the allegations appearing in the third-party complaint and ordered the insurer to reimburse the insured's settlement expenses.¹⁵¹

More disturbing, the New York court applied a disparate impact, rather than a disparate treatment, analysis even though the insurance policy clearly excluded intentional age discrimination¹⁵² and the victim's complaint clearly stated that "AMA engaged in a 'systematic effort' to eliminate . . . [plaintiffs' jobs] by engaging in 'willful discrimination on the basis of

147. 507 U.S. 604 (1993).

148. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1). See also *Hazen Paper Co.*, 507 U.S. at 609 ("We long have distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination. . . . The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. 'It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.' . . . By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.").

149. 641 N.Y.S.2d 802 (N.Y. Sup. Ct. 1996).

150. *American Management Ass'n*, 641 N.Y.S.2d at 805 ("AMA retained its own counsel to defend the Clancy action, which was ultimately settled for \$1.2 million. . . . In addition, AMA asserts that it incurred approximately \$575,000 in defense costs. . . .").

151. *Id.* at 807 ("This court need not decide [whether the ADEA permits a disparate impact analysis] in order to make a determination in this action. It is clear that the Clancy claim alleged enough facts to make a prima facie claim for disparate impact discrimination. . . . Accordingly, Atlantic Mutual had a duty to defend AMA in the Clancy action.") (emphasis added).

152. *Id.* at 804 ("Under the general liability endorsement, Atlantic Mutual agreed to provide AMA with insurance coverage for 'personal injury' . . . to which the policy applies, 'caused by an occurrence.' . . . 'Personal injury' was defined in the umbrella endorsement to include . . . 'age discrimination (unless insurance thereof is prohibited by law) not committed by or at the direction of [AMA]. . . .').")

age.’”¹⁵³ There was no compelling need to apply either a disparate impact or a disparate treatment analysis. The doctrine of reasonable expectation, the plain meaning rule, or another common law doctrine would have sufficed.

The declarations appearing in *E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co.*¹⁵⁴ and *Independent School District of Eveleth v. St. Paul Fire and Marine Insurance Co.*¹⁵⁵ are even more perplexing and questionable. Unlike the court in *American Management Association*, the district judges in these latter cases used a disparate treatment analysis to determine whether the insurers had a duty to provide a legal defense in two age discrimination cases. Again, the duty-to-defend rulings were mixed, poorly reasoned, and considerably influenced by allegations of the third-party victims rather than by substantiated facts.

In *E-Z Loader Boat Trailers*, “neither policy mentioned . . . age discrimination as a covered risk.”¹⁵⁶ Instead, the policies “protected E-Z Loader from liability stemming from an ‘occurrence’ that causes ‘bodily injury’ or ‘personal injury.’”¹⁵⁷ Therefore, the controversy really centered on the meaning of these latter terms rather than on “age discrimination.” However, the lower court as well as the Washington Supreme Court performed a cursory review of the facts surrounding the alleged age discrimination claim,¹⁵⁸ applied a disparate treatment analysis, and held that the insurer did not have to defend E-Z Loader.¹⁵⁹ The court could have simply cited the doctrine of plain meaning or general rules of contract construction and ruled that the insurance contract did not cover “age discrimination.” The court felt compelled to perform a Title VII analysis when the facts of the case did not require one.

Finally, in *Independent School District*, the insurance contract also did not cover age discrimination.¹⁶⁰ The underlying age discrimination suit was

153. *Id.* at 805.

154. 726 P.2d 439 (Wash. 1986).

155. 495 N.W.2d 863 (Minn. Ct. App. 1993).

156. *E-Z Loader*, 726 P.2d at 442.

157. *Id.* at 441.

158. For example, citing the lower court’s conclusion, the Washington Supreme Court stated:

[T]he [third-parties] . . . were the direct targets of the employer because of their . . . age. . . . They were not discriminated against because of some improper policy or goal of the employer [disparate impact analysis], but because the employer acted directly and purposefully against them as individuals [disparate treatment]. This was not . . . unintentional discrimination occurring through a facially neutral employment practice.

Id. at 444.

159. *Id.* at 445.

160. *Independent School District*, 495 N.W.2d at 864. The policy only stated: “This agreement protects against losses and expenses that occur when claims or suits are brought against you or any protected persons for a wrongful act based on: An error or omission, Negligence, Breach of Duty or Misstatement or misleading statement.” *Id.*

settled;¹⁶¹ therefore, the record did not include an extensive array of evidentiary facts and proof of age discrimination by a preponderance of the evidence. More important, the court concluded that the school district had intentionally practiced age discrimination but the insurance contract clearly excluded “wrongful acts committed deliberately.”¹⁶² Nevertheless, the court declared that the insurer had to reimburse the school district’s litigation and settlement expenses.

The court reached this conclusion by rejecting a disparate impact analysis¹⁶³ and employing by implication a disparate treatment interpretation. The court simply declared that “we hold that a coverage clause which indemnifies ‘wrongful act,’ . . . covers claims resulting from the school district’s alleged intentional discrimination.”¹⁶⁴ Before presenting its declaration, the court had cited and embraced the doctrine of *contra proferentem*: “[I]t is well established that ambiguities in insurance contracts are construed in favor of the insured.”¹⁶⁵ If the court had employed this doctrine, it still could have reached the same conclusion: The insurer had a duty to indemnify the insured for expenses associated with the age discrimination suit.

More important, applying the doctrine of ambiguity rather than a Title VII analysis would have removed the need to read intentional age discrimination into the coverage provision where it clearly was not intended. Additionally, employing the former doctrine would have eliminated the need to discuss either disparate impact or disparate treatment. As an added benefit, the ultimate ruling would have been less strained and more intelligible.

Below is a discussion of the application of a Title VII analysis in duty-to-defend and duty-to-indemnify cases in which the underlying claims involve other forms of irrational discrimination, housing and gender-based discrimination, and racial and sexual harassment. In those sections, we will see the kinds of conflicting and unintelligible declarations that result when courts needlessly employ disparate impact and disparate treatment doctrines to determine rights and obligations under liability and indemnity insurance contracts.

161. *Id.* at 865 (“[T]he district settled the dispute . . . for \$18,000.”).

162. *Id.* at 866.

163. *Id.* at 865 n.1.

164. *Id.* at 867.

165. *Id.* at 866 n.2.

V. DECLARATORY JUDGMENTS—CONFLICTS OVER WHETHER
INSURERS MUST DEFEND HOUSING DISCRIMINATION SUITS
INVOLVING PROTECTED CLASSIFICATIONS

A. *Conflict Over Whether Insurers Must Defend Disparate Impact or Disparate Treatment Housing Discrimination Suits*

In *Jones v. Alfred H. Mayer Co.*,¹⁶⁶ the U.S. Supreme Court held that an alleged housing discrimination victim may simultaneously commence causes of action¹⁶⁷ under the Civil Rights Act of 1866¹⁶⁸ and under Title VIII of the Fair Housing Act of 1968.¹⁶⁹ Section 1982 of the Civil Rights Act requires a plaintiff to prove discriminatory intent¹⁷⁰ but an aggrieved victim's burden of proof under Title VIII is not as explicit. Must a housing discrimination complainant prove a violation by employing a Title VII disparate impact analysis? Or must the alleged victim use the Title VII disparate treatment theory to prove injury and damages?

The U.S. Supreme Court has yet to decide this issue although there are "structural affinities" between Title VIII and Title VII.¹⁷¹ On the other hand, some lower courts have held that a plaintiff may prove a Title VIII violation by employing either a disparate treatment or a disparate impact analysis.¹⁷² To prevail under the disparate impact theory, an alleged victim

166. 392 U.S. 409 (1968).

167. *Jones*, 392 U.S. at 416 nn.19–21.

168. 42 U.S.C. § 1982. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

169. 42 U.S.C. § 3604(a) and (d). Section 3604(a) states: "[It is illegal to] refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." Section 3604(d) reads: "[It is illegal to] represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available."

170. *See, e.g.*, *Hamilton v. Svatik*, 779 F.2d 383, 387 (7th Cir. 1985).

171. *See* Christopher P. McCormack, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 *FORDHAM L. REV.* 563, 564 (1986) ("Courts and commentators also recognize structural affinities between the two laws. Interpretation of the Fair Housing Act has therefore developed through analogy to Title VII doctrine. Title VIII . . . incorporate[s] . . . Title VII prima facie case structure that governs burdens of proof, persuasion and production in litigation under both statutes.").

172. *See, e.g.*, *Gamble v. City of Escondido*, 104 F.3d 300, 304–05 (9th Cir. 1997); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *But see Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995) ("[On another occasion,], we 'refuse[d] to conclude that every action which produces discriminatory effects is illegal. . . . Rather, the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute.' Since then, this court has recognized that disparate impact analysis is not appropriate in certain contexts."); *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992) (holding that claim alleging failure to insure in certain instances is not conducive to disparate impact analysis); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990) (holding that "[s]ome practices lend themselves to disparate impact method, others do not").

may prove a prima facie case of housing discrimination by proving a discriminatory effect.¹⁷³ Conversely, to succeed under the disparate treatment rule, the complainant must prove discriminatory intent.¹⁷⁴

This raises another controversial issue that involves complaints based on multiple claims or mixed claims.¹⁷⁵ If a liability insurance contract excludes intentional acts but covers unintentional conduct, must the insurer still defend the insured when a third-party complaint accuses the insured of violating 42 U.S.C. § 1982, Title VIII of the Civil Rights Act of 1968, and some other fair housing statute? Or, stated slightly differently, is there a duty to defend or indemnify if an underlying housing discrimination suit involves both disparate treatment and disparate impact claims?

Mixed-claims or multiple-allegation controversies generate an exorbitant amount of litigation and cause much division among state and federal courts.¹⁷⁶ Nonetheless, the excessive litigation and interjurisdictional divisions that mixed-claims cases generate could be avoided, especially where the controversy concerns insurers' duty to defend alleged civil rights violators. This can be achieved if courts would simply stop trying to apply a Title VII analysis in duty-to-defend housing discrimination cases, because the subsequent declaratory judgments are poorly reasoned and provide little direction for future litigants.

To illustrate, in *Village Management, Inc. v. Hartford Accident and Indemnity Co.*,¹⁷⁷ African-American complainants filed a class action housing discrimination suit against the insured, Village Management.¹⁷⁸ The underlying complaint asserted that the insured was "guilty of intentional discrimination against, and of producing a disparate impact on . . . [African Americans] who had applied [for] or would apply for federally subsidized apartments."¹⁷⁹ Village Management asked Hartford to defend the action and pay settlement expenses. The insurer declined, forcing the insured to petition the court for declaratory relief.

As a defense, Hartford correctly pointed out that the liability contract did not cover intentional discrimination.¹⁸⁰ Although acknowledging that

173. See *Nelson v. Dziedzic*, 1995 WL 631805, at *3 (N.D. Ill. Oct. 25, 1995) ("To establish a prima facie case of housing discrimination under [section] 3604, a plaintiff must show that (1) she belongs to a minority; (2) the defendant was aware of it; (3) the plaintiff was ready and able to accept defendant's offer to rent; and (4) the defendant refused to deal with her. Once the plaintiff has established a prima facie case, the burden of persuasion shifts to the defendant to show that he acted without any discriminatory intent.").

174. See *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250 (10th Cir. 1995).

175. See *Rice*, *supra* note 77, at 1169-73 nn.201-33 and accompanying text.

176. *Id.*

177. 662 F. Supp. 1366 (N.D. Ill. 1987).

178. *Village Management, Inc.*, 662 F. Supp. at 1370 nn.5-7.

179. *Id.*

180. *Id.* at 1375 n.15. Under the comprehensive liability policy, the "risks included liability

fact, the court cited the rule regarding mixed-claims petitions in both Illinois and the Seventh Circuit: "Where a lawsuit poses multiple claims, some within and some outside the scope of policy coverage, the insurer has a duty to defend."¹⁸¹ In its conclusion, the court stated: "[All of the underlying] *allegations were at least potentially* within the [p]olicy's coverage. [The alleged victims] charged [Village Management] with discrimination against the class both in intentional terms and because of the disparate impact of [Village Management's] actions. . . . Hartford therefore had a duty to defend. . . ."¹⁸²

Village Management is a puzzling decision for several reasons. First, not every allegation in the complaint was potentially within the coverage of the policy. In fact, the policy explicitly excluded intentional discrimination. Second, the court did not really find a disparate impact. There was no elaborate discussion of the elements required for a prima facie case nor was there even an attempt to find evidence that would support each element. The U.S. District Court for the Northern District of Illinois essentially performed a superficial disparate impact analysis that only furthers the confusion and conflicts in this area of law. The district court could have reached the same conclusion, ordering the insurer to defend, simply by applying the doctrine of ambiguity, the doctrine of reasonable expectations, or general rules of contract.

That is what the Seventh Circuit did in *Smiljanic v. Economy Preferred Insurance Co.*,¹⁸³ in another mixed-claims, section 8, duty-to-defend case. In the underlying suit, an African-American complainant "filed a multi-claim suit. . . . [She] alleged that [the insured] violated 42 U.S.C. § 1437(t)(1)(B) by refusing to accept her application for tenancy because of her status as a section 8 voucher holder."¹⁸⁴ She also alleged that the insured "discriminated against her on account of her race, thereby violating the Fair Housing Act, 42 U.S.C. § 3601 et seq., 42 U.S.C. §§ 1981 and 1982, and the Wisconsin Open Housing Act, Wis. Stat. § 101.22(6)."¹⁸⁵

The liability carrier refused to defend the insured, arguing that "[the insured's] conduct was not an occurrence covered under the policy and that [the third-party complainant] did not allege any injury covered by the policy."¹⁸⁶ Although the U.S. District Court for the Western District of

for what the [p]olicy call[ed] 'personal injury' . . . a term defined as . . . injury arising out of one or more of the following offenses committed during the policy period: . . . (4) discrimination or humiliation *not intentionally committed* by or at the direction of the insured. . . ." *Id.* at 1369 (emphasis added).

181. *Id.* at 1372 n.9.

182. *Id.*

183. 54 F.3d 1272 (7th Cir. 1995).

184. *Smiljanic*, 54 F.3d at 1275-76.

185. *Id.* at 1276.

186. *Id.* at 1283. "The policy . . . cover[ed] 'bodily injury' and 'property damage' caused

Wisconsin performed a disparate impact analysis to resolve the fair housing claims, it refused to use a disparate impact test to decide the duty-to-defend question. The court simply cited general rules of contract construction and the doctrine of ambiguity and held that the insurer had no duty to defend or indemnify.¹⁸⁷

There were mixed claims in *Smiljanic* and there was controversy and uncertainty about whether the exclusion clause excluded coverage for each claim. Yet both the district court and the Seventh Circuit ignored, rejected, or conveniently overlooked what the *Village Management* court correctly observed. In the Seventh Circuit, “[w]here a lawsuit poses multiple claims, some within and some outside the scope of policy coverage, the insurer has a duty to defend”¹⁸⁸ because “[courts should] not inquire into the relative merits of the claims.”¹⁸⁹ Moreover, in the Seventh Circuit, the law is clear about another matter: “Ambiguities must be construed in favor of the insured.”¹⁹⁰

Village Management and *Smiljanic* present conflicting declarations that are difficult to reconcile, especially considering that the facts, mixed claims, and contractual agreements are similar in both cases. Such perplexing decisions are not restricted to the Seventh Circuit. Similar declarations also appear in other jurisdictions where tribunals employed a disparate treatment analysis to determine whether insurers must defend or indemnify.¹⁹¹ Courts could reduce the confusion and increase predictability if they would simply stop using a Title VII analysis to decide controversies involving duty-to-defend housing discrimination suits, especially when the underlying fair housing suit involves multiple claims or mixed causes of action.

B. *Conflict Over Whether the Alleged Housing Discrimination Arose Out of the Invasion of the Right of Private Occupancy*

It is black letter that “[a] landlord owes no duty to a prospective tenant except not to entrap [the prospective tenant] by concealing facts which an

by an ‘occurrence,’ which the policy define[d] as ‘an accident, including continuous or repeated exposure to substantially the same general harmful conditions.’ An exclusion clause state[d] that the policy [did] not cover bodily injury or property damage ‘expected or intended from the standpoint of the insured.’ The district court held that the policy covered only accidents, not intentional acts resulting in unintended or unexpected damage. . . .” *Id.* at 1284.

187. *Id.* at 1284–85.

188. *Village Management, Inc.*, 662 F. Supp. at 1372 n.9.

189. *Smiljanic*, 54 F.3d at 1284 (emphasis added).

190. *Id.* at 1284.

191. *See, e.g., Monsler v. Cincinnati Casualty Co.*, 598 N.E.2d 1203, 1208 (Ohio Ct. App. 1991) (applying a disparate treatment analysis and declaring that the insurer had no duty to defend a housing discrimination, 42 U.S.C. §§ 3601 *et seq.*, and mixed claims, 42 U.S.C. § 1982, suit). *See also Groshong*, 923 P.2d at 1287 (applying a disparate treatment analysis and declaring that the insurer had no duty to defend a housing discrimination suit, 42 U.S.C. § 3601).

ordinary inspection would not disclose.”¹⁹² The “ ‘fundamental purpose’ of a lease is to convey an interest in real property [and] ‘any rights or obligations of the parties which may be embodied in the lease remain dormant’ until that conveyance is complete.”¹⁹³ Under common law, a prospective tenant, unlike a tenant, has no legal rights or interests in or associated with a landlord’s property absent a landlord-tenant relationship, an enforceable conveyance, or a contractual relationship.

However, the pertinent language in 42 U.S.C. § 1982 is clear: “All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to . . . purchase, lease . . . hold [and] convey real . . . property.”¹⁹⁴ Title VIII of the Civil Rights Act of 1968 creates an even more specific right: “[I]t shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer . . . a dwelling to any person because of race, color, religion, sex or national origin.”¹⁹⁵ Title VIII also states that “[i]t shall be unlawful . . . [t]o represent to any person because of race, color, religion, sex or national origin that any dwelling is not available for . . . sale . . . or rental when such dwelling is in fact so available.”¹⁹⁶

These principles protect both tenants and prospective tenants, and courts have consistently permitted prospective tenants to file private causes of actions against landowners and landlords under both civil rights acts,¹⁹⁷ even though a prospective tenant under common law has no legally protected rights associated with, or any interest in, a landlord’s property. A landlord must not permit known dangers on the property to injure a prospective tenant. But do “known dangers” also include racial, gender-based, age, and other forms of irrational housing discrimination?

Landlords, residential communities, commercial and residential managers, and leasing companies often purchase a liability policy to cover “an ‘offense’ arising out of the insured’s business.”¹⁹⁸ Under a typical commercial liability policy or a landlords’ and tenants’ insurance contract,

192. See *Steele v. Latimer*, 521 P.2d 304, 307 (Kan. 1974). See also *Vermes v. American Dist. Telegraph Co.*, 251 N.W.2d 101, 105 (Minn. 1997) (“[I]t would be a basic duty of the landlord to inform the prospective tenant of any qualities of the premises which might reasonably be undesirable from the tenant’s point of view.”).

193. *71 Main Street Assoc. v. Grosso*, 667 N.Y.S.2d 772, 773 (N.Y. App. Div. 1998).

194. *Id.*

195. 42 U.S.C. § 3404(a).

196. 42 U.S.C. § 3404(d).

197. See, e.g., *Cabrera v. Jakobovitz*, 24 F.3d 372, 373 (2d Cir. 1994) (allowing individuals who had posed as prospective tenants (testers) to sue under both 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir. 1994) (allowing a prospective African-American tenant to sue under both 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*); *Asbury v. Brougham*, 866 F.2d 1276, 1278 (10th Cir. 1989) (stating that 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* prohibits discrimination on the basis of race and allowing the prospective tenant to go forward).

198. *SCI Liquidating Corp. v. Hartford Fire Ins. Co.*, 1999 WL 509824, at *2 (11th Cir. 1999).

“‘personal injury’ includes, among other offenses, ‘the . . . invasion of the right of private occupancy.’”¹⁹⁹ Therefore, when prospective tenants sue landlords for violating § 1982, Title VIII of the Fair Housing Act, or both, landlords often cite the right-of-private-occupancy language and ask insurers for a legal defense and/or indemnification.

Some insurers argue that the “right of occupancy” does not give prospective tenants a property interest in landlords’ real property. Other carriers argue that, even if the language creates a right for prospective tenants, an invasion of that right does not include housing or residential discrimination. Therefore, both insurers and insureds often ask state and federal judges to decide whether discrimination against prospective tenants is an injury or offense “arising out of the invasion of the right of private occupancy.”

The doctrines of reasonable expectations or of ambiguity would be the most effective and efficient way to resolve this type of controversy. The phrase “invasion of the right of private occupancy” is unclear, and arguably there are at least two interpretations.²⁰⁰ Thus, it should be construed in

199. *Boston Housing Authority*, 781 F. Supp. at 82. In 1991, the Insurance Services Office amended the “right of privacy occupancy” clause to remove the controversy surrounding it. See Jean A. Mortland, *Discrimination Actions Against Landlords: Are They Insurable?*, 31 REAL PROPERTY, PROB. & TRUST J. 55, 87 n.29 (1996) (“The 1991 version . . . amends the wrongful eviction definition to ‘[t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies by or on behalf of its owner, landlord, or lessor’”) (emphasis added). However, the change has not eliminated conflicting coverage decisions that this clause generates in duty-to-defend and duty-to-indemnify cases. Compare *Brown v. Travelers/Aetna Property Casualty Corp.* 1999 WL 455008, at *2 (9th Cir. June 29, 1999) (concluding that the clause covered the “wrongful eviction of a tenant” and ordering the insurer to defend the landlord) with *United States v. Security Management Co.*, 96 F.3d 260, 270 (7th Cir. 1996) (concluding that the insurer did not have both a duty to defend and a duty to indemnify the landlord because the clause did not cover “alleged racial discrimination” against “testers”).

200. Under one interpretation, the phrase could mean that the insurer must defend or pay damages when a tenant experiences an “invasion,” which is an “injury” under tort law. See, e.g., *Bower v. Westinghouse Electric Corp.*, 1999 WL 518926, at *10–11 (W. Va. July 19, 1999) (“The ‘injury’ that underlies a claim for . . . any . . . cause of action sounding in tort . . . is ‘the invasion of any legally protected interest.’” RESTATEMENT (SECOND) OF TORTS § 7(1) (1964)); *Rice v. Certaineed Corp.*, 704 N.E.2d 1217, 1219 (Ohio 1999). BLACK’S LAW DICTIONARY 389–93 (6th ed. 1990) defines approximately forty subtypes of “damages,” compensatory and punitive being only two of the types listed “‘Damages’ flow from an ‘injury,’ which ‘denotes the invasion of any legally protected interest.’” Of course, the phrase also could mean that the insurer must pay or defend when the landlord suffers a “personal injury” or invasion *when others occupy or attempt to occupy* a landlord’s property. See, e.g., *Kitsap County v. Allstate Ins. Co.*, 964 P.2d 1173, 1183–85 (Wash. 1998) (“Significantly, an ‘invasion’ is defined as an ‘act of . . . encroachment or trespassing.’ . . . Occupancy is defined as the ‘period during which one owns, rents, or uses certain premises or land.’ . . . Something is ‘private’ if it is ‘[s]ecluded from the sight, presence or intrusion of others.’ . . . It would seem apparent from the above definitions that the plain, ordinary, and popular meaning that an average purchaser of insurance would ascribe to the phrase ‘other invasion of the right of

favor of the insured. In practice, however, courts spend an inordinate amount of time discussing whether prospective tenants' property rights were violated in underlying housing discrimination controversies. This in turn generates even more conflicting and highly questionable duty-to-defend rulings.

This point is illustrated in *Bernstein v. North East Insurance Co.*²⁰¹ The Bernsteins owned an apartment house in northwest Washington, D.C. They refused to rent an apartment to an African-American who sued the Bernsteins under the Fair Housing Act of 1968 and the Civil Rights Act of 1866, claiming that she was a victim of ethnic discrimination.²⁰² After the case settled, the Bernsteins asked North East Insurance Company to reimburse the settlement and litigation expenses. The insurer refused, and the Bernsteins sued.

They claimed that North East should have defended them because the alleged ethnic discrimination arose out of the invasion of the right of private occupancy, a covered claim under the policy.²⁰³ The D.C. Circuit disagreed, stating that the prospective tenant:

never asserted that *she* had acquired a " 'right of private occupancy' " or that the Bernsteins had interfered with such a right[.] [Instead,] the alleged wrong [only] interfered with her right to be nondiscriminatorily considered for a possible future right of private occupancy. . . . One who merely seeks to view an apartment, with an eye to possible tenancy, has no such interest.²⁰⁴

In *Martin v. Brunzelle*,²⁰⁵ the U.S. District Court for the Northern District of Illinois reached the same conclusion after examining very similar facts in an underlying housing discrimination suit and employing a property rights analysis to resolve the duty-to-defend controversy. The court decided that the insurer had no duty to defend or indemnify the landlord who allegedly discriminated against a prospective tenant.²⁰⁶ The court declared that "the phrase 'other invasion of the right of private occupancy' provides coverage only if there exists a landlord-tenant relationship or if the [prospective tenant] has a 'vested property right.' [Therefore, since] Martin had no such 'right,' Brunzelle could not have committed an 'invasion of the right of private occupancy.' "²⁰⁷

private occupancy' would include a trespass on or against a person's right to use premises or land that are secluded from the intrusion of others. Indeed, this view of the phrase would be consistent with a definition of trespass found in *Black's Law Dictionary* at 1509: '[a]n unlawful interference with one's . . . property.' ")

201. 19 F.3d 1456 (D.C. Cir. 1994).

202. *Bernstein*, 19 F.3d at 1457.

203. *Id.*

204. *Id.* at 1458.

205. 699 F. Supp. 167 (N.D. Ill. 1988).

206. *Martin*, 699 F. Supp. at 171.

207. *Id.* at 170 ("In . . . normal legal English, . . . a 'right' is a legally enforceable claim of

Although some courts²⁰⁸ have embraced the *Bernstein* ruling, others have not. For example, in *Gardner v. Romano*,²⁰⁹ the plaintiffs in the underlying consolidated lawsuits accused the landlord and property manager, Romano, of violating the Fair Housing Act of 1968 and the Civil Rights Act of 1866. One complainant, an African-American, accused the insureds of refusing to rent an apartment to her because of racism. The other complainant, a white, said Romano refused to rent an apartment to her because she “plan[ned] to live with a black man.”²¹⁰

After State Farm Insurance Co. refused to defend the insureds in the underlying actions, the insureds asked the court for declaratory relief. They argued that “invasion of the right of private occupancy” included ethnic discrimination and another injury, “an invasion of the right to occupy.”²¹¹ State Farm asserted that the phrase did not apply because the prospective tenants had “no possessory rights in the apartments” [because the company inserted the provision only] to cover instances where [a landlord violated] a tenant[’s] . . . property rights. . . .”²¹²

In a display of both intelligence and common sense, the U.S. District Court in Wisconsin ordered State Farm to defend the underlying actions. It appropriately refused to employ a property rights analysis to resolve the dispute and instead invoked the doctrine of ambiguity. The court declared that “[c]onstruing this vague policy language against the drafter, . . . State Farm has not met its burden [and established] that the [underlying] claims . . . are clearly beyond the policy coverage.”²¹³ The court also cited the doctrine of reasonable expectations: “[I]nterpreting the ‘personal injury’

one person against another . . . (*Restatement (Second) of Property* § 1.2). . . . Unquestionably Martin had no ‘right’ of private occupancy, no ‘right’ to occupy the apartment she applied for. Though she was entitled not to be discriminated against [under the civil rights statute], that is not . . . the same as the ‘right’ to occupy . . . an enforceable claim of occupancy. . . .”
Id.

208. See *Boston Housing Authority*, 781 F. Supp. at 84 (holding that “racial discrimination in rental housing and in rental services does not constitute an ‘other invasion of the rights of privacy occupancy.’ . . . Racial discrimination does not constitute an act of trespass and cannot be considered as ‘invasion of the right of private occupancy.’ ”); *State Farm Fire & Casualty Co. v. Plutsky*, 848 F.2d 199, 1988 WL 53926, at *1 (9th Cir. 1998) (concluding that the “right of private occupancy is clearly a right enjoyed only by current tenants, not prospective ones”); *Larson v. Continental Cas. Co.*, 377 N.W.2d 148, 149 (S.D. 1985) (holding that racial discrimination in rental housing “did not fall within the scope of coverage under the policy which provided coverage for ‘personal injury’ which arises out of the ‘eviction or other invasion of the right of private occupancy’ ”). See also *Commercial Union Ins. Co. v. Image Control Property Management*, 918 F. Supp. 1165, 1172 (N.D. Ill. 1996) (holding that discrimination in rental property on the basis of mental disability “does not fall within coverage for an ‘invasion’ into the ‘right of private occupancy’ ”).

209. *Gardner*, 688 F. Supp. at 489.

210. *Id.* at 489.

211. *Id.* at 492.

212. *Id.*

213. *Id.* at 493.

definition to include claims for race discrimination . . . comports with the reasonable expectations of the insureds, keeping in mind that the insureds are entitled to the benefit of the doubt on the duty to defend issue.”²¹⁴

Litigants in *State Farm Fire & Casualty Co. v. Westchester Investment Co.*²¹⁵ and *Clinton v. Aetna Life & Surety Co.*²¹⁶ also asked judges to determine whether insurers had a duty to defend in cases where the underlying claims involved violations under 42 U.S.C. § 1982 and state fair housing laws. Like the *Gardner* court, the courts in *Westchester* and *Clinton* refused to adopt a property rights analysis to determine whether an “invasion of the right of private occupancy” included ethnic discrimination against prospective African-American tenants. Instead, the *Westchester* and *Clinton* courts simply cited the reasoning and holding of *Gardner* in ordering the insurers to defend.

Finally, in *Town of Goshen v. Grange Mutual Insurance Co.*,²¹⁷ a white male sued the Town of Goshen under 42 U.S.C. § 1983,²¹⁸ claiming that the town unjustifiably prevented him from developing his land for residential growth.²¹⁹ The town asked Grange Mutual to defend the underlying action. Citing the “invasion of private occupancy” provision in the contract, the insurer refused to defend the underlying action, arguing “that an appreciable and tangible interference with the physical property itself [was] necessary to constitute an ‘invasion of the right of private occupancy.’”²²⁰

The New Hampshire Supreme Court rejected this argument. Although “the allegations in the complaint would constitute the required ‘invasion of the right of private occupancy,’” the court wisely decided not to perform

214. *Id.* at 493.

215. 721 F. Supp. 1165 (C.D. Cal. 1989).

216. *Clinton*, 594 A.2d at 1046.

217. 424 A.2d 822 (N.H. 1980).

218. A property owner may commence a civil action under 42 U.S.C. § 1983 against impermissible discrimination or for the deprivation of rights. The provision states in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .”

219. *Town of Goshen*, 424 A.2d at 823–24 (“Wentzell is the owner of a parcel of land in Goshen referred to as ‘Sunshine Acres II.’ Seeking to develop the property, he applied under the . . . town ordinances for subdivision approval. . . . His complaint . . . alleges . . . ‘[t]hat the . . . Town of Goshen did not want [him] to gain subdivision approval . . . because . . . the policy and the custom of the Town . . . was . . . to restrict growth and deny any large scale development. . . . [The complaint also alleged] [t]hat the [town’s] actions . . . were wanton, malicious and oppressive[,] deprived the plaintiff of his ability to ever recover the money, . . . caused him . . . to suffer the taking of his property without just compensation or the due process of law, [and deprived] plaintiff [of] . . . his right to the free enjoyment of his property. . . .”).

220. *Id.* at 824.

an exhaustive and complicated property analysis to resolve the duty-to-defend issue. Instead, the court properly invoked the doctrine of ambiguity and stated simply:

Had Grange wished to exclude coverage for invasion of private property when framed in a section 1983 action, it could have done so by explicit language in the policy. . . . In the [present] case . . . , there is no civil rights or section 1983 exclusion. . . . The policy terms are unclear, and therefore the ambiguities created will be construed against the company and in favor of the insured.²²¹

VI. DECLARATORY JUDGMENTS — INTRA- AND
INTERJURISDICTIONAL CONFLICTS OVER WHETHER INSURERS
MUST DEFEND INSURED OR INDEMNIFY INSURED FOR EXPENSES
ASSOCIATED WITH GENDER-BASED EMPLOYMENT
DISCRIMINATION SUITS

A. Conflicting Intrastate Rulings Over Whether Insurers Must Defend or Indemnify Gender-Based Discrimination Suits

The theme of this article is that courts should deliver declaratory judgments that are fair, well reasoned, and intelligible. In addition, courts should try to prevent extralegal factors or immaterial evidence that appear in underlying discrimination suits from influencing or controlling whether the insurers or insureds receive declaratory relief in duty-to-defend and duty-to-indemnify controversies. More important, declaratory judgments should be consistent and predictable. If facts, allegations, and legal theories in a controversy are like those in an earlier decision, litigants should be able to predict who is more likely to prevail when they petition for declaratory relief.

State courts have great difficulty making predictable declaratory judgments when asked to decide whether liability contracts cover “bodily injuries caused by” sex or gender-based discrimination. The ability to predict whether courts will award relief does not increase substantially, even when an insurance contract explicitly excludes or covers gender-based discrimination claims. Remarkably, some state courts have ordered insurers to defend sex discrimination suits when the policy explicitly excluded such claims, while others have refused to order a defense or indemnification when sex discrimination clearly appeared as a covered risk in the coverage clause.

Two California decisions are illustrative, especially in view of the state’s explicit and codified policies:

221. *Id.* at 825.

(1) It is . . . declared as the public policy of this state . . . to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . sex . . . ;²²²

(2) All contracts which . . . directly or indirectly . . . exempt anyone from responsibility for . . . fraud, or willful injury to the person . . . of another, or violation of law . . . are against the policy of law;²²³ and

(3) An insurer is not liable for a loss caused by the willful act of the insured. . . .²²⁴

In *Transamerica Insurance Co. v. Superior Court*,²²⁵ the complainant alleged that the insured, Western Industrial Management Corp., practiced gender-based employment discrimination. The insurer refused to defend the insured and refused to reimburse litigation and settlement expenses, claiming that the employer's liability policy excluded "bodily injury arising out of . . . discrimination of any kind against any employee."²²⁶

To resolve this controversy, the *Transamerica* court chose not to advance any one of the public policies stated above. Instead, the California Court of Appeal for the Second District cited three state principles of law:

(1) A duty to defend exists if there is any potential for coverage under the policy;

(2) In interpreting insurance contracts, terms . . . are interpreted in their "ordinary and popular sense" unless used by the parties in a technical sense or a special meaning . . . ; and

(3) Any ambiguity will be resolved in favor of coverage [and] . . . [a] term is ambiguous if it is susceptible of two or more interpretations.²²⁷

Then the court declared that "[the] language [in the exclusion clause] is clear and unambiguous. Based upon [the] complaint and the injuries presented to the trial court, the court should have found [there was] . . . no duty to defend. . . ."²²⁸

Two years after *Transamerica*, the California Court of Appeal for the First District decided *Melugin v. Zurich Canada*.²²⁹ The underlying facts were nearly identical to those in *Transamerica*: female employees sued their employer and supervisor, Canada Life Assurance Company and Gary Melu-

222. CAL. GOV'T CODE § 12920 (West).

223. *Id.* § 1668.

224. CAL. INS. CODE § 533 (West).

225. 29 Cal. App. 4th 1705 (Cal. 1994).

226. *Transamerica Insurance Co.*, 29 Cal. App. 4th at 1709, 1710 ("Western tendered defense of the civil action. . . , the defense was denied. Western ultimately settled the civil claim, paying . . . \$380,000, and incurred attorneys fees and costs for defending the matter in the amount of \$227,571.40, of which [the insurer] reimbursed Western \$34,813.13. This was apparently the amount incurred prior to the time that [the] defense of the civil claim was denied.").

227. *Id.* at 1714.

228. *Id.* at 1716.

229. 50 Cal. App. 4th 658 (1996).

gin, respectively, for allegedly discriminating on the basis of gender.²³⁰ Melugin and Canada Life tendered the defense of the underlying action to their insurer, Zurich Canada, but Zurich refused to defend, claiming that its policy did not cover employment-related sex discrimination.²³¹

The relevant portion of the policy stated that "the [i]nsurer agrees to pay on behalf of the [i]nsured all sums which the [i]nsured shall become obligated to pay as damages . . . because of . . . [p]ersonal [i]njury."²³² The policy defined personal injury to include "sexual discrimination." However, there was an important proviso: "[D]amages based on [sexual discrimination] are only covered where insurance against same is not prohibited by law."²³³ Citing California's public policy against sex discrimination in the workplace and against insuring willful misconduct, Zurich argued that it had no duty to defend.

The appellate court should have simply cited the principles and holding outlined in *Transamerica* and delivered a consistent predictable declaration. Instead, the *Melugin* court discussed and summarily dismissed the insurer's public policy defense and declared that Zurich must defend the underlying action:

If Zurich desires to market and sell a policy which . . . excludes all claims of discrimination by employees of any insured, it must say so in clear, unambiguous policy language which is not present in the exclusionary language of the [current] policy. . . . [S]ection 533 . . . [does] not relieve Zurich of the broad duty to defend. . . .²³⁴

The California court, however, inappropriately dismissed important facts and settled state principles to achieve a strained declaration. First, the policy's proviso covered sex discrimination only if the discrimination was not willful or intentional. This is material because "the underlying action against Melugin and Canada Life . . . alleg[ed] wrongful discriminatory treatment followed by [the] termination of . . . employment[]." ²³⁵ California law states that "an employment termination . . . cannot be unintentional."²³⁶ Finally and more important, California courts have stated on a number of occasions that the public policy as outlined in section 533 bars coverage for intentional acts or occurrences, which arguably includes intentional gender-based discrimination.²³⁷

230. *Melugin*, 50 Cal. App. 4th at 661.

231. *Id.*

232. *Id.* at 663.

233. *Id.*

234. *Id.* at 669.

235. *Id.* at 661.

236. *Lipson*, 9 Cal. App. 4th at 159.

237. *Cf. Coit Drapery Cleaners, Inc.*, 14 Cal. App. 4th at 1602, 1614 (holding that an insurer had no duty to indemnify where it was alleged that the insureds had wrongfully terminated

Inconsistent declarations also appear in other states.²³⁸ For example, the Massachusetts Court of Appeals in 1996 decided *New England Mutual Life Insurance Co. v. Liberty Mutual Insurance Co.*,²³⁹ in which the insured asked the insurer to defend a sex discrimination suit that commenced under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Massachusetts Civil Rights Act.²⁴⁰ The insurer declined, arguing that the insurance contract did not cover “personal injury arising out of . . . discrimination . . . which is committed by or at the direction of the insured.”²⁴¹ The insured stressed that the “exclusionary clause [should] not apply absent a finding of unlawful discrimination.”²⁴²

The Massachusetts appellate court disagreed, noting that:

We look to the plain language of the exclusionary clause and construe its language in the usual and ordinary sense. . . . It is the source from which the [third-party] plaintiff’s personal injuries originate rather than the specific theories of liability alleged in the complaint which determines the insurer’s duty to defend. Consequently, the insurer had no duty to defend the insured under the terms of the policy.²⁴³

Again in 1996, the Massachusetts Court of Appeals decided *HDH Corporation v. Atlantic Charter Insurance Co.*,²⁴⁴ a very similar duty-to-defend gender-based discrimination case.²⁴⁵ Like the exclusionary clause in *New England Mutual*, the employers’ liability contract in *HDH Corporation* explicitly excluded “damages arising out of discrimination against any employee in violation of law.”²⁴⁶ The court did not employ the reasoning in

an employee, and discriminated against her because section 533 bars coverage for “the wilful act of the insured”); *Lipson*, 9 Cal. App. 4th at 158, 161 (declaring there was no coverage for an action brought by a former employee who alleged that the insured harassed and wrongfully terminated him); *B & E Convalescent Center*, 8 Cal. App. 4th at 92, 102 (no obligation under section 553 to defend a suit alleging only intentional discrimination).

238. Compare *Mattox Enterprises v. St. Paul Mercury Ins. Co.*, 1995 WL 541471, at *3 (Minn. App. Ct. Sept. 12, 1995) (declaring that the insurer had no duty to defend a gender-based discrimination suit) with *Jostens, Inc. v. CNA Ins./Continental Cas. Co.*, 403 N.W.2d 625, 629 (Minn. 1984) (citing the doctrine of ambiguity and holding that the insurer had a duty to defend the gender-based discrimination suit). See also *Jackson County Hosp. v. Alabama Hospital Ass’n Trust*, 619 So. 2d 1369, 1373 (Ala. 1993) (holding that the insurer had no duty to defend a sex discrimination suit) and *E-Z Loader*, 726 P.2d at 444 (concluding that the insurer had no duty to defend a gender-based discrimination suit).

239. 667 N.E.2d 295 (Mass. App. Ct. 1996).

240. *New England Mutual*, 667 N.E. 2d at 297 n.1.

241. *Id.* at 297.

242. *Id.* at 298.

243. *Id.* at 298–99.

244. 668 N.E.2d 872 (Mass. App. Ct. 1996).

245. *HDH Corporation*, 668 N.E.2d at 873 (“A former employee of . . . HDH Corporation, claiming emotional distress caused by sexual discrimination and wrongful termination, brought an action. . . . HDH promptly notified its workers’ compensation and employers’ liability insurer, Atlantic Charter Ins. Co.” The insurers eventually denied coverage.)

246. *Id.* at 874.

New England Mutual and instead cited dicta in its 1993 decision, *Peerless Insurance Co. v. Hartford Insurance Co.*,²⁴⁷ to conclude:

[In *Peerless*,] we recognized that read literally, the complaint did not implicate . . . employer liability coverage under the policy . . . yet we pointed out [that] "surely a wholly literal reading of the complaint was not reasonable." . . . The *Peerless* case makes clear, albeit in dicta, that Atlantic had a duty to defend against the employee's action.²⁴⁸

In the author's view, something is wrong when a court construes language in the usual and ordinary sense in one duty-to-defend gender-based discrimination case and refuses to accept the literal reading of language in another, especially when the facts and complaints in both cases are substantially similar.

B. *Conflicting Federal Circuit Decisions Over Whether Insurers Must Defend or Indemnify Gender-Based Discrimination Suits*

The federal Equal Pay Act²⁴⁹ states in relevant part that "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex . . . for equal work on jobs . . . which requires equal skill, effort and responsibility. . . ."²⁵⁰

Since the early 1980s, disgruntled employees have filed thousands of federal lawsuits against employers under the Act.²⁵¹ Hundreds more lawsuits²⁵² have commenced in state courts under the EPA and under state equal pay acts that are substantially equivalent to the EPA.²⁵³

Among federal district courts considering duty-to-defend equal pay controversies, a split has developed over whether national insurance carriers must defend employers. Some federal judges apply a Title VII disparate treatment or disparate impact analysis, some use common law contract principles, and others use a combination of state and federal principles to determine whether a legal defense or indemnification is warranted.

247. 613 N.E.2d 125 (Mass. App. Ct. 1993).

248. *HDH Corporation*, 668 N.E.2d at 875.

249. Hereinafter EPA. Fair Labor Standards Act of 1938, § 6(d)(1), 29 U.S.C. § 206(d)(1) (1999).

250. *Id.*

251. This statistical information was generated by searching Westlaw's ALLFEDS database on August 18, 1999, using the subjects "EQUAL PAY ACT" and SY("EQUAL PAY ACT").

252. This statistical information was generated by searching Westlaw's ALLSTATES database on August 18, 1999, using the subjects "EQUAL PAY ACT" and SY("EQUAL PAY ACT").

253. See, e.g., California's Equal Wage Rates Act, CAL. LAB. CODE § 1197.5 (West 1999); Maryland's Equal Pay for Equal Work Act, MD. CODE ANN., LAB. & EMPL. § 3-304 (1999); Massachusetts Equal Pay Act, MASS. GEN. LAWS ANN. ch. 149, § 105A (1999); Ohio's Equal Pay Act, OHIO REV. CODE ANN. § 4111.17 (Banks-Baldwin 1999); West Virginia's Equal Pay for Equal Work Act, W. VA. CODE § 21-5B-3 (1999).

In *Jefferson-Pilot Fire & Casualty Co. v. Sunbelt Beer Distributors, Inc.*,²⁵⁴ a female employee accused her employer of gender-based discrimination in violation of the EPA.²⁵⁵ Sunbelt asked Jefferson-Pilot for a defense and indemnification. The insurer asked the district judge for declaratory relief, arguing that “the underlying . . . action was not within the coverage of the policy and that [it had] no duty either to defend or to indemnify Sunbelt in [the underlying] action.”²⁵⁶

Sunbelt’s insurance policy contained “a course of employment” exclusion clause, stating that “[t]his insurance does not apply to . . . ‘[b]odily injury’ to . . . [a]n employee of the insured arising out of and in the course of employment by the insured. . . . This exclusion applies . . . whether the insured may be liable as an employer or in any other capacity.”²⁵⁷ Finding no ambiguity and construing these contractual words and phrases literally,²⁵⁸ the district judge for the U.S. District Court for the District of South Carolina issued a sound and fair declaration: “Because [the third-party complainant’s] action arose out of her employment with Sunbelt, the court agrees that her action is excluded from coverage. . . .”²⁵⁹

Like the *Jefferson-Pilot* court, the U.S. District Court for the Northern District of California declared in *American Guarantee and Liability Insurance Co. v. Vista Medical Supply*²⁶⁰ that the insurer did not have to defend an employer that allegedly violated California’s Equal Pay Act.²⁶¹ But the *American* court reached its conclusion another way.

American’s comprehensive general liability policy covered “bodily injury . . . caused by an occurrence.”²⁶² The policy “defined an occurrence as ‘an accident . . . which results in bodily injury . . . neither expected nor intended from the standpoint of the insured.’”²⁶³ Citing this language, *American* argued that the disgruntled employee was actually “alleging a disparate

254. 839 F. Supp. 376 (D. S.C. 1993).

255. *Jefferson-Pilot*, 839 F. Supp. at 378 (“Deana Presley . . . [also] brought an action . . . for racial discrimination in violation of 42 U.S.C. § 1981. [She] allege[d] that she was fired for dancing with black males at a social gathering after a marketing function.”).

256. *Id.* at 378.

257. *Id.* at 380.

258. *Id.* at 378. However, at the outset, the district judge noted that “South Carolina law commands that insurance coverage [must be] liberally construed against the insurer, and any ambiguities in the policy [must be] interpreted in favor of the insured.”

259. *Id.* at 380.

260. 699 F. Supp. 787 (N.D. Cal. 1988).

261. *American*, 699 F. Supp. at 792. Darlene Wilson, the disgruntled employee, alleged “that Vista violated California Labor Code section 1197.5, which requires . . . employers [to] pay men and women the same for work in the same ‘establishment’ that is of ‘the same quantity and quality of the same classification of work.’” *Id.* But *American* argued that the insurance policy “[did] not cover the claim[] for . . . wage discrimination in violation of California Labor Code section 1197.5. . . .” *Id.* at 788.

262. *Id.* at 789.

263. *Id.*

treatment claim, which require[d] proof of discriminatory motive.”²⁶⁴ Vista stressed that “intentional conduct is covered if the insured did not intend to harm the victim by his conduct.”²⁶⁵ Vista also argued that the “sexual discrimination claim [was] covered under the bodily injury section of the policy.”

The *American* court could have decided this matter intelligibly and efficiently by declaring that “bodily injury” does not include unequal pay and therefore American had no duty to defend or indemnify. As the alternative, the judge could have simply invoked the doctrine of plain meaning and held that the policy clearly did not cover gender-based wage discrimination claims. Instead, the court simply assumed that such claims were covered, focused on the meaning of an “occurrence,” and presented an elaborate convoluted Title VII analysis.

The insurance contract covered “bodily injury caused by an occurrence not expected or intended by [Vista].”²⁶⁶ After referencing this language, the district judge observed that under California’s Title VII doctrine,²⁶⁷ “a disparate treatment claim . . . requires proof of discriminatory motive . . . [.] [therefore, the equal pay claim could] . . . not [be] an occurrence within the terms of the policy.”²⁶⁸ But then the court stated: “California courts have focused not on whether the claim requires proof of intent . . . but . . . have [tried to determine] whether the alleged act giving rise to damages is purposeful.”²⁶⁹ Finally, holding for the insurer, the judge wrote: “[T]he act of setting an employment policy is intentional; [therefore,] the decision to [set] pay scales cannot be . . . an ‘occurrence’ . . . [under] Vista’s insurance [contract].”²⁷⁰

American is an unduly complicated declaration that is not likely to provide clear direction for future litigants. More important, the ruling is unnecessarily convoluted because a Title VII analysis was performed where one was not really needed. The court could have reached the same conclusion by simply stating that wage discrimination is an intentional act and

264. *Id.* at 791.

265. *Id.* at 789.

266. See notes 273–74 and accompanying text.

267. *American*, 699 F. Supp. at 791 n.3 (“To disprove disparate treatment under [the California Fair Employment and Housing Act], a plaintiff must establish intentional discrimination. . . . The California Fair Employment and Housing Commission requires a showing of intentional discrimination to prove disparate treatment under FEHA, but does not use the same analysis as that used under Title VII. . . . [However,] the California Fair Employment and Housing Commission applies the same standards to a disparate impact claim . . . as are applied to disparate impact under Title VII.”).

268. *Id.* at 791.

269. *Id.* However, this language is extremely confusing. In the present case, which claim requires proof of intent? Which alleged act gave rise to damages? Arguably, the claim and the act are the same: wage discrimination.

270. *Id.* at 792.

is therefore excluded under the policy. Consequently, American has no duty to defend Vista for allegedly violating California's Equal Pay Act.

Finally, *Bradley Corporation v. Zurich Insurance Co.*²⁷¹ also involves a duty-to-defend equal pay controversy.²⁷² In the underlying suit, a female employee alleged that her employer paid a male employee a higher salary even though she and the male employee performed "substantially the same duties."²⁷³ After receiving notice of the suit, Bradley notified Zurich, its insurer. Shortly thereafter, Zurich reported that it would neither defend the underlying action nor reimburse Bradley for any damages paid to the third-party victim because its policy did not cover equal pay sex discrimination claims.²⁷⁴

The policy stated in relevant part: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' . . . to which this coverage part applies."²⁷⁵ The insurance contract defined "'personal injury' as injury arising out of, among other things, '[o]ral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services.'"²⁷⁶ Although a careful reading of that clause elicits no coverage for gender-based equal pay discrimination claims, the court declared that "Zurich had a duty to defend Bradley in the [underlying] lawsuit."²⁷⁷

When the third-party complainant filed her statutory equal pay action, "her [request for] damages included humiliation and injury to [her] reputation. . . ."²⁷⁸ According to the court, a claim for these types of damages is sufficient to establish a claim for slander or oral defamation.²⁷⁹ Slander in most circumstances is an intentional tort, and before a court awards damages for slander, the plaintiff must establish a prima facie case by proving all elements associated with this cause.²⁸⁰ The third-party plaintiff in *Bradley Corp.* failed to do so.

271. *Bradley Corp.*, 984 F. Supp. at 1193.

272. *Id.* at 1195-96 ("Ms. Sarafolean . . . sued Bradley in federal court . . . alleging that . . . Bradley had unlawfully discriminated against her on the basis of sex in violation of the Equal Pay Act . . . and Title VII of the Civil Rights Act. . .").

273. *Id.* at 1199 ("[The female complainant] was a credit analyst-collector; her duties included collecting Bradley's accounts receivable and approving . . . shipment orders for Bradley's fixture division."). *Id.* at 1195.

274. *Id.* at 1196.

275. *Id.* at 1199.

276. *Id.*

277. *Id.* at 1200.

278. *Id.* at 1199.

279. *Id.* at 1200 ("In sum, the Sarafolean complaint sufficiently (or at least fairly debatably) alleged a slander or disparagement claim such that Zurich had a duty to defend Bradley. . . .").

280. *See, e.g., Mosley v. Evans*, 630 N.E.2d 75, 77 (Ohio App. Ct. 1993) ("In order to establish a prima facie case of defamation, a plaintiff is required to establish that the statement made is actionable, that the defendant published that statement to a third person, and that the recipient understood the defamatory meaning of the published statement. Once this prima

Bradley Corp. is a forced and poorly reasoned decision. This type of ruling could cause litigants to conclude that sound judicial decision making is likely to be sacrificed in favor of strained and unwarranted declarations in duty-to-defend gender discrimination cases. Although splits continue to exist over whether insurers must defend such cases, some courts have resolved this issue more soundly, forthrightly, and cautiously without creating the appearance of judicial bias.²⁸¹

VII. DECLARATORY JUDGMENTS — INTERJURISDICTIONAL
CONFLICTS OVER WHETHER INSURERS MUST DEFEND INSUREDS
OR INDEMNIFY INSUREDS FOR EXPENSES ASSOCIATED WITH
SEXUAL HARASSMENT SUITS

A. *The Critical Distinction Between a Layperson's Definition of Sexual Harassment and the Legal Standard Required to Establish a Prima Facie Case of Sexual Harassment in the Workplace*

The American Association of University Women "defines sexual harassment as not just touching but also making sexual 'comments, jokes, gestures or looks,' writing sexual graffiti on bathroom walls, spreading sexual rumors, and calling someone gay or lesbian."²⁸² A lay definition of sexual harassment might include uninvited or unwelcome sexual advances, unsolicited vulgar sexual remarks, or both. In fact, some school officials "define sexual harassment as virtually any unwelcome contact between students."²⁸³ A San Francisco jury awarded \$500,000 to a fourteen-year-old girl after finding that school officials had ignored her complaints about her classmate, a sixth-grade boy, who frequently made sexual gestures and taunts toward her.²⁸⁴

The legal definition of sexual harassment is considerably broader and more complex. First, there is an evolving legal standard to determine whether a student has sexually harassed another student in a public school

facie case is established, the defendant may avoid liability by invoking various defenses. The defense which is relevant to this case is that of qualified or conditional privilege."); *EEOC v. Southern Publishing Co.*, 705 F. Supp. 1213, 1219 (S.D. Miss. 1988) ("A cause of action for defamation is a relational interest tort intended to redress injury to reputation. The damages recoverable are for the injury to reputation, though the damages may also include an additional element [of] emotional or mental harm.").

281. *Compare Southern Publishing Co.*, 705 F. Supp. at 1219-20 (holding that the insurer had a duty to defend a slander action but no duty to defend a Title VII, gender-based employment discrimination action) *with* *General Accident Ins. Co. of Am. v. Gastineau*, 990 F. Supp. 631, 638 (S.D. Ind. 1998) (holding that the insurer had a duty to defend a "sex discrimination," primarily a Title VII sexual harassment action).

282. *See* Review & Outlook: *Sex and Schoolchildren*, WALL ST. J., June 7, 1993, at A14.

283. *See* Rene Sanchez, *Schools Get U.S. Guidance on Harassment Much of the Time, A Kiss Is Just a Kiss*, WASH. POST, Mar. 14, 1997, at A25.

284. *Id.*

or in an institution of higher education.²⁸⁵ Second, there are two standards to help determine whether sexual harassment has occurred in the workplace. Under each standard, it is not enough to simply allege and prove that a defendant subjected a plaintiff to some uninvited sexual remarks or behavior.

To make a *prima facie* case of *quid pro quo* sexual harassment in the workplace, an aggrieved party must establish that “refusal to submit to unwelcome sexual advances or requests for sexual favors resulted in a tangible job detriment.”²⁸⁶ The definition of “tangible job detriment” is murky. The Seventh Circuit has held that “a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, [or] a material loss of benefits” qualifies as a tangible detriment.²⁸⁷ On the other hand, the Sixth Circuit has ruled that a “demotion without a change in pay, benefits, duties, or prestige” is not a tangible job detriment.²⁸⁸ In addition, the Federal Circuit has held that “a supervisor’s mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute *quid pro quo* harassment. . . .”²⁸⁹

The U.S. Supreme Court has addressed the meaning of “tangible job detriment” twice. In *Faragher v. City of Boca Raton*, the Court stated that a

285. See, e.g., *Davis v. Monroe County Bd. of Ed.*, 524 U.S. 980 (1999) (Parent, on behalf of fifth-grade student, sued the school board and school officials under Title IX for failure to remedy classmate’s sexual harassment of student. The U.S. Supreme Court held that a private Title IX damages action may lie against a school board in cases of student-on-student harassment but only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that “harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”); Sanchez, *supra* note 283, at A25 (“The Education Department made it official yesterday. . . . In new guidelines released for schools nationwide, the department urged educators to consider the age and maturity of students and to use ‘judgment and common sense’ when deciding whether an incident among students is harassment, or merely inappropriate. . . . “In order to give rise to a complaint[,] . . . sexual harassment must be sufficiently severe, persistent or pervasive that it adversely affects a student’s education or creates a hostile or abusive educational environment. . . . For a one-time incident to rise to the level of harassment, it must be severe.”); Rene Sanchez, *In School, Early Lessons on Sexual Harassment*, WASH. POST, Oct. 4, 1996, at A1 (“At the start of this school year, the department sent a 20-page document to schools nationwide outlining its views on sexual harassment among students on school grounds. The department said that a school can be held liable under Title IX—the federal law that prohibits discrimination on the basis of sex in education—for failing to stop sexual harassment among students once they are notified of it.”); Kristina Sauerwein, *A New Lesson in Schools: Sexual Harassment Is Unacceptable*, L.A. TIMES, Aug. 1, 1994, at E (“‘Peer sexual harassment’ is defined by attorney Jeanette Lim, director of policy and programs for the federal Office for Civil Rights, as: ‘Behavior so severe, pervasive and persistent that it creates a hostile environment for the student. It is usually of a sexual nature.’”).

286. See *Jones v. Clinton*, 1998 WL 148370, at *8 (E.D. Ark. Apr. 1, 1998).

287. See *Crary v. Liberty National Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993).

288. See *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (6th Cir. 1996).

289. See *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (emphasis added).

complainant might establish a tangible job detriment by proving that a "supervisor's harassment culminate[d] in a tangible employment action, such as discharge, demotion, or undesirable reassignment."²⁹⁰ In *Burlington Industries, Inc. v. Ellerth*,²⁹¹ the Court was more specific. First, the Court observed that (1) "A tangible employment action in most cases inflicts direct economic harm"; (2) "Tangible employment actions fall within the special province of [a] supervisor"; and (3) "A tangible employment decision requires an official act of the enterprise, a company act."²⁹² The Court concluded by noting that activities "such as hiring, firing, failing to promote, reassignment with significant different responsibilities, [and] . . . significant change[s] in benefits"²⁹³ are tangible job detriments, and such detriments are the direct results of a tangible employment action.

As mentioned above, a complainant may also commence a hostile work environment sexual harassment suit against an employer. This form of sexual harassment arises when "sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."²⁹⁴ Although the U.S. Supreme Court has not outlined each element of a prima facie case of hostile work environment sexual harassment, circuit courts and the states have fashioned their own standards.²⁹⁵ Significantly, to prevail under

290. 524 U.S. 742 (1998).

291. *Burlington*, 524 U.S. at 742.

292. *Id.* at 745-47.

293. *Id.* at 748.

294. See *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 474 (8th Cir. 1995), quoting *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988).

295. See, e.g., *Schmitz v. ING Securities, Futures & Options, Inc.*, 1999 WL 528024, at *2 (7th Cir. July 20, 1999) ("To make out a prima facie case for sexual harassment due to a hostile work environment, [a complainant] must show the following: (1) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) the harassment was based on sex; (3) *the sexual harassment had the effect of unreasonably interfering with her work performance in creating an intimidating, hostile or offensive working environment* that affected seriously her psychological well-being; and (4) a basis for employer liability exists.") (emphasis added); *Peacock v. Northwestern National Ins. Group*, 156 F.3d 1231, 1998 WL 476245, at *2 (6th Cir. 1998) ("In order to prove a prima facie case of a hostile work environment, a plaintiff must show: (1) the employee is 40 years or older; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) *the harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment*; and (4) the existence of some basis for liability on the part of the employer. With respect to the third element, we have stated that while a plaintiff must also subjectively feel that an environment is hostile, '[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive,' is beyond the purview of the AEDA.") (emphasis added); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1042 (2d Cir. 1993) ("In order to establish a prima facie case of sexual harassment based upon a 'hostile work environment,' a plaintiff must demonstrate: (1) that she is a member of a protected group; (2) that she was the subject of unwelcome advances; (3) that the harassment was based upon her sex; and (4) that *the harassment affected a term, condition or privilege of employment*. A plaintiff

either rule, a complainant must prove that a manager or supervisor “subjected [the complainant] to unwelcome sexual harassment based upon [gender],” and the harassment “affected a term, condition, or privilege of employment.”²⁹⁶

The uninvited conduct must be sufficiently severe or pervasive “to alter the conditions of employment and create an abusive working environment”²⁹⁷ but “[t]he behavior creating the hostile working environment need not be overtly sexual in nature.”²⁹⁸ It has to be “‘unwelcome’ in the sense that the employee regarded the conduct as undesirable or offensive.”²⁹⁹

B. Federal Courts: Interjurisdictional Conflicts Over Whether Insurers Must Defend or Indemnify Sexual Harassment Suits

Even though “sexual harassment” or “harassment” may not appear as defined terms in various employment liability contracts, courts can decide these sorts of controversies by employing either the doctrine of ambiguity or the adhesion doctrine. Indeed, the use of either doctrine would increase the likelihood of fairly predictable declarations and eliminate conflicts among the circuits.

Federal courts, however, have not adopted these settled doctrines to resolve conflicts when the contracts mention harassment or sexual harassment. For example, in *General Accident Insurance Co. of America v. Gastineau*,³⁰⁰ Kim Gastineau, a male employee who worked for Fleet Mortgage Corporation, alleged that his female manager had sexually harassed him. He also asserted that the manager’s “conduct had the purpose and effect of unreasonably interfering with his work performance and [it] created an intimidating, hostile, and offensive working environment. . . .”³⁰¹ Fleet asked its insurer to defend the underlying suit. But the insurer argued that it was “obligated neither to indemnify nor to defend Fleet . . . because Gastineau did not allege a bodily injury ‘arising out of an occurrence’ as defined by the policy.”³⁰²

must also demonstrate in a ‘hostile work environment’ case that ‘the supervisor’s [or co-worker’s] actions should be imputed to the employer.’ ” (emphasis added); *Bonenberger v. Plymouth Township*, 132 F.3d 20, 25 (3d Cir. 1997) (“To make out a prima facie case of hostile work environment sexual harassment under Title VII, a plaintiff must prove (1) the employee suffered intentional discrimination because of [his or her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.”).

296. See *Jones*, 1998 WL 148370 at *13.

297. *Meritor Savings Bank, FB v. Vinson*, 477 U.S. 57, 67 (1986).

298. See *Jones*, 1998 WL 148370, at *13.

299. See *Hall*, 842 F.2d at 1014.

300. *General Accident Ins. Co. v. Gastineau*, 990 F. Supp. 631 (S.D. Ind. 1998).

301. *Id.* at 631.

302. *Id.* at 634.

The U.S. District Court for the Southern District of Indiana concluded that under Title VII, "the standard for hostile work environment claims is negligence."³⁰³ Then the court found as a matter of law that a sexual harassment hostile work environment claim qualified as a "bodily injury arising out of an occurrence."³⁰⁴ For these reasons, the district court found that the insurer "has a duty to defend and indemnify Fleet in [the] Gastineau suit. . . ."³⁰⁵ This decision only muddies this area of insurance law. As outlined above, the standard required to establish a prima facie case of hostile work environment sexual harassment is not the same as that required to prove a prima facie case of common law negligence.

More important, the court did not even attempt to explain why the term "bodily injury" encompasses a hostile work environment claim. This is a major flaw because a hostile work environment sexual harassment claim has little if anything to do with "bodily injury," "physical injury," "physical touching," "mental abuse," or "an injury or occurrence expected or intended from the standpoint of the insured." Clearly, the district court could have avoided this confusion and still decided in favor of the insured by simply employing the doctrine of ambiguity.

In *Duff Supply Co. v. Crum & Foster, Ins.*,³⁰⁶ the U.S. District Court for the Eastern District of Pennsylvania decided in favor of the insurer in a declaration that is also flawed. In *Duff*, a female employee (McLean) alleged "that her employer touched her several times in a sexually offensive manner and generally maintained a sexually hostile work environment."³⁰⁷ *Duff Supply* asked its insurer for a legal defense.

The insurer refused to defend or indemnify because "personal injury" and "an occurrence," as defined in the policy, were not alleged in the underlying sexual harassment suit.³⁰⁸ The insurer also argued that the policy excluded the sexual harassment claim because that claim "arose out of and [occurred] in the course of [McLean's] employment."³⁰⁹ Adopting the insurer's theory of the case, the court stated that "it is beyond dispute that McLean's injuries [did] arise out of and in the course of employment. . . . The factual allegations manifestly demonstrate that [the] . . . allegedly

303. *Id.* at 638.

304. *Id.*

305. *Id.*

306. 1997 WL 255483 (E.D. Pa. May 8, 1998).

307. *Duff*, 1997 WL 255483, at *1 ("McLean contended that as a result of this intentional or reckless misconduct, she sustained severe and agonizing 'physical injuries and stress, as well as emotional and psychological distress, financial losses, humiliation, embarrassment and shame.'").

308. *Id.* at *2.

309. *Id.* ("Defendants argue[d] that Exclusion 2e bars coverage for '[b]odily [i]njury' to . . . an employee of the insured arising out of and in the course of employment of the insured."). *Id.* at *15.

wrongful conduct occurred at work, thus any bodily injury which McLean suffered as a result of [Duff's] conduct could only be found to have arisen out of and in the course of employment."³¹⁰ The court concluded, therefore, that the insurer had no legal duty to defend or to indemnify the insured.

The *Duff* court incorrectly assumed that "bodily injury" as defined under the contract included sexual harassment as defined for a Title VII analysis. However, assuming, as the court did, that these terms are synonymous, the court still should have applied either the doctrine of plain meaning or traditional rules of contract construction. The insurer would have still prevailed under either approach, and the decision would have been more intelligible.

The court's failure to employ one of the approaches mentioned above is not its most egregious omission. The declaration is void of any evidence that the court understands the distinction between the layperson's definition and the barriers that an alleged victim must overcome to successfully prove a prima facie case of sexual harassment under Title VII of the Civil Rights Act of 1964. The *Duff* court performed neither a quid pro quo nor a hostile work environment analysis to determine whether the insurer should have defended the underlying sexual harassment suit or reimbursed the insured for expenses associated with defending the suit.

Again, the employment liability contract stated explicitly that the insurer had no duty to defend or indemnify if an employee's "bodily injury" arose out of and in the course of employment. But a quid pro quo, as well as a hostile work environment, sexual harassment claim has very little if anything to do with bodily injuries per se. The focus of each claim centers primarily on compensation of employees who allegedly experienced a deprivation of some economic, financial, or property interest. Viewed from this perspective, Duff Supply's insurer would arguably have a duty to defend the company because the exclusion clause certainly did not exclude "economic or financial deprivations that arise out of and in the course of employment."

C. Federal Courts: Intrajurisdictional Conflicts Over Whether Insurers Must Defend or Indemnify Sexual Harassment Suits

A review of cases in the Fifth Circuit will help illustrate how one circuit's cursory and strained analyses generated disharmonious declarations about whether insurers must defend sexual harassment suits. First, in *Old Republic Insurance Co. v. Comprehensive Health Care Associates, Inc.*,³¹¹ female employees sued Steve Tarris and his employer, Comprehensive Health Care

310. *Id.* (emphasis added).

311. 2 F.3d 105 (5th Cir. 1993).

Associates,³¹² for sexual harassment. The women alleged that CHCA and its agent's conduct subjected them to a "working environment where sexual compliance was made a condition of employment."³¹³

Old Republic refused to defend the suit. The insurer cited the exclusion clause that stated in pertinent part:

It is understood and agreed that . . . [t]he policy does not provide coverage [for] any claim, demand or causes of action arising out of or resulting from . . . any claim arising from the employment between the insured and any of its employees . . . whether caused by, or at the instigation . . . or . . . direction of, or omission by, the insured, his employees, or any cause whatsoever.³¹⁴

The Fifth Circuit correctly observed that the "exclusion broadly cover[ed] virtually any claim arising out of the employment relationship between CHCA . . . and other employees"³¹⁵ and found that the insurer had no duty to defend.

However, in *Western Heritage Ins. v. Magic Years Learning Centers & Child Care*,³¹⁶ the Fifth Circuit reached a very different conclusion two years later. In *Western Heritage*, a former employee filed a suit against the husband-and-wife owners of Magic Years alleging that the husband had sexually harassed her. The owners asked their insurer for a legal defense. The insurer refused to defend, citing the following exclusion clause: "This insurance does not apply . . . to bodily injury to any employee of the insured arising out of and in the course of [her] employment by the insured. . . ."³¹⁷

The Fifth Circuit did not even try to interpret the meaning of the "arising out of" and "course of employment" language as it did in *Old Republic*. Nevertheless, *Western Heritage* was still ordered to defend the suit.³¹⁸ According to the Fifth Circuit,

Western Heritage may have intended to exclude coverage of claims by "any employee" of the insured, but it did not do so. Instead, the policy excludes coverage of claims by "any employee of the insured." The author of the policy knew how to write the word "any," for he used it to modify "employee," but not "insured."³¹⁹

Western Heritage is less than impressive for several reasons. First, the complainant who filed the underlying sexual harassment suit was in fact an employee of the insured and therefore the insurer had no duty to defend under the policy. Second, it would have been helpful and perhaps even instructional for future litigants if it was known whether "bodily injury"

312. Hereinafter CHCA.

313. *Old Republic*, 2 F.3d at 107.

314. *Id.* at 108.

315. *Id.*

316. 45 F.3d 85 (5th Cir. 1995).

317. *Western Heritage*, 45 F.3d at 89 (emphasis added).

318. *Id.* at 90.

319. *Id.* at 89.

includes sexual harassment claims and, if so, why. Finally, it is not clear whether the alleged sexual harassment arose out of the course of employment. If it did, would the insurer still have a contractual duty to defend Western Heritage in the underlying sexual harassment suit?

The conflicts within the circuit reported in this section as well as the splits among the circuits discussed above are just a few examples of poorly reasoned and conflicting duty-to-defend/indemnify sexual harassment cases. There are other conflicting federal court decisions,³²⁰ and similar conflicts also can be found among various state supreme and appellate court cases.³²¹ It is likely that such disagreements will continue in both federal and state courts until judges start to appreciate the real distinction between a layperson's and the legal definition of sexual harassment. Also, courts are likely to remain divided over whether insurers must defend sexual harassment suits as long as judges fail to consistently employ the doctrines of ambiguity and adhesion, especially where the liability contracts clearly do not exclude or list sexual harassment as a covered claim.

320. *Compare, e.g.*, *Sphere Drake Ins. Co. v. Shoney's Inc.*, 923 F. Supp. 1481, 1488 (M.D. Ala. 1996) (viewing hostile work environment sexual harassment and "bodily injury" synonymously and stressing that an insurer would have to defend an employer in an underlying sexual harassment suit if the insured establishes that the alleged sexual harassment "[arose] out of and in the course of . . . employment") *with* *Commercial Union Ins. Co. v. Sky, Inc.*, 810 F. Supp. 249, 255 (W.D. Ark. 1992) (holding "that the alleged sexual harassment does not constitute 'bodily injury' arising from an 'occurrence' within the meaning of the policy [and] that interrelated and interdependent acts of sexual harassment do not constitute 'personal injury' as defined by the policy [and]. . . declar[ing] . . . no coverage for sexual harassment[.] [therefore,] . . . Commercial has no duty to defend Sky, Inc. against these claims").

321. *Compare, e.g.*, *Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*, 699 A.2d 1153, 1155-57 (Me. 1997) (holding that the insurer had a duty to defend the underlying suit after concluding that "bodily injury" included a hostile work environment sexual harassment claim arising out of and in the course of employment) and *Meadowbrook, Inc. v. Tower Ins. Co.*, 543 N.W.2d 418, 423-24 (Minn. App. Ct. 1996) (concluding that the insurer had a duty to indemnify the insured after finding that "bodily injury" included a hostile work environment sexual harassment claim arising out of an "occurrence" under the policy) *with* *Aetna Cas. & Sur. Co. v. Wannamoisett Country Club, Inc.*, 1998 WL 99832, at *1-2 (R.I. Jan. 23, 1998) (failing to perform either a quid pro quo or a hostile environment sexual harassment analysis but holding that the insurer had no duty to defend because, although the underlying complainant alleged that "she was a victim of unconsented touching," "she made no allegation of bodily injury" as required under the policy); *Ottumwa Housing Auth. v. State Farm Fire & Cas. Co.*, 495 N.W.2d 723, 726-27 (Iowa 1993) (failing to perform either a quid pro quo or a hostile environment sexual harassment analysis but holding that the insurer had no duty to defend because the alleged "bodily injury" arose out of and in the course of the alleged victim's employment with the insured); *Northern Ins. Co. of New York v. Morgan*, 918 P.2d 1051, 1053-54 (Ariz. App. Ct. 1995) (performing a very cursory quid pro quo analysis and concluding that the insurer had no duty to defend the underlying sexual harassment suit because the alleged unwelcome physical and sexual acts were intentional rather than negligent acts); *State Farm Fire & Cas. Co. v. Compupay Inc.* 654 So. 2d 944, 946-47 (Fla. Dist. Ct. App. 1995) (failing to perform either a quid pro quo or a hostile environment sexual harassment analysis but holding that the insurer had no duty to defend because the court found that "the alleged accuser's acts were intentional" and because the definitions of occurrence and bodily injury under the coverage provision were not satisfied).

VIII. DECLARATORY JUDGMENTS—AN ANALYSIS OF WHETHER INSURERS MUST DEFEND INSUREDS OR INDEMNIFY INSUREDS FOR EXPENSES ASSOCIATED WITH ETHNIC-BASED HARASSMENT AND MENTAL ANGUISH SUITS

Ethnic minorities in America often experience harassment and severe mental distress in the workplace on the basis of ethnicity. Hate groups and racist neighbors also harass some ethnic minorities when the latter move into formerly white neighborhoods or communities. To reduce the frequency of ethnic-based harassment and severe mental anguish, a fair number of victims have sued their employers and neighbors in federal and state courts.

Unlike cases involving the duty to defend/indemnify sexual harassment suits, there are no inter- and intrajurisdictional splits over whether insurers must defend insureds or indemnify them. In every reported case in which insurers petitioned courts for declaratory relief, the courts ruled that insurers had no duty to defend or to indemnify. At least in this area of law, consistent declarations are being delivered. It appears that these tribunals are consistently applying either the doctrine of plain meaning or traditional rules of contract interpretation, which would partially explain the frequent successes of insurers.

Ethnic harassment can be defined as the intent to harass or intimidate an individual because of the individual's ethnicity or national origin. From a legal perspective, ethnic harassment involves considerably more than an intent to harass or intimidate. Evidence that an alleged harasser interfered unreasonably with the ethnic minority's work performance or with a minority's right to enjoy and maintain his or her residence is also required. However, when courts attempt to decide whether insurers must defend/indemnify ethnic harassment suits, judges frequently want to know only whether the insured harasser's verbal abuse, physical conduct, or both were intentional.

These and other issues are explored below after a brief overview of the legal standards required to establish a *prima facie* case of ethnic-based harassment and mental anguish in the workplace and in a residential environment.

A. *The Legal Standard Required to Establish a Prima Facie Case of Ethnic-Based Harassment in an Employment Environment*

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color . . . or national origin."³²² The U.S. Supreme Court has also

322. 42 U.S.C. § 2000e2(a)(1) (1997).

ruled that “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.”³²³

Of course, “[i]f the conduct is not severe or so pervasive as to create [a work] environment that a reasonable person would find hostile or abusive, then Title VII has not been violated.”³²⁴ If the alleged ethnic minority victim “does not subjectively perceive the [work] environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and [consequently] there is no Title VII violation.”³²⁵

Severe ethnic-based harassment has frequently been defined by what it is not. The U.S. Supreme Court has stated that severe harassment does not include the “mere utterance of an . . . epithet which engenders offensive feelings in an employee.”³²⁶ The Eighth Circuit has held that derogatory ethnic comments made in the course of casual conversation do not constitute ethnic-based harassment unless there is a “steady barrage of opprobrious [ethnic] comments.”³²⁷ A New York court ruled that mocking an ethnic minority’s accent is not actionable and is insufficient to establish a case of ethnic-based harassment.³²⁸ An Illinois court decided that ethnic-based harassment did not occur when a bank official told an Asian-American female employee that “she would ‘fit right in’ with the women in China who worked in the fields barefoot. . . .”³²⁹

Even though a universal definition of severe ethnic-based harassment does not exist, courts have recognized repeatedly that an employee may commence an independent ethnic-based harassment claim under either Title VII or a state statute.³³⁰ Under Title VII, the cause of action is called a hostile work environment action. It is a disparate treatment rather than a disparate impact claim.³³¹ To successfully establish a prima facie case of

323. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), quoting *Meritor*, 477 U.S. at 67.
324. See *Chaddah v. Harris Bank Glencoe-Northbrook*, 1994 WL 75515, at *2 (N.D. Ill. Dec. 2, 1994).

325. *Harris v. Forklift Sys., Inc.*, 510 U.S. 20. (1993).

326. *Id.*, quoting *Meritor*, 477 U.S. at 67 (ellipsis in *Harris*).

327. See *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 89 (8th Cir. 1977).

328. See *Lopez v. Metropolitan Life Ins. Co.*, 52 Fair Empl. Prac. Cas. (BNA) 1555, 1559 (N.D.N.Y. 1989).

329. See *Chaddah*, 1994 WL 75515, at *3-4.

330. Compare, e.g., *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir. 1991) and *Nazarie v. Trans World Airlines, Inc.*, 807 F.2d 1372, 1380 (7th Cir. 1987) with *Ellis v. Safety Ins. Co.*, 672 N.E.2d 978, 986 (Mass. 1996) and *Batchelder v. Allied Stores Corp.*, 473 N.E.2d 1128 (Mass. 1985).

331. See, e.g., *Sphere Drake Ins. Co.*, 923 F. Supp. at 1492 (“Both the hostile [work] environment claim and the quid pro quo claim are disparate treatment claims, which require that the plaintiff prove that the alleged wrongdoer acted intentionally.”); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982) (holding that a hostile work environment claim is a disparate treatment claim, requiring proof of intent).

ethnic harassment based on disparate treatment in a hostile work environment, claimants must plead and prove that: (1) they are members of a protected class—an ethnic group; (2) they were subjected to unwelcome ethnic-based harassment; (3) the harassment was based on ethnicity; (4) the harassment had the effect of unreasonably interfering with work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer is vicariously liable for ethnic-based harassment by its employees or agents.³³²

There is no universal definition of “an intimidating, hostile, or offensive work environment.” The U.S. Supreme Court has stated several times that “‘simple teasing,’ offhand comments, and isolated incidents (unless extremely serious) will not amount to . . . changes in the ‘terms and conditions of employment.’”³³³ To determine whether a work environment is hostile, intimidating, or abusive, courts generally consider a variety of factors, including “the frequency of the . . . conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”³³⁴

B. The Legal Standard Required to Establish a Prima Facie Case of Ethnic-Based Harassment and Mental Distress in a Residential Environment

Section 3604(a) of the Civil Rights Act of 1968 states in pertinent part that “it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny . . . a dwelling to any person because of race, color, religion, . . . or national origin.”³³⁵

Section 3617 reads in relevant part that “[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section . . . 3604 . . . of this title.”³³⁶ Since the enactment of these statutes, aggrieved homeowners and tenants have initiated a variety of ethnic-based harassment actions against their neighbors³³⁷ and landlords.³³⁸

332. See *Hafford v. Seidner*, 1999 WL 477025, at *4 (6th Cir. July 12, 1999) (emphasis added).

333. *Id.* at *6.

334. See *Saxton v. American Tel. & Tel.*, 10 F.3d 526, 534 (7th Cir. 1993), quoting *Harris*, 510 U.S. at 20.

335. 42 U.S.C. § 3604(a).

336. 42 U.S.C. § 3617.

337. See, e.g., *Obana*, 996 F. Supp. at 239 (“Plaintiffs . . . commenced this action against their [African-American neighbors], seeking monetary damages against [the] defendants for their alleged interference with plaintiffs’ rights under § 3617 of the Fair Housing Act. . . . [Plaintiffs] not-too-friendly neighbors . . . engaged in a series of discriminatory acts against [plaintiffs] based upon plaintiffs’ race (Hebrew), religion (Jewish), and national origin (Middle Eastern).”); *Byrd v. Brandenburg*, 922 F. Supp. 60, 62 (N.D. Ohio 1996) (“[A] Molotov cock-

Clearly, § 3617 outlaws intimidation, coercion, threats, and interference based on ethnicity. Neither § 3617 nor § 3604 explicitly guarantees ethnic minorities a legal right to enjoy and use their homes or residential settings without being harassed, threatened, or intimidated.³³⁹ Nevertheless, over the years, federal courts have ruled that § 3617 can serve as an independent basis for an ethnic-based harassment action where there is no predicate for liability under § 3604.³⁴⁰ An alleged victim of ethnic-based residential harassment must prove several causes before obtaining various remedies under § 3617 of the Civil Rights Act of 1968.

First, courts generally “apply Title VII discrimination analysis [to resolve] Fair Housing Act [FHA] discrimination claims,”³⁴¹ and a “plaintiff can establish an FHA discrimination claim under a theory of disparate treatment or disparate impact.”³⁴² However, plaintiffs who allege that they are victims of ethnic harassment in their homes must plead and prove a prima facie case of disparate treatment before receiving damages. Specifically, aggrieved parties must prove the following elements: (1) they belong to an ethnic minority group; (2) the alleged harasser knew that they belonged to the minority group; (3) the alleged harasser committed an act of violence toward the residences at issue; and (4) the alleged harasser’s be-

tail was thrown onto the porch of plaintiff’s home. The plaintiffs are African Americans. . . . [T]hey allege[d] that the Molotov cocktail was thrown onto their porch by a group of neighborhood teenagers who are Caucasian. . . . [P]laintiffs alleged that the incident violated their rights under the Fair Housing Act. . . .”).

338. See, e.g., *Smith v. Stechel*, 510 F.2d 1162, 1163 (9th Cir. 1975) (“[P]laintiffs . . . alleged that they were hired . . . to manage an apartment complex. . . ; that they were fired . . . for renting apartments to [African-Americans] and Mexican Americans. They asserted that this constituted a violation of rights granted by . . . section 817 of Title VIII of the 1968 Civil Rights Act. . . .”).

339. *But see Ohana*, 996 F. Supp. at 242 (“[A] regulation promulgated under the [Fair Housing Act] provides that the enjoyment of one’s dwelling free from discrimination comes within the protection afforded by § 3617, 24 C.F.R. § 100.400(c)(2). It states, specifically, that ‘[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of race, color, . . . or national origin of such persons’ is prohibited by § 3617.”).

340. See *Ohana*, 996 F. Supp. at 241 (concluding that “whether § 3617 can ever serve as a separate basis for [a Fair Housing Act] claim where there is no predicate for liability under any of the statute’s specifically referenced enumerated substantive provisions” can be answered affirmatively); *Stirgus v. Benoit*, 720 F. Supp. 119, 123 (N.D. Ill. 1989) (observing that “defendants [argued that the action] must be dismissed because Stirgus failed to allege a connection between the section 3712 claim and her rights under section 3604” and concluding that “[w]hether . . . the firebombing of Stirgus’s house violated any other section of the Fair Housing Act, [that] brutal act [fell] squarely within the parameters of section 3617”); *Waheed v. Kalafut*, 1988 WL 9092, at *2 (N.D. Ill. Feb. 2, 1988) (permitting an independent action under § 3617 where ethnic minority accused a defendant of firebombing plaintiffs’ house, banging garbage cans, and screaming racial epithets); *Evans v. Tubbe*, 657 F.2d 661, 622–23 (5th Cir. 1981) (permitting an independent action under § 3617 where ethnic minority accused defendant of harassing, intimidating and threatening plaintiff and preventing plaintiff from using and enjoying her property).

341. See *Gamble*, 104 F.3d at 304.

342. See *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999).

havior interfered with rights of aggrieved parties to purchase and maintain their homes.³⁴³ Of course, they also must prove injury in fact, causation, and damages.³⁴⁴

Finally, ethnic minorities also have sued their employers and neighbors for the intentional infliction of emotional distress under the common law.³⁴⁵ However, what the alleged minority must prove before recovering damages varies by jurisdiction. For example, to prevail in a suit for the intentional infliction of emotional distress in Texas,

the complainant must establish that: (1) The defendant acted intentionally or recklessly; (2) The defendant's conduct was extreme and outrageous; and (3) The defendant's actions caused the plaintiff severe emotional distress. Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery is initially a question of law.³⁴⁶

The Texas Supreme Court has defined outrageous conduct as "that which goes beyond all possible bounds of decency . . . and [that which is] utterly intolerable in a civilized society."³⁴⁷

The rules in Connecticut and Illinois are different. The Connecticut Supreme Court has stated that to establish a *prima facie* case of intentional emotional distress, the aggrieved minority must prove

(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress . . . was severe.³⁴⁸

On the other hand, the Illinois Supreme Court ruled that this action comprises three elements:

First, the conduct . . . must be truly extreme and outrageous. Second, the actor must either *intend* that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will cause severe emotional distress. Third, the conduct must in fact cause severe emotional distress.³⁴⁹

343. See *Wabeed*, 1988 WL 9092, at *3 (outlining the prerequisite elements to establish a *prima facie* case); *Byrd*, 922 F. Supp. at 63 (same).

344. Cf. *Jackson v. Okaloosa County*, 21 F.3d 1531, 1537 (11th Cir. 1994) (stressing that an aggrieved party "must plead injury in fact, causation and redress ability in order to have standing to assert her claims" under Title VIII of the Civil Rights Act of 1964).

345. See, e.g., *Littlefield v. McGuffey*, 954 F.2d 1337, 1340-41 (7th Cir. 1992); *Green v. Konover Residential Corp.*, 1997 WL 736528, at *18 (D. Conn. Nov. 24, 1997).

346. See *Thomas v. Clayton Williams Energy, Inc.*, 1999 WL 740443, at *5 (Tex. App.-Houston (14th Dist.) Sept. 23, 1999).

347. See *Wormick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993).

348. *Green*, 1997 WL 736528, at *16 (emphasis added).

349. See *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1988).

Several lower courts in Illinois “have divided the third element . . . into two separate elements: severe emotional distress and both actual and proximate causation.”³⁵⁰

C. *Insurers Have No Duty to Defend Insureds or Reimburse Expenditures Associated with Workplace Ethnic Harassment Suits: A Critique of Courts’ Conflicting Explanations*

As noted above, unlike declarations involving sexual harassment claims, courts declare overwhelmingly that liability insurers have no duty to defend/indemnify residential and workplace ethnic harassment suits. However, their justifications for consistently ruling against employers and/or neighbors are exceedingly strained and less than instructive for future litigants.

Multnomah County School District v. Northwestern Pacific Indemnity Co.,³⁵¹ for example, presents an excellent illustration of multiple workplace ethnic harassment claims and of an appellate court’s delivering unwarranted and inconsistent duty-to-defend rulings. Speiginer, an African-American teacher, alleged in the underlying suit that “I have been employed with the School District for five years. During that period I have been harassed concerning my work and methods of teaching. . . . I believe this has occurred [because] I am black.”³⁵² Another African-American instructor, Bryant, also alleged ethnic harassment, asserting that

I have been de-evaluated because . . . supplies that were promised to me . . . were not given. This situation create[s] a problem for me as a teacher and [for] my students. I am constantly . . . harassed by supervisors evaluating me as being incompetent. I feel that other [African Americans] are being treated the same way.³⁵³

Three African-American females employed as security guards also sued the school district, alleging both gender discrimination and ethnic harassment.³⁵⁴ The school district settled the Speiginer case and asked Northwestern for reimbursement. The district also asked the insurer to defend the other actions. After the insurer refused, the school district petitioned for declaratory relief. The circuit court decided that Northwestern had a duty to defend and a duty to pay a part of the settlement amount as well as current and future defense costs.³⁵⁵

How did the court reach that conclusion? First, the school district argued

350. See *Littlefield*, 954 F.2d at 1343 n.1.

351. 650 P. 2d 929 (Or. App. Ct. 1981).

352. *Multnomah County School District*, 650 P. 2d at 939.

353. *Id.* at 941.

354. *Id.* at 940.

355. *Id.* at 941.

“that the terms [in the contract] should be given their plain, ordinary meanings.”³⁵⁶ The pertinent provision stated that

[Northwestern] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay on account of any claim for breach of duty made against the insured by reason of any negligent act, error or omission of the insured. . . . [A]nd the company shall have the . . . duty to defend any suit against [the insured] seeking damages on account of such breach of duty even if any of the allegations of the suit are groundless, false, or fraudulent. . . .³⁵⁷

After examining this clause, the judge adopted the school district’s theory and decided against the insurer.

Northwestern appealed the ruling to the Oregon Court of Appeals. However, unlike the circuit court, the appellate court refused to employ the doctrine of plain meaning to decide the insurer’s rights and obligations under the contract. Instead, the court of appeals performed an unwarranted and a superficial Title VII analysis. First, it declared that the contract only covered negligent acts or acts stemming from a “breach of duty” rather than “intentional injury causing conduct.”³⁵⁸ Next, the court observed that disparate treatment claims require proof of intentional conduct,³⁵⁹ but that claims based on disparate impact “could encompass actions, judgments, or decisions that might be considered negligent acts [and, therefore,] potentially within the coverage of the policy.”³⁶⁰ Finally, the appellate court stated that “[c]laims of harassment because of [ethnicity] must be claims of disparate treatment.”³⁶¹ In dicta, the court stated that “[h]arassment is not a facially neutral policy or practice which has merely a discriminatory impact, but a claim which . . . requires a showing of intent.”³⁶²

In light of these pronouncements, the appellate court held that Northwestern must defend the school district against the ethnic harassment suit filed by the three African-American females,³⁶³ had no duty to defend the employer against Bryant’s ethnic harassment action,³⁶⁴ and had

356. *Id.* at 934.

357. *Id.* at 932.

358. *Id.* at 934.

359. *Id.* at 935.

360. *Id.* at 936.

361. *Id.* at 940.

362. *Id.*

363. *Id.* at 941 (“The allegations regarding pay and days off, although they could include claim of disparate treatment, would also allow proof of a facially neutral practice or policy of the district in unintentional discrimination. Because that possibility exists, the claims are within the errors and omissions coverage, and the trial court correctly held Northwestern liable for defense costs.”).

364. *Id.* at 941 (“As we have noted, harassment is not a facially neutral practice or policy.

no duty to pay the settlement expenses associated with Speiginer's suit.³⁶⁵

These inconsistent holdings are troublesome. The appellate court's disparate treatment analysis is superficial. One element of ethnic harassment in the workplace requires an employee to prove that the harassment unreasonably interfered with his or her work performance. Another element requires the third-party victim to prove that the employer is vicariously liable for a supervisor's or an agent's harassment based on ethnicity. However, the Oregon appellate court considered neither element.

Bryant's ethnic harassment claim was arguably a disparate impact claim. He alleged that "I am constantly . . . harassed by supervisors. . . . I feel that other [African-Americans] are being treated the same way." If this language were viewed in a light more favorable to the alleged victims, it could be reasonably concluded that, although the school district's practice of evaluating teacher performance was facially neutral in its treatment of African-American and white schoolteachers, the practice affected African-American teachers more harshly than other teachers without a sound business justification.³⁶⁶ Viewed from this perspective, Northwestern would have a duty to defend the school district. But the court never considered this point.

Second, each of the African-American complainants alleged ethnic harassment in the underlying suits, which means that each had the burden of proving that the school district's conduct was intentional. Yet the appellate court forced Northwestern to defend/indemnify the insured only when the third-party victims were females. Assuming that the females' complaints involved a disparate impact claim and accepting that the male's claim involved disparate treatment actions, the court still should have ordered Northwestern to defend every suit.

At least three years before *Multnomah County School District*, the Oregon Supreme Court adopted the mixed-claims or the multiple-claims rule to help lower courts resolve duty-to-defend, duty-to-pay, and duty-to-indemnify controversies:

When [a] complaint is filed against the insured which alleges, without amendment, that the insured is liable for conduct covered by the policy, the insurer has the duty to defend the insured, even though other conduct is also alleged which is not within the coverage. The insurer owes a duty to defend if the

Racial harassment requires intent and is not within the errors and omissions coverage of Northwestern's policy.").

365. *Id.* at 940 ("The amount of the settlement between Speiginer and the district is not within Northwestern's errors and omissions policy coverage. . . . [T]his is a claim of intentional harassment and retaliation. Northwestern has no duty to defend this type of action under the terms of the policy.").

366. *Cf. Teamsters*, 431 U.S. at 335-36 n.15 ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their *treatment* of different groups but that in fact *fall more harshly on one group than another* and cannot be justified by business necessity.") (emphasis added).

claimant can recover against the insured under the allegations of the complaint upon any basis for which the insurer affords coverage.³⁶⁷

Under this rule, the Oregon appellate court should have ordered Northwestern to defend/indemnify each workplace ethnic harassment lawsuit.

D. Insurers Have No Duty to Defend Insureds or Reimburse Expenditures Associated with Workplace Mental Anguish Suits: A Critique of Courts' Diverse Explanations

Employers also have asked their liability insurers to defend them against ethnic minorities' suits alleging the intentional infliction of emotional distress. When insurers refuse to defend or indemnify, employers petition courts for declaratory relief. Among the reported cases, state courts typically rule in favor of the insurers although the reasons for ruling against "ethnically insensitive" employers are unintelligible, less than convincing, and arguably unfair.

In *Interface Group-Massachusetts, Inc. v. United States Fire Insurance Co.*,³⁶⁸ a discharged minority employee sued the employer in the underlying suit, alleging "[ethnic] discrimination in employment, retaliation, bad faith termination and intentional infliction of emotional distress."³⁶⁹ The Massachusetts judge observed that the insurance contract "provide[d] coverage for 'bodily injury by accident or bodily injury by disease' [but excluded] 'coverage for bodily injury intentionally caused or aggravated' by the insured."³⁷⁰ The court also noted that in Massachusetts, "the duty to defend is based on the facts alleged in the complaint and those which are known by the insurer."³⁷¹

But then the judge concluded that the insurer had no duty to defend the employer for the following reason: "The record contain[ed] no evidence that the insurer knew of any physical injuries when it denied coverage."³⁷² This is a poorly reasoned explanation at best. In Massachusetts, an employee who sues his or her employers for the intentional infliction of emotional distress does not have to allege and prove a physical injury.³⁷³ Con-

367. See *Nielsen v. St. Paul Ins. Co.*, 583 P.2d 545, 547 (Or. 1978) (emphasis added).

368. 1994 WL 175022 (D. Mass. Apr. 21, 1994).

369. *Interface Group-Massachusetts, Inc.*, 1994 WL 175022, at *1.

370. *Id.*

371. *Id.*

372. *Id.*

373. See, e.g., *Haddad v. Gonzalez*, 576 N.E.2d 658, 667-68 (Mass. 1991) ("[T]he elements of a cause of action for intentional infliction of emotional distress include: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct . . . ; (2) that the conduct was 'extreme and outrageous' . . . ; (3) that the actions of the defendant were the cause of the plaintiff's distress . . . ; and (4) that the emotional distress sustained by the plaintiff was 'severe.' . . . There is no requirement of physical injury in common law intentional infliction of emotional distress cases, and we see no reason to create such a requirement. . . .").

sequently, the employer has little reason to be concerned about physical injuries. More importantly, whether the insurer has notice of physical injuries is also highly irrelevant and should have no bearing on whether a court orders the insurer to defend or indemnify.

The U.S. District Court for the Southern District of Ohio also delivered a strained duty-to-defend decision in *State Farm Fire & Casualty Co. v. Hiermer*.³⁷⁴ In the underlying suit, an ethnic minority accused Rockwell International Corporation and its supervisor of racial discrimination, slander, and intentional infliction of emotional distress.³⁷⁵ State Farm insured the supervisor under a homeowners' policy. The contract "insured against personal liability and for property damage" but "exclude[d] bodily injury or property damage which [was] expected or intended by an insured."³⁷⁶

State Farm petitioned the court for declaratory relief, claiming that it had no contractual obligation to defend the supervisor, and the district court agreed. The court structured its syllogism this way: The homeowners policy did not cover bodily injury that an insured intends to inflict. A cause of action for the "[i]ntentional infliction of emotional distress is by definition intentional," so therefore State Farm had no duty to provide a legal defense against this intentional tort claim.³⁷⁷

The court's analysis was unsound. First, the contract stated that the insured's allegedly intentional behavior must cause a third-party victim's "bodily injury." However, the agreement does not even attempt to outline the various types of actions, intentional or negligence-based causes, that the insurer must defend. Second, the court observed that "[the third-party victim's claim] of intentional . . . infliction of emotional distress . . . [is not a claim] of bodily injury as that term is defined in the State Farm policy."³⁷⁸ But in this case, contractual definition should not have been determinative for the following reasons.

The language appearing in a legislatively approved homeowners' policy is subject to the common law, and the Ohio Supreme Court has ruled that "an actor may be liable for the intentional infliction of emotional distress absent a physical injury to the claimant."³⁷⁹ Moreover, "[i]t is well-settled

374. 720 F. Supp. 1310 (S.D. Ohio 1988).

375. *Hiermer*, 720 F. Supp. at 1313 ("In that action, [John D.] Penn allege[d] that [supervisor] Hiermer violated 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, and Ohio common law. . .").

376. *Id.* at 1314–15.

377. *Id.* at 1315.

378. *Id.* at 1314.

379. See *Uland v. S.E. Johnson Companies*, 1998 WL 123086, at *6 (Ohio Ct. App. Mar. 13, 1998). See also *Pyle v. Pyle*, 463 N.E.2d 98 (Ohio Ct. App. 1983) (ruling that a plaintiff must plead and prove the following elements to prevail in an intentional infliction of emotional distress suit: "(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (2) that the actor's conduct was so extreme and outrageous as to go 'beyond all possible bounds

that if the language of an insurance policy is ambiguous, it will be construed liberally in favor of the insured and strictly against the insurer."³⁸⁰ In light of these Ohio principles, the insured supervisor should have received a favorable policy ruling.

E. Insurers Have No Duty to Defend Insureds or Reimburse Expenditures Associated with Residential Ethnic Harassment Suits: A Critique of Courts' Inconsistent Explanations

Federal constitutional law and criminal statutes guarantee the right of racial or ethnic minorities to live in their homes free from ethnic harassment, intimidation, hostilities, and hate crimes. Public policy as well as civil rights statutes also give ethnic minorities the right to seek redress for residential harassment.

However, whether liability insurers must defend their insureds in a residential ethnic harassment suit is controversial. Every court considering this narrow question has ruled that insurers have no contractual duty to defend or indemnify insureds accused of harassing ethnic minorities in the minorities' residences. These duty-to-defend decisions, involving ethnic-based residential harassment, are also inordinately strained, badly reasoned, and unfair to both the insured and the alleged victims of residential harassment.

In *Allstate Insurance Co. v. Browning*,³⁸¹ an often-cited residential harassment case, Christopher Browning, a white sixteen-year-old, and two of his teenage friends harassed the Richardsons, an African-American family residing in Milwaukie, Oregon, by burning a cross in their yard and shouting racial epithets.³⁸² Browning testified that he harassed the Richardsons by breaking their car and house windows, spray painting their house, and threatening their safety. However, there was "no evidence that Christopher Browning personally carried out these . . . acts."³⁸³

The Richardsons sued both Christopher and his parents in state court. In their multiple- or mixed-claims complaint, they alleged trespass, including an allegation of property destruction, parental neglect under a state statute, and both intentional and negligent interference with the use and enjoyment of their property.³⁸⁴ In addition, they alleged "severe mental

of decency' and was such that it can be considered as 'utterly intolerable in a civilized community'; (3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and (4) that the mental anguish suffered by plaintiff is serious and of a nature that 'no reasonable man could be expected to endure it.' . . .").

380. See *White v. John Hancock Mutual Life Ins. Co.*, 1992 WL 217502, at *2 (Ohio Ct. App. Jan. 20, 1993).

381. 598 F. Supp. 421 (D. Or. 1983).

382. *Browning*, 598 F. Supp. at 421.

383. *Id.* at n.1.

384. *Id.*

and physical stress, trauma, pain, discomfort and nervousness.” Further, they had “incurred medical expenses[,] lost business profits . . . and . . . [expenses trying to make] their premises safe from further intrusions.”³⁸⁵

Allstate insured Christopher Browning and his parents under a homeowners’ policy. The pertinent part of the coverage provision stated: “[This] policy provides coverage for losses due to bodily injury or property damage which an insured person becomes obligated to pay,” but “the policy exclude[s] bodily injury or property damage intentionally caused by an insured person.”³⁸⁶ Citing the exclusion clause, Allstate refused to defend the juvenile harasser and his parents. The federal judge for the U.S. District Court for the District of Oregon endorsed the insurer’s decision.

Under Oregon’s common law, “harm itself, not just the act causing the harm[,] must have been intended” before Allstate’s exclusion clause could be used successfully as an affirmative defense.³⁸⁷ Then the judge declared: “This court finds from the undisputed facts that Christopher Browning’s acts were intentional and were intended to produce the kind of harm which resulted. [Therefore, Allstate has no duty to defend the teenager because] the damage and injury resulting from [Christopher’s] acts are . . . excluded from coverage under the insurance policy.”³⁸⁸

The judge’s conclusion is suspect for several reasons. First, although the court said that the prejudiced juvenile had an intent to harass, injure, and intimidate the Richardsons, the undisputed facts did not support this finding. The African-American complainants themselves “alleged that [although] the boys’ acts were intentional, the harm they caused . . . was not intended.”³⁸⁹ Furthermore, the youth swore under oath that his acts, though intentional and racist, were not designed to harm or injure the Richardsons physically or mentally.³⁹⁰

The Richardsons also sued Christopher’s parents, presumably under Oregon’s parental responsibility statute, arguing that the parents were neg-

385. *Id.*

386. *Id.*

387. *Id.* at 423. *See also Neilsen*, 583 P.2d at 545 (“It is not sufficient that the insured’s intentional, albeit unlawful acts have resulted in unintended harm; the acts must have been committed for the purpose of inflicting the injury and harm before either a policy provision excluding intentional harm applies or the public policy against insurability attaches.”).

388. *Id.* (emphasis added).

389. *Id.* at 422 (emphasis added).

390. *See, e.g., id.* at 422–23 (At Christopher Browning’s deposition, he testified as follows: “Question: Where did you get the idea for [burning] the cross? Answer: Well, I had seen such things done on T.V., and it was kind of just . . . a spur of the moment thing. . . . Question: And why did you think it was a good idea? Answer: It wasn’t necessarily . . . a good idea. It was just an idea. . . . Christopher Browning also testified that he had no racial hatred and did not know the emotional effects his acts would have on the Richardsons or on any other [African-American] person. . . . [He stated] that he did not anticipate that . . . harm . . . would result from his ‘pranks’ and that he did not intend to harm the Richardsons in any manner.”).

ligent for failing to prevent their son's allegedly racist acts.³⁹¹ However, the judge's declaring that Allstate had no duty to defend unfairly penalized the "innocent" parents. Robert and Kathleen Browning were coinsureds under the homeowners' policy. If a third-party victim sues an insured and a co-insured for allegedly committing an excluded intentional act and a covered negligent act, respectively, the insurer must still defend and/or indemnify the "innocent" coinsured who did not commit the intentional act. This is commonly called the "innocent coinsured doctrine."³⁹² In light of this doctrine and on the basis of the undisputed facts reported in *Browning*, Allstate had an unambiguous duty to defend the parents in the underlying suit.³⁹³

391. *Id.* at 422. The identity of the Oregon statute does not appear in the decision. However, at the time this controversy arose, a parental responsibility statute had been enacted for at least six years. That statute, OR. REV. STAT. § 30.765 (1975) — LIABILITY OF PARENTS FOR TORT BY CHILD, states in pertinent part: "[T]he parent or parents of an unemancipated minor child shall be liable for actual damages to person or property caused by any tort intentionally or recklessly committed by such child. . . . The legal obligation of the parent or parents of an unemancipated minor child to pay damages under this section shall be limited to not more than \$7,500, payable to the same claimant, for one or more acts. When an action is brought under this section on parental responsibility for acts of their children, the parents shall be named as defendants therein and, in addition, the minor child shall be named as a defendant."

392. *Cf.* Michigan Basic Property Ins. Ass'n v. Wasaarovich, 542 N.W.2d 367, 369–70 (Mich. Ct. App. 1995) ("[T]he innocent coinsured doctrine prevents an insurer from voiding a policy that would otherwise cover the particular loss on the basis of fraud by the insured as long as the coinsured is innocent of any wrongdoing.").

393. *See, e.g.,* West American Ins. Co. v. Ambassador Pizza, Inc., 145 F.3d 1224, 1229 (10th Cir. 1998) (applying Utah law and concluding that "the term 'any insured' in an exclusion clause in a policy that also contains a severability clause does not exclude coverage for all insureds when only one insured is at fault"); Allstate Ins. Co. v. Worthington, 46 F.3d 1005, 1007 (10th Cir. 1995) (applying Utah law and upholding the trial court's ruling that "the term 'an insured' as used in the intentional and criminal exclusion clauses was ambiguous [respecting] whether the husband's criminal and intentional acts excluded indemnification for the [innocent] wife's negligent acts"); McFarland v. Utica Fire Ins. Co., 814 F. Supp. 518, 525 (S.D. Miss. 1992), *aff'd*, 14 F.3d 55 (5th Cir. 1994) (applying Mississippi law and concluding that "[t]he language of the exclusion [clause] withholds coverage for 'an' act committed by 'an' insured, not 'any' act committed by 'any' insured [and that] one . . . may reasonably conclude . . . the exclusion provision is directed only at the acting insured"); Litz v. State Farm Fire & Cas. Co., 695 A.2d 566, 571 (Md. 1997) (applying Maryland law and concluding "that the business pursuits exclusion in [the] homeowner's policy applies separately to each insured such that one insured's excluded activity does not preclude coverage for other insureds who did not participate in the excluded activity"); Morgan v. Cincinnati Ins. Co., 411 Mich. 267, 276 (Mich. 1981) (declaring that under a fire insurance contract "the provision voiding the policy in the event of fraud by 'the insured' is to be read as having application only to the insured who committed the fraud. . . . The provision has no application to any other person described in the policy as an insured."); Premier Ins. Co. v. Adams, 632 So. 2d 1054, 1057 (Fla. Dist. Ct. App. 1994) (applying Florida law and holding that in order to give effect to all parts of the contract, court must construe the policy as excluding only coverage for separate insurable interest of the insured who intentionally caused an injury); Borman v. State Farm Fire & Cas. Co., 499 N.W.2d 419, 421 (Mich. Ct. App. 1992) (applying Michigan law and holding that "[the liability insurance contract] must not be construed to deny coverage to an innocent coinsured for the intentional wrongs of another insured"); Allstate Ins. Co. v. Cole, 1998 WL 487029, at *2 (Ohio Ct. App. Dec. 16, 1998) (applying Ohio law and con-

Finally, the underlying complaint was a mixed-claims or a multiple-allegations complaint that presented at least two mixed claims: (1) the allegation that Christopher and his friends intentionally and negligently interfered with the Richardsons' right to use and enjoy their home; and (2) the allegation that his parents were statutorily liable for failing to monitor Christopher's allegedly racist conduct. Given these mixed allegations, the federal district court should have ordered Allstate to defend the parents.

Oregon's common law is clear: "If the complaint contains some allegations of conduct or damage excluded from the policy but has other allegations which would fall within the policy coverage, the insurer has a duty to defend."³⁹⁴ Allstate's responsibilities under the policy were to pay damages on behalf of the parents or the son "for losses due to bodily injury or property damage which an insured person becomes obligated to pay."³⁹⁵ The jury in the underlying case found the parents liable for negligence; therefore, the judge should have satisfied the jury's judgment and ordered Allstate to pay the damages.

Eight years after *Browning*, another federal judge in the Ninth Circuit issued an unduly forced duty-to-defend ruling involving residential harassment. In *Allstate Insurance Co. v. Tankovich*,³⁹⁶ ethnic minorities James and Deborah Ahl and their child filed a civil rights action in a California court, claiming that their neighbor Frank Tankovich harassed them solely because of their ethnicity. The Ahls prevailed, and the state court judge entered a judgment in their favor and awarded substantial actual, punitive, and treble damages.

Five months later, Allstate filed a declaratory judgment action in the U.S. District Court for the Northern District of California, claiming that it had

cluding that "the applicability of the intentional acts exclusion [was] conclusively established by the [insured son's] conviction of a reckless act. However, the [insured son's] conviction [could not] be given conclusive effect against his [co-insured] parents[.] [therefore, the parents] should [not] be denied a defense". *But see* *Cuervo v. Cincinnati Ins. Co.*, 665 N.E.2d 1121, 1122-23 (Ohio 1996) (applying Ohio law and concluding that the homeowners' insurance policy did not provide liability coverage for the negligence claim against the innocent coinsured father that arose out of the insured sixteen-year-old son's intentional acts—the sexual molestation of minor children); *Taryn E.F. by Grunewald v. Joshua M.C.*, 505 N.W.2d 418, 422 (Wis. 1993) (applying Wisconsin law and declaring that "[t]he term 'any insured' unambiguously precludes coverage to all persons covered [under] the policy if any one of them engages in excludable conduct," notwithstanding a severability clause that provided that "[e]ach person listed above is a separate insured under this policy"); *American Family Mut. Ins. Co. v. Copeland-Williams*, 941 S.W.2d 625, 627, 629 (Mo. Ct. App. 1997) (applying Missouri law and declaring that "the phrase 'any insured' unambiguously precludes coverage to all persons covered by the policy if any one of them engages in excludable conduct," notwithstanding a severability clause that states that "the liability coverage applies separately to each insured").

394. *Paxton-Mitchell Co. v. Royal Indemnity Co.*, 569 P.2d 581, 584 (Or. 1977).

395. *Browning*, 598 F. Supp. at 422.

396. 776 F. Supp. 1394 (N.D. Cal. 1991).

no duty to defend its insured, Tankovich, and no duty to pay nearly \$160,000 in awarded damages. The exclusion clause in Tankovich's policy stated in pertinent part:

[This policy does] not cover bodily injury or property damage resulting from . . . [a]n act . . . intended or expected to cause bodily injury or property damage . . . even if the bodily injury or property damage is of a different kind or degree, or is sustained by a different person or property, than that intended or expected.³⁹⁷

Stressing that a criminal court had convicted Tankovich under the California penal code for committing hate crimes against the Ahls, the federal judge declared that Allstate had no duty to defend or pay damages because the policy excluded the insured's intentional misconduct.³⁹⁸ Tankovich did not appear in the declaratory judgment proceeding to present a counterargument. However, the Ahls appeared and argued that, although Tankovich intended to commit each of the hate crimes, Allstate had failed to prove that he had the requisite intent to harm them.³⁹⁹

The court dismissed the argument, stating that hate crimes "appear[] to involve harm that is [an] inherent and an inevitable result of such acts."⁴⁰⁰ Furthermore, the court stressed that "Mr. Tankovich's acts of leaving racially offensive and threatening telephone messages, spray painting racially offensive words, . . . driving his truck onto the [Ahls'] lawn and shouting threats of violence are just as disturbing as the acts [reported] in *Browning*."⁴⁰¹

Certainly there is no evidence that the *Tankovich* judge was indifferent to the Ahls' plight. However, it appears that the judge was more concerned about not rewarding Mr. Tankovich for his reprehensible behavior than about forcing Allstate to compensate the minority victims for their suffering. The Allstate policy covered "only . . . liabilities for bodily injury and property damage arising from *an accident*"⁴⁰² that the judge cited and used as an indefensible justification for ruling against the minority victims and their harasser. According to the court, Allstate need not pay the damages because "Mr. Tankovich's racial harassment . . . [could not] be construed . . . [as] an 'accident' for purpose of coverage under the insurance policy."⁴⁰³

There are at least two legally defensible reasons why the *Tankovich* court should have forced Allstate to pay the damages. First, the insurance contract excluded "bodily injury or property damage resulting from . . . [a]n

397. *Tankovich*, 776 F. Supp. at 1397.

398. *Id.*

399. *Id.* at 1395-97.

400. *Id.* at 1398.

401. *Id.* at 1398.

402. *Id.* at 1396.

403. *Id.*

act . . . intended or expected to cause bodily injury or property damage.⁴⁰⁴ However, the undisputed facts revealed that there were no bodily injuries⁴⁰⁵ and no property damages⁴⁰⁶ in the sense of physical destruction or harm. Unquestionably, Tankovich verbally harassed his minority neighbors and legally interfered with and invaded their legally protected right to enjoy, use, and maintain their residence in peace. However, the contract did not exclude from coverage mental anguish resulting from either verbal harassment, hate speech, offensive words, intentional interferences, or negligent interferences. Consequently, the federal judge should have ordered Allstate to pay the awarded damages. Furthermore, even if the meanings of “bodily injury” and “property damages” were unclear, they must be construed in favor of the insureds, regardless of whether the insured is an alleged racist or saint.⁴⁰⁷

Of course, there is a more compelling reason why Allstate should have been ordered to defend the suit and pay the awarded damages. The Ahls filed a state civil rights action, presumably under California’s “personal rights” statute, section 52.1.⁴⁰⁸ To prevail under that provision, the Ahls

404. *Id.* at 1397.

405. *Id.* at 1395 (Tankovich subjected his minority neighbors to “racially offensive and threatening messages . . . ; [and] to loud offensive racial comments. . .”).

406. *Id.* (Tankovich “[drove] his truck onto the Ahls’ front lawn; . . . bang[ed] on the Ahls’ door . . . ; [threw] firecrackers [on the Ahls’] back lawn . . . ; and spray paint[ed] offensive words on the front of the [house] after the Ahls had vacated it.”).

407. *See, e.g., Gray v. Zurich Ins. Co.*, 419 P.2d 168, 172 n.7 (Cal. 1966), repeating the language appearing in *Coast Mutual B.L. Ass’n v. Security T.I. & G. Co.*, 57 P.2d 1392, 1393 (Cal. 1936) (“In the decision of this question we are to be guided by well-established rules relating to the construction of insurance policies. Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had a right to expect, and to that end doubts, ambiguities, and uncertainties arising out of the language used in the policy must be resolved in his favor.”); *Garcia v. Truck Ins. Exchange*, 682 P.2d 1100, 1105 (Cal. 1984) (“In addition, the principle that ambiguities in insurance policies must be strictly construed against the insurer stems, primarily, from a recognition of the typical relationship between the parties. Ordinarily, we are faced with a conflict between the purchaser of an insurance contract and the insurance carrier. In such cases, it is typically the carrier who drafts the insurance contract, unilaterally, and for policy reasons is thus held responsible for any ambiguity in language.”). *But see Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 959 P.2d 265, 272–73 (Cal. 1998) (stressing that “[a] policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. . . . The fact that a term is not defined in the policies does not make it ambiguous. . . . Nor does ‘[d]isagreement concerning the meaning of a phrase,’ or ‘the fact that a word or phrase isolated from its context is susceptible of more than one meaning.’ . . . [L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.’ . . . ‘If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured’s reasonable expectation of coverage.’ ”).

408. *See CAL. CIVIL CODE* § 52.1 (West 1991) — CIVIL ACTIONS FOR PROTECTION OF RIGHTS. We presume that this is the correct statute, because a careful reading of *Tankovich* failed to disclose the precise description of the statute under which the Ahls commenced their “civil

would have had to allege and prove that Mr. Tankovich violated or interfered with their rights to exercise and enjoy the privacy, peace, and quiet of their residence, as guaranteed under federal and state constitutional and statutory laws.⁴⁰⁹ Under section 52.1, the Ahls could file and prove a prima facie violation of an intentional tort, a negligence-based tort, or a mixture of actions with the two broad categories.

The minority victims alleged and established that Tankovich "forced [the Ahls] to change residences[,] . . . telephon[ed] the Ahls' landlord and [left] racially offensive and threatening messages on [the landlord's] answering machine." They also proved that Tankovich allowed his dog to chase Deborah when she was attending to her child.⁴¹⁰ Given these facts, the Ahls' complaint involved or potentially could have involved multiple mixed causes of action. For example, they could have initiated actions for negligent interference with existing landlord and tenant relations,⁴¹¹ intentional and negligent infliction of emotional distress,⁴¹² negligent and intentional interference with present and prospective contractual (lease) rights and professional relationships,⁴¹³ intentional and negligent misrepresentations

rights." However, when the Ahls filed their civil action against Tankovich, § 52.1 had been enacted to help reduce and remedy the effects of harassment, "hate crimes," and the deprivation of personal rights. The Ahls' allegations are precisely the types of activities that § 52.1 was designed to address. See *Jones v. Kmart Corp.*, 58 Cal. Rptr. 2d 576, 579-80 n.1 (Cal. Ct. App. 1996) ("Kmart [argued] that section 52.1 . . . provide[s] a cause of action . . . only for those [violations] involving hate crimes or discrimination. . . . We agree with Kmart's state action contention, which makes it unnecessary for us to consider the discriminatory intent argument. . . . As originally enacted in 1987, section 52.1, subdivision (b) provided only for injunctive relief and 'other appropriate equitable relief.' (Stats. 1987, ch. 1277, § 3.) In 1990, the Legislature amended the provision to authorize recovery of damages. (Stat. 1990, ch. 393, § 1).")

409. Section 52.1(b) states in relevant part: "Any individual whose exercise or enjoyment of rights secured by the *Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with*, as described in subdivision (a), may institute . . . a civil action for damages, including, but not limited to, damages . . . , injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured." (emphasis added). See also § 52.1 (a), which reads in pertinent part: "Whenever a person or persons, whether . . . acting under color of law, *interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.*" (emphasis added).

410. *Tankovich*, 776 F. Supp. at 1395.

411. Cf. *Gill v. Hughes*, 278 Cal. Rptr. 306, 307 (Cal. Ct. App. 1991).

412. Cf. *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194, 203 (Cal. Ct. App. 1980) (noting that "unlike the general rule in personal injury cases, the negligent infliction of emotional distress, anxiety, worry, [and] discomfort is compensable without physical injury in cases involving the tortious interference with property rights").

413. Cf. *Redding v. St. Francis Med. Center*, 255 Cal. Rptr. 806, 807 (Cal. Ct. App. 1989); *Benach v. County of Los Angeles*, 71 Cal. Rptr. 2d 13, 19 (Cal. Ct. App. 1997).

made to a landlord,⁴¹⁴ and negligent and intentional interference with parental rights.⁴¹⁵

Therefore, in light of these revelations, there are two additional reasons why the court should have ruled in favor of the minority victims. First, under California law, “[a]n insurer is not liable for a loss caused by the willful act of the insured; but [the insurer] is not exonerated by the negligence of the insured, or of the insured’s agents or others.”⁴¹⁶ But more important, “[i]n an action where all the claims are potentially covered by the [insurance contract], the insurer has a duty to defend. . . . And if some of the claims are potentially covered and some are not, there is a duty to defend the claims which are potentially covered.”⁴¹⁷

IX. A CASE STUDY—AN EMPIRICAL ANALYSIS OF FEDERAL AND STATE COURT DUTY-TO-DEFEND AND DUTY-TO-INDEMNIFY DECLARATORY JUDGMENTS INVOLVING THIRD-PARTY CIVIL RIGHTS CLAIMS—1900–2000

This article has shown that courts generally are divided over whether liability insurers must defend or indemnify insureds that allegedly violate antidiscrimination laws. Under some circumstances, courts order insurance companies to defend their insureds in civil rights actions depending upon whether the courts employ traditional rules of contract construction or the doctrines of ambiguity, reasonable expectation, and plain meaning. On other occasions, however, courts cite the public policy surrounding various antidiscrimination laws to help decide whether liability insurers must defend, reimburse their insureds, or both.

During the early stages of the research for this article, a cursory examination of a few declaratory judgment cases revealed a puzzling finding: The gender of the third-party victim appeared to influence whether courts would order insurers to defend. For example, insurers did not have to defend alleged civil rights violators when the third-party victims were only females. However, when the victims in the underlying suit were males or both males and females, judges were more likely to order an insurer to defend or indemnify its insureds. More significantly, those initial findings occurred repeatedly, regardless of the types of violations alleged in the underlying civil rights actions.

414. *Cf.* *Cohen v. S & S Construction Co.*, 201 Cal. Rptr. 173, 174 (Cal. Ct. App. 1983).

415. *Cf.* *Ochoa v. Superior Court*, 216 Cal. Rptr. 661, 665 (Cal. 1985).

416. CAL. INS. CODE § 533 (West 1991).

417. *See* *St. Joe Minerals Corp. v. Zurich Ins. Co.*, 89 Cal. Rptr. 2d 101, 106 (Cal. Ct. App. 1999) (“These rules are inherent in the fact that the policy promises a defense, but no one can really know at the outset of the claim against the policyholder whether a particular claim that is ‘potentially covered’ will result in an actual duty to indemnify based on facts provided in the underlying action.”).

This writer has researched, documented, and reported elsewhere that background variables or irrelevant criteria significantly affect judges' declaratory judgments.⁴¹⁸ But it was truly unsettling to discover that the gender of a third party would actually influence whether judges would order insurers to defend insureds, who themselves were accused of discriminating on the basis of gender or violating other civil rights laws.

In light of those initial and unexpected revelations, the author decided to do a more comprehensive empirical study to determine whether other irrelevant and prejudicial factors were systematically affecting, either intentionally or unintentionally, the duty-to-defend and duty-to-indemnify declarations of federal and state judges. The findings were astounding. Although courts profess to use only established legal doctrines and public policy to declare rights and obligations under insurance contracts, the evidence suggests otherwise. Empirical evidence demonstrates that ethnicity, types of insureds, types of third-party victims, and a host of other extralegal factors affect whether courts force insurance companies to defend or indemnify their insureds.

A. *Source of Data, Sampling Procedures, and Background Attributes of Insurers, Insureds, and Third-Party Civil Rights Complainants*

The research hypothesis of this article is as follows. When alleged civil rights victims sue insureds, judges allow clearly immaterial factors, such as the gender, ethnicity, geographic location, or legal status of third-party victims, to significantly influence whether they force insurers to defend insureds who allegedly practice irrational discrimination. Westlaw and LEXIS-NEXUS data retrieval systems as well as traditional reporters and other legal sources were used to locate every state and federal declaratory judgment on this topic, reported or unreported, between 1900 and 1999.⁴¹⁹ There were 181 such decisions, including 68 trial court rulings and 113 appellate rulings. The findings and discussion presented in the sections below are derived from the statistical analysis of these 181 declaratory judgments.⁴²⁰

418. See, e.g., Rice, *The Duty to Defend Insureds' Intentional and 'Immoral' Acts Under Liability Insurance Contracts: An Historical and Empirical Review of Federal and State Court Declaratory Judgments—1900–1997*, 47 AM. UNIV. L. REV. 1311, 1202–1414.

419. Search of Westlaw, ALLSTATES, ALLFEDS, MIN-CS, CTA, and DCT databases (June 1999), and search of LEXIS, Genfed Library, COURTS File (July 1999).

420. See Willy E. Rice, *Insurers' Duty to Defend and Indemnify Insured Civil Rights Violators: An Empirical Investigation of State and Federal Judges' Declaratory Judgments Between 1900–1999 (1999)* (an unpublished working paper—on file with the author). All statistical procedures, databases, and results are on file with the author.

B. *Bivariate Relationships Between the Disposition of Duty-to-Defend/Indemnify Disputes in State and Federal Declaratory Judgment Hearings and the Demographic Attributes of the Insureds and the Alleged Third-Party Civil Rights Victims*

Table 1 illustrates the most striking demographic attributes of insureds and third-party victims, those appearing in the declaratory judgment and underlying civil rights actions, respectively. First, the middle column, labeled State & Federal District Courts (N = 68), highlights background information about insureds who asked federal and state district courts only for declaratory relief. The right column, labeled State & Federal Appellate Courts and State Supreme Courts (N = 113), describes the attributes of the insured who went beyond district courts to appellate courts for relief.

A comparison of the two columns reveals some noteworthy findings. At the very bottom of Table 1, we find "Disposition of Declaratory Judgment Action from Complainants' (Insureds') View." Briefly put, insureds are significantly less likely to prevail when they petition state and federal district courts for declaratory relief. Superior courts are slightly more likely to force insurance companies to defend or indemnify insureds. The reported statistically significant⁴²¹ percentages are 64.7 percent and 43.7 percent, respectively.

Near the top of Table 1, the percentages indicate that the distributions of district and appellate court cases by Region of Country, by Circuits, and by Types of Complaining Insureds are fairly similar with a few minor exceptions. However, among the district court cases, the third-party victims in the underlying civil rights suits were significantly more likely to be disgruntled employees and prospective tenants, 63.2 percent and 23.5 percent, respectively. Conversely, among the appellate court cases, slightly greater percentages of third-party claimants were consumers, small businesses, and a variety of other individuals. The respective percentages are 4.4 percent, 2.7 percent, and 30.1 percent.

Near the center of Table 1, the percentages show that the distributions of district court and appellate court judgments by the ethnicity and gender of third-party victims are fairly similar. However, among district court cases, the third-party complainants in the underlying federal civil rights suits were significantly more likely to commence fair housing claims under 42 U.S.C. § 1982 and Title VIII of the Civil Rights Act of 1968. The

421. In previous articles, the author presented a short and an uncomplicated discussion of statistically significant findings and the Chi Square statistics. See Willy E. Rice, *Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems That the Fair Housing Act of 1983 Would Eliminate*, 27 *How. L.J.* 227, 253-55 & nn.161-62 (1984); Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 *REV. LITIG.* 219, 284-85 nn.403-04 (1986).

TABLE 1. DECLARATORY JUDGMENT ACTIONS: SOME SELECTED DEMOGRAPHIC CHARACTERISTICS OF LITIGANTS WHO PETITIONED STATE AND FEDERAL COURTS TO DECLARE WHETHER LIABILITY INSURERS HAVE A DUTY TO DEFEND INSURED WHO ALLEGEDLY DISCRIMINATED AGAINST THIRD-PARTY VICTIMS—BETWEEN 1900 AND 1999 (N = 181)

Demographic Characteristics	State & Federal District Courts (N = 68)	State & Federal Appellate Courts and State Supreme (N = 113)
	(Percent)	(Percent)
Region of Country		
East	13.2	8.8
Midwest	25.0	34.5
Northeast	7.4	8.0
South	10.3	10.6
Southwest	8.8	8.0
West	35.3	30.1
Circuits		
First	10.3	5.3
Second	4.4	1.8
Third	4.4	4.4
Fourth	4.4	5.3
Fifth	7.4	6.2
Sixth	1.5*	8.0*
Seventh	22.1	15.9
Eighth	2.9*	11.5*
Ninth	33.8	28.3
Tenth	4.4	3.5
Eleventh	4.4	8.0
Federal	—	1.8
Declaratory Judgment Actions— Types of Complaining Insureds		
Corporate Officers & Directors	39.7	32.7
Private Employers	11.8	8.0
Insured Individuals	13.2	2.7
Governments	13.2	10.6
Small Businesses	7.4	10.6
Professionals	1.5	8.0
Schools	2.9	7.1
Others	10.3	14.9
Underlying Suits—Third Parties'		
Legal Status		
Employee	63.2*	34.5*
Tenant	23.5**	9.7**
Landowner	4.4	3.5
Innocent Bystander	4.4*	8.0*
Professional	4.4	4.4
Student	5.9	2.7
Consumer	—	4.4
Small Business	—	2.7
Other		30.1*

TABLE 1. (Continued)

Demographic Characteristics	State & Federal District Courts (N = 68)	State & Federal Appellate Courts and State Supreme (N = 113)
	(Percent)	(Percent)
Underlying Suits—Third-Party Individuals' Ethnicity		
African-American	32.4	24.8
Anglo-American	52.9	60.2
Other Minorities	14.7	15.0
Underlying Suits—Gender of the Third Parties Commencing the Action		
Females, Only	48.5	39.8
Males, Only	35.3	34.5
Both Females & Males	14.7	24.8
Underlying Federal Suits—Third Parties' Legal Theories		
Civil Rights Act, 42 U.S.C. § 1981	7.4	9.7
Civil Rights Act, 42 U.S.C. § 1982	8.8	4.4
Civil Rights Act, 42 U.S.C. § 1983	13.2	13.3
Civil Rights Act-1964, Title VII	25.0	25.7
Civil Rights Act-1968, Title VIII	20.6**	8.8**
Age Discrimination Act-1967	4.4	5.3
Underlying State Suits: Third Parties' Legal Theories—States' Antidiscrimination Laws		
Employment Discrimination	38.2	35.4
Ethnic Discrimination	29.4**	15.9**
Gender Discrimination	23.5	26.5
Housing Discrimination	8.8**	3.5**
Sexual Harassment	22.1	19.5
Grounds for Disposing of the Declaratory-Judgment Actions		
Merit	100.0	89.4
Procedural	—	10.6
Disposition of the Declaratory-Judgment Actions From Complainants' View		
Favorable Outcome	35.3	43.7***
Unfavorable Outcome	64.7***	56.3

Levels of Statistical Significance— Chi Square: *** p < .001
 Fisher's Exact Test: ** p < .01
 * p < .05

percentages are 8.8 percent and 20.6 percent, respectively. Conversely, among appellate court cases, third parties were less likely to file § 1982 and Title VIII claims in the underlying federal civil rights suits. The percentages are 4.4 percent and 8.8 percent, respectively.

Finally, Table 1 also illustrates the types of legal theories that third-party complainants advanced in the underlying state civil rights suits. Among district court cases, third parties were significantly more likely to allege that insureds violated state civil rights statutes by discriminating on the basis of ethnicity (29.4 percent) and by practicing housing discrimination (8.8 percent). Among the appellate court cases, third-party victims were significantly less likely to complain about these violations; the percentages are 15.9 percent and 3.5 percent, respectively.

Table 2 illustrates the disposition of duty-to-defend actions in federal and state district courts by selected demographic characteristics of the third-party victims in the underlying civil rights suits and of insureds in the declaratory judgment actions. This evidence begins to help answer the principal question: Do extralegal factors influence judges in the disposition of duty-to-defend/indemnify controversies?

The first demographic variable appearing in Table 2 is Third-Party Victims' Theories of Recovery in the Underlying Civil Rights Suits. The evidence reveals that judges are significantly more likely (56.5 percent) to force insurers to defend insureds when civil rights complainants sue insureds for violating Title VIII of the Civil Rights Act of 1968. However, courts are extremely less likely to order insurance companies to defend insureds when civil rights victims sue insureds for violating Title VII of the Civil Rights Act of 1964 and the Age Discrimination Act of 1967. The unfavorable percentages are 75.0 percent and 77.8 percent, respectively.

Large liability carriers insure consumers in every state and must respond to their insureds' lawsuit in every jurisdiction. Does geographic region affect whether carriers must defend or indemnify insureds who allegedly violated civil rights laws? On the basis of the percentages reported in Table 2, the answer is yes. Should geographic location influence the disposition of duty-to-defend and duty-to-indemnify controversies? Clearly not.

First, it is worth mentioning that regardless of location of courts, insureds were still less likely to prevail when they petitioned courts for declaratory relief. Stated another way, insureds had less than a 50 percent chance of prevailing in each and every region of the country—the East,⁴²² Midwest,⁴²³ Northeast,⁴²⁴

422. The East includes Delaware, the District of Columbia, Massachusetts, Maryland, New Jersey, New York, and Pennsylvania.

423. The Midwest includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, West Virginia, and Wisconsin.

424. The Northeast includes Connecticut, Maine, New Hampshire, Rhode Island, Vermont, Puerto Rico, and Guam.

TABLE 2. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN FEDERAL AND STATE DISTRICT COURTS BY SELECTED DEMOGRAPHIC CHARACTERISTICS OF LITIGANTS (N = 181)

Selected Demographic Characteristics	Subcategories	Disposition of Declaratory Judgment Actions from Insureds' Perspectives		Number of Cases	Chi Square Value (Degrees of Freedom)
		Favorable	Unfavorable		
		Percent			
Underlying Suits: Third Parties' Legal Theories	Civil Rights Act, Title VII	25.0	75.0	(N = 40)	7.111*** (df = 2)
	Civil Rights Act, Title VIII	56.5	43.5	(N = 23)	
	Age Discrimination Act, 1967	22.2	77.8	(N = 9)	
Geographic Location of State and Federal District Courts	East	47.4	52.6	(N = 10)	14.177*** (df = 5)
	Midwest	44.6	55.4	(N = 56)	
	Northeast	14.3	85.7	(N = 14)	
	South	47.2	52.6	(N = 19)	
	Southwest	33.3	66.7	(N = 15)	
	West	19.0	81.0	(N = 58)	
Distribution of State and Federal District Courts Within the Twelve Federal Circuits	First Circuit	23.1	76.9	(N = 13)	20.989*** (df = 11)
	Second Circuit	40.0	60.0	(N = 5)	
	Third Circuit	50.0	50.0	(N = 8)	
	Fourth Circuit	33.3	66.7	(N = 9)	
	Fifth Circuit	25.0	75.0	(N = 12)	
	Sixth Circuit	10.0	90.0	(N = 10)	
	Seventh Circuit	45.5	54.5	(N = 33)	
	Eighth Circuit	60.0	40.0	(N = 15)	
	Ninth Circuit	18.2	81.8	(N = 55)	
	Tenth Circuit	42.9	57.1	(N = 7)	
	Eleventh Circuit	58.3	41.7	(N = 12)	
	Federal Circuit	50.0	50.0	(N = 2)	

Levels of statistical significance: ***, $p < .01$.

South,⁴²⁵ Southwest,⁴²⁶ and West.⁴²⁷ However, when the insureds sued national and regional carriers in the Northeast, Southwest, and West for refusing to defend, courts were overwhelmingly less likely to declare that insurers had a duty to defend or indemnify insureds. The unfavorable lopsided percentages are 85.7 percent, 66.7 percent, and 81.0 percent, respectively.

Finally, statistics illustrated in Table 2 suggest that judges awarded or failed to award declaratory relief depending upon the circuit in which the action commenced. For example, if the declaratory judgment action arose in the Eighth or Eleventh Circuits, judges were significantly more likely to order insurers to defend or indemnify. The favorable percentages are 60.0 percent and 58.3 percent, respectively. On the other hand, judges were overwhelmingly less likely to force insurance companies to defend or indemnify insureds in the First, Second, Fourth, Fifth, Sixth, and Ninth Circuits. The reported unfavorable percentages are 76.9 percent, 60.0 percent, 66.7 percent, 75.0 percent, 90.0 percent, and 81.8 percent, respectively.

Once more, the statistical evidence reported in Table 2 is based on the disposition of duty-to-defend controversies. There appears to be no common sense reason, in law or under principles of equity, to explain or justify the systematic effects of demographic factors on these decisions.

Table 3 illustrates the relationship between the disposition of declaratory judgment actions in courts of appeals and the characteristics of insureds and third-party victims in the underlying civil rights suits. In this table, we see the effects of Types of Insureds on appellate courts' dispositions. The first set of statistically significant findings shows that federal and state courts of appeals are substantially more likely to order insurance companies to defend when the insureds are professionals and administrators at public and private schools. The percentages are 62.5 percent and 85.7 percent, respectively. However, when the insureds are corporations, proprietors (private employers), small businesses, and other types of insureds, appellate courts are significantly less likely to order insurance companies to defend or indemnify. The latter pertinent percentages are 51.4 percent, 57.1 percent, 91.7 percent, and 61.8 percent, respectively.

The next two sets of statistically meaningful findings in Table 3 are disturbing because they suggest that courts of appeals are likely to allow ethnicity and gender to influence the outcome of declaratory judgment actions. For instance, when Asians, Jews, Native Americans, Pacific Islanders, and Puerto Ricans (Other Minorities) accuse insureds of discriminating

425. The South includes Alabama, Georgia, Florida, Mississippi, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia.

426. The Southwest includes Arkansas, Louisiana, Oklahoma, and Texas.

427. The West includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

TABLE 3. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN FEDERAL COURTS OF APPEALS AND IN STATES' APPELLATE AND SUPREME COURTS BY SELECTED DEMOGRAPHIC CHARACTERISTICS OF LITIGANTS (N = 103)

Selected Demographic Characteristics	Disposition of Declaratory Judgment Actions from Insureds' Perspectives		Number of Cases	Chi Square Value (Degrees of Freedom)
	Favorable	Unfavorable		
	Percent			
Types of Insureds	Corporations	48.6	51.4	13.025*** (df = 5)
	Private Employers	42.9	57.1	
	Professionals	62.5	37.5	
	Public & Private Schools	85.7	14.3	
	Small Businesses	8.3	91.7	
Other	38.2	61.8		
Underlying Suits: Third-Party Victims' Ethnicity	Anglo-Americans	41.9	58.1	7.2000** (df = 2)
	African-Americans	30.8	69.2	
	Other Minorities†	73.3	26.7	
Underlying Suits: Third-Party Victims' Gender Per Suit	Female, only	29.5	70.5	6.246** (df = 2)
	Male, only	54.3	45.7	
	Both Females & Males	54.2	45.8	

†This category includes Asians, Jews, Native Americans, Pacific Islanders & Puerto Ricans.

Levels of statistical significance:

*** p ≤ .01

** p ≤ .05

on the basis of ethnicity, federal and state appellate courts are substantially more likely (73.3 percent) to order liability insurers to defend or indemnify insureds.

Conversely, when whites sue insureds for allegedly discriminating on the basis of ethnicity, appellate courts are less likely to force insurers to defend. When the third-party victims are African-Americans, the likelihood of appellate courts ordering insurance companies to defend insureds is also substantially less. The reported percentages for whites and African-Americans are 58.1 percent and 69.2 percent, respectively.

The gender of third-party complainants also affects the disposition of declaratory judgment actions. For example, if plaintiffs in the underlying civil rights litigation are males only or both males and females, appellate courts are more likely to order insurance companies to defend or indemnify insureds accused of violating federal and state antidiscrimination statutes. The percentages are 54.3 percent and 54.2 percent, respectively. On the other hand, when the complainants in the underlying civil rights suits are females only, appellate courts are substantially less likely (70.5 percent) to order insurers to defend.

Under an equal protection analysis, ethnicity is a suspect classification; therefore, if a state actor wants to discriminate on the basis of ethnicity, that actor must present a compelling justification.⁴²⁸ In addition, before a state actor can discriminate on the basis of gender, that actor must present some legitimate reason.⁴²⁹ However, in the context of a declaratory judgment hearing, there is no compelling reason why appellate courts would allow the ethnicity and gender of civil rights victims to influence whether courts order insurers to defend insureds who themselves have been accused of discriminating on the basis of gender or ethnicity.

This evidence is valid and not a statistical quirk. For example, Table 4 presents the relationship between the gender of third-party victims and the disposition of the declaratory judgment actions, controlling for the influence of the third-party complainants' ethnicity.

The findings in Table 4 answer the question whether the combined effects of ethnicity and gender influence whether appellate courts will force insurers to defend alleged civil rights violators. When African-Americans and other minorities accuse insureds of violating antidiscrimination laws, courts are statistically no more likely to order insurers to defend insureds

428. See, e.g., *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273-74 (1986).

429. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) ("Our decisions . . . establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification. The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'").

TABLE 4. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN FEDERAL COURTS OF APPEALS AND IN STATE APPELLATE AND SUPREME COURTS BY THE GENDER OF THIRD-PARTY VICTIMS WHO COMMENCED UNDERLYING SUITS, CONTROLLING FOR THE INFLUENCE OF THIRD-PARTY VICTIMS' ETHNICITY (N = 103)

Disposition of Declaratory-Judgment Actions in Federal Appellate Courts and in State Appellate and Supreme Courts from the Insureds' Perspective	Third-Party Victims' Ethnicity: Whites			Third-Party Victims' Ethnicity: African-Americans & Other Minorities		
	Female Victims, Only (N = 37)	Male Victims Only (N = 16)	Both Males & Females (N = 9)	Female Victims, Only (N = 7)	Male Victims, Only (N = 19)	Both Males & Females (N = 15)
	Percent	Percent	Percent	Percent	Percent	Percent
Favorable	27.0	75.0	55.6	42.9	36.8	60.0
Unfavorable	73.0	25.0	44.4	57.1	63.2	40.0

Chi Square = 10.584
 Degrees of Freedom = 2
 p < .001

Chi Square = 1.849
 Degrees of Freedom = 2
 (not statistically significant)

when the minority plaintiffs are just females, just males, or both males and females. Among African-Americans and other minorities, gender does not help to predict whether appellate courts will order insurance companies to defend the underlying civil rights suits. The reported Chi Square statistic (1.849) is not statistically significant.

On the other hand, when white plaintiffs sued insureds in the underlying lawsuits for violating state and federal antidiscrimination laws, gender influenced whether state and appellate courts ordered insurers to defend the alleged civil rights violators. For instance, when the third-party plaintiffs in the underlying suits were only white males or white males and females, courts were significantly more likely to compel insurers to defend their insureds. The reported percentages are 75.0 percent and 55.6 percent, respectively.

Courts were substantially less likely (73.0 percent) to order insurers to defend or indemnify insureds when the plaintiffs in the underlying civil rights actions were only white females. The reported Chi Square statistic (10.586) is statistically significant at $p < .0001$.

Table 5 presents the relationship between the disposition of duty-to-defend disputes in federal and state appellate courts and the types of third-party allegations, controlling for the ethnicity of third-party victims. The percentages in Table 5 tell whether the relationship between the disposition of declaratory judgment actions and alleged discriminatory conduct by insureds is statistically significant when third-party victims are just whites or when the alleged victims are just African-Americans and other ethnic minorities.

Once more, the findings show that depending on third-party victims' ethnicity, state and appellate courts are more or less likely to force insurers to defend/indemnify alleged civil rights violators. What do the findings in Table 5 reveal? First, some white victims accused insureds of practicing employment discrimination but other whites claimed that insureds committed other forms of irrational discrimination.⁴³⁰ The results show, however, that appellate courts are no more likely to order insurance companies to defend insureds when white victims complain about employment discrimination than when whites complain about other types of discriminatory acts. The reported Chi Square statistic (.9580) is not statistically significant.

Of course, when African-Americans and other ethnic minorities sue insureds for allegedly practicing employment discrimination, appellate courts are substantially more likely to force insurers to defend their insureds.

430. The following types of discriminatory behavior are included in this category: discriminatory access to capital and credit in the financial markets; discrimination in housing; discrimination in higher education; racial and sexual harassment; discrimination on the basis of religion; gender discrimination; and discrimination on the basis of national ancestry.

TABLE 5. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN FEDERAL COURTS OF APPEALS AND IN STATE APPELLATE AND SUPREME COURTS BY THE INSUREDS' ALLEGEDLY DISCRIMINATORY CONDUCT, CONTROLLING FOR THE INFLUENCE OF THIRD-PARTY VICTIMS' ETHNICITY (N = 103)

Disposition of Declaratory-Judgment Actions in Federal Appellate Courts and in State Appellate and Supreme Courts from the Insureds' Perspective	Third-Party Victims' Ethnicity: Whites		Third-Party Victims' Ethnicity: African-Americans & Other Minorities	
	Third-Party Victim Alleged Employment Discrimination (N = 49)	Third-Party Victim Alleged Other Forms of Discrimination (N = 13)	Third-Party Victim Alleged Employment Discrimination (N = 18)	Third-Party Victim Alleged Other Forms of Discrimination (N = 23)
	Percent	Percent	Percent	Percent
Favorable	38.8	53.8	66.7	30.4
Unfavorable	61.2	46.2	33.3	69.6

Chi Square = .9580
 Degrees of Freedom = 2
 (not statistically significant)

Chi Square = 5.331
 Degrees of Freedom = 2
 p < .01

When African-Americans and other ethnic minorities accused insureds of practicing other forms of irrational discrimination, appellate courts are less likely to compel insurers to defend alleged violators of civil rights. The corresponding percentages in Table 5 are 66.7 percent and 69.6 percent, respectively. The corresponding Chi Square statistic (5.331) is statistically significant at $p < .01$.

Before the author started the present investigation and analysis, some anecdotal evidence suggested that when third-party civil rights victims accused insureds of practicing various forms of harassment, i.e., sexual and residential harassment, courts were less likely to force insurers to defend their insureds. Courts were more likely to order a legal defense or indemnification when third-party victims accused insureds of practicing various forms of discrimination. To be sure, both harassment and discrimination are prohibited behaviors under various state and federal antidiscrimination laws, especially under Title VII of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968.

Therefore, the author decided to determine whether the anecdotal findings would disappear after performing a broader analysis. And if the preliminary findings did not disappear, the author wanted to know whether the ethnicity of the third-party victims could explain the propensity of courts to rule one way when third-party victims complained about harassment and to rule another way when victims complained about discrimination.

Table 6 presents three insightful bivariate relationships. First, reading the table from left to right, we notice that the anecdotal or preliminary findings did not disappear.

Examining the entire population of cases ($N = 181$) and without controlling for the influence of third-party victims' ethnicity, we discovered the following: When third-party victims accuse insureds of practicing racial, gender, employment, or housing discrimination, state and federal judges are more likely to force insurance carriers to defend the insureds. On the other hand, if third-party plaintiffs accuse insureds of practicing sexual or residential harassment, courts are exceedingly less likely to compel insurers to defend insureds who allegedly violated civil rights laws. The relevant percentages are 51.4 percent and 67.6 percent, respectively. The Chi Square statistic (4.2420) is statistically significant at $p < .01$.

These statistical findings do not appear among duty-to-defend cases where the underlying civil rights complainants are only African-Americans. In those declaratory judgment actions, courts are much less likely to order insurers to defend/indemnify alleged civil rights violators when African-Americans file sexual and residential harassment suits. These tribunals are substantially less likely to force liability carriers to defend/indemnify alleged civil rights violators when African-Americans file various types of

TABLE 6. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN ALL STATE AND FEDERAL COURTS BY THE INSURED'S ALLEGEDLY DISCRIMINATORY CONDUCT, CONTROLLING FOR THE INFLUENCE OF THIRD-PARTY VICTIMS' ETHNICITY (N = 181)

Disposition of Actions in Federal Appellate Courts and in State Appellate and Supreme Courts from the Insureds' Perspective	Third-Party Victims Filing the Underlying Suit: All Ethnic Groups			Third-Party Victims Filing the Underlying Suit: African-Americans Only			Third-Party Victims Filing the Underlying Suit: Whites and Nonblack Minorities		
	Third-Party Victim	Third-Party Victim	Third-Party Victim	Third-Party Victim	Third-Party Victim	Third-Party Victim	Third-Party Victim	Third-Party Victim	Third-Party Victim
	Alleged Various Forms of Harassment (N = 37)	Alleged Other Forms of Discrimination (N = 144)	Alleged Various Forms of Harassment (N = 4)	Alleged Various Forms of Discrimination (N = 46)	Alleged Various Forms of Discrimination (N = 33)	Alleged Other Forms of Discrimination (N = 98)	Alleged Various Forms of Harassment (N = 33)	Alleged Other Forms of Discrimination (N = 98)	Alleged Other Forms of Discrimination (N = 98)
Favorable	Percent 32.4	Percent 51.4	Percent 25.0	Percent 41.3	Percent 33.3	Percent 56.1	Percent 33.3	Percent 56.1	Percent 56.1
Unfavorable	67.6	48.6	75.0	58.7	66.7	43.9	66.7	43.9	43.9
	Chi Square = 4.2420 Degree of Freedom = 1 p < .01	Chi Square = .4080 Degree of Freedom = 1 (not statistically significant)	Chi Square = 5.1290 Degree of Freedom = 1 p < .01						

antidiscrimination suits. The pertinent percentages are 75.0 percent and 58.7 percent, respectively. The reported Chi Square statistic (.4080) is not statistically significant. These specific findings are consistent with the findings displayed in Table 2.

The remaining percentages appearing in Table 6 represent the relationship between disposition of duty-to-defend controversies and third-party claims, where the plaintiffs in the underlying suits are whites and other ethnic minorities (excluding African-Americans). These results deviate from those appearing immediately above. Specifically, judges are substantially less likely to force insurers to defend when whites, Asians, and other white ethnics accuse insureds of practicing sexual and residential harassment. They are more likely to order insurance companies to defend when whites, Asians, and others charge insureds with discriminating on the basis of race, age, gender, marital status, and disability. The relevant percentages are 66.7 percent and 56.1 percent, respectively. The corresponding Chi Square statistic (5.1290) is statistically significant at $p < .01$.

C. *A Multivariate, Two-Stage Probit Analysis—A Review of the Simultaneous Relationships Between Multiple Demographic Variables and the Disposition of Duty-to-Defend/Indemnify Controversies in State and Federal Declaratory Judgment Hearings*

Thus far, we have reviewed several bivariate relationships between, say, disposition and region of country, disposition and third parties' ethnicity, disposition and gender, and so forth. On the basis of the percentages associated with those bivariate findings, the author has implied that federal and state judges themselves issue biased or prejudiced rulings. As we have discovered, these jurists are significantly more or less likely to rule in favor of insureds or insurers depending on the civil rights victims' ethnicity, gender, and geographic location as well as on the insureds' legal status.

However, inferring that courts are biased or prejudiced simply because our investigation uncovered some statistically significant bivariate relationships is methodologically unsound. First, when insurers refuse to defend insureds, some policyholders might decide not to seek declaratory relief. However, other insureds might decide to sue. Of those deciding to sue, some will be successful but others will not. The unsuccessful insureds might well appeal their adverse rulings. An insured's decision to file the initial action as well as his or her decision to appeal an adverse ruling is called "self-selection." Consequently, the statistical error that "self-selection" produces is called "selectivity bias,"⁴³¹ and a prudent researcher needs to test for the presence of such bias in the sample data.

431. In previous writings, the author has discussed and presented examples of selectivity bias. See Willy E. Rice, *Judicial and Administrative Enforcement of Individual Rights Under the*

Second, measuring the individual effect of each variable on the disposition of declaratory judgment actions without controlling for the simultaneous influences of other factors enables one to say little, if anything, about the predictive power of, say, ethnicity, gender, or any other single factor. Therefore, the multiple and simultaneous effects of variables on the disposition of declaratory judgment actions should always be measured. The statistical procedure used to measure such influences is called a multivariate, two-staged probit analysis.⁴³²

Table 7 presents the results of two multivariate models. Model A, to the left of the vertical line, includes three predictor variables and their subcategories: Types of Insureds, six categories; Types of Third-Party Victims, three categories; and a *Lambda* Term, the test for selectivity bias. Model B, to the right of the vertical line, also includes three predictor variables and their respective subcategories: Types of Insureds, five categories; Federal Circuits, five categories; and a *Lambda* Term, the test for selectivity bias.

The total sample for this study included 181 declaratory judgments. Initially, district court judges heard each of these controversies. But 103 litigants were dissatisfied with the district courts' declarations; therefore, those disgruntled insureds and insurers appealed the adverse rulings. For unknown reasons, sixty-eight ($N = 68$) litigants did not appeal.⁴³³

National Labor Relations Act and Under the Labor-Management Relations Act Between 1935 and 1990—An Historical and Empirical Analysis of Unsettled Intercircuit and Intra-circuit Conflicts, 40 DEPAUL L. REV. 653, 730–34 (1991); Willy E. Rice, *Race, Gender “Redlining,” and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583, 692–93 (1996). But here we present another brief example: Let us assume that a researcher discovers that appellate court judges are significantly less likely to award declaratory relief to males. At that point, the researcher might conclude that the judges are biased against males. But the researcher must ensure that the population of males *who decided to ask for relief in courts of appeals* is not statistically different from the population of males *who decided not to appeal a district court judge’s adverse declaration*. There could be something extremely wanting about the unsuccessful males or about their respective cases, rather than judicial bias or prejudice, that provides a better explanation of their lack of success in the appellate court hearings as well as in the district courts.

432. In several published insurance law articles, the author has discussed and employed this statistical procedure. See Rice, *supra* note 77, at 1208–14 nn.386–87; Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts’ Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act—1941–1993*, 43 CATH. U. L. REV. 399, 445–49 nn.213–219 (1994); Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Courts’ Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900–1991*, 41 CATH. U. L. REV. 325, 369–77 nn.157–60 (1992).

433. There were 68 “just district court” cases and 113 “both district and appellate court” decisions. However, in this analysis, there are only 103 “both district and appellate court” declarations. What happened to the additional ten cases? Those ten cases were not included in the multivariate analyses because some of the subcategories of the predictor variables had missing information.

TABLE 7. INSURERS' DUTY TO DEFEND INSURED'S ALLEGEDLY DISCRIMINATORY ACTS: THE INFLUENCE OF SELECTED PREDICTOR VARIABLES ON LITIGANTS' DECISIONS TO INITIATE DECLARATORY JUDGMENT ACTIONS AND ON THE DISPOSITION OF THOSE ACTIONS IN STATE AND FEDERAL COURTS, 1940-1999 (N = 181)

Model A Selected Predictor Variables or Background Characteristics	Decision to Initiate a Cause of Action in State and Federal Appellate Courts (N = 103)		Disposition of Declaratory- Judgment Actions Among White Victims (N = 78)	
	Probit Values (Standard Errors)	Absolute Values of t-Statistics	Probit Values (Standard Errors)	Absolute Values of t-Statistics
Types of Insureds				
Corporate Officers & Directors	0.2143 (.084)	2.521	0.4248 (5.17)	.0820
Private Employers	-.1190 (.245)	.4854	-.6430 (3.06)	.2097
Governments	-.1365 (.168)	.8108	-.1649 (3.74)	.0440
Professionals	0.3082 (.154)	2.000	1.1872 (7.44)	.1595
Public & Private Schools	0.0253 (.311)	.0812	4.1025 (.766)	5.3553***
Small Businesses	-.0931 (.129)	.7218	-.6710 (2.46)	.2727
Third-Party Victims				
Employees: Current & Prospective	0.1730 (.097)	1.771	-0.5250 (4.38)	.1198
Tenants: Current & Prospective	-.1635 (.182)	.8980	-1.7181 (4.60)	.3730
Innocent Bystander	0.3078 (.090)	.3393	0.1416 (1.134)	.1248
<i>Lambda</i> Term (Test for Selectivity Bias)	—	—	2.834	.0645
CONSTANT	0.1132	1.710	-2.072 (31.8)	.0651

Under Model A, there are four distributions of probit coefficients and t-statistics, respectively. The probit values and t-statistics illustrated under the heading Decision to Initiate a Cause of Action in State and Federal Appellate Courts (N = 103) answer this question: Do the multiple and simultaneous effects of types of insureds and types of third-party victims significantly influence insureds' or insurers' decisions to appeal their adverse rulings? The answer is no, because the corresponding t-statistics indicate that none of the probit values are statistically significant. Stated

TABLE 7. (Continued)

Model B Selected Predictor Variables or Background Characteristics	Decision to Initiate a Cause of Action in State and Federal Appellate Courts (N = 103)		Disposition of Declaratory- Judgment Actions Among White Victims (N = 78)	
	Probit Values (Standard Errors)	Absolute Values of t-Statistics	Probit Values (Standard Errors)	Absolute Values of t-Statistics
Types of Insureds				
Corporate Officers & Directors	0.2244 (.079)	2.8368	-.4327 (2.46)	.1753
Private Employer	0.1129 (.222)	.5076	-.8798 (1.33)	.6606
Professionals	0.3290 (1.49)	2.1999	-.0942 (3.61)	.0260
Public & Private Schools	0.0815 (.325)	.2502	3.6018 (.920)	3.9123**
Small Businesses	-.1228 (.128)	.9594	-.9361 (1.58)	.5893
Federal Circuits				
Sixth Circuit	0.2938 (.149)	1.9590	1.0404 (3.08)	.3370
Seventh Circuit	0.3663 (.128)	2.8517	-.6381 (3.76)	.1693
Eighth Circuit	-.2306 (.111)	2.0688	0.6869 (2.58)	.2658
Ninth Circuit	-.3141 (.097)	3.2094	0.3749 (3.60)	.1039
Eleventh Circuit	-.2230 (1.24)	1.7970	-.1986 (2.63)	.0754
Lambda Term (Test for Selectivity Bias	—	—	1.7214 (19.2)	.0892
CONSTANT	0.1862 (.065)	2.8567	0.6021 (13.1)	.0457

Levels of statistical significance: *** p < .001

** p < .01

another way, the litigants' decision to appeal or not to appeal cannot be explained by knowing who were the insureds and who were the third-party victims in the underlying antidiscrimination actions.

But the more important question is: In federal and state appellate courts, are the simultaneous and multiple effects of types of insureds and types of third-party victims more likely or less likely to influence the disposition of duty-to-defend disputes? The answer to this question is found among the distributions of probit values and t-statistics located under the heading

Disposition of Declaratory Judgment Actions Among Anglo-American Victims (N = 78). There, we find one statistically significant probit value (4.1024).

What does this positive probit coefficient suggest? At a minimum, it means that when examining the simultaneous influences of all subcategories of predictor variables, appellate courts are significantly more likely to order liability insurers to defend or indemnify insureds if (1) the insureds are public or private schools, and (2) the victims suing public and private schools in the underlying civil rights suits are whites. Certainly, this finding is quite revealing for two reasons. First, the *Lambda* Term (2.834) is not statistically significant, suggesting the absence of selectivity bias in the sample data. Second, this finding does not appear when African-Americans or other ethnic minorities sue insureds in underlying civil rights actions.

Fairly often, when a researcher substitutes different predictor variables in a model or when he or she removes previous predictors, the subsequent findings change, primarily because there are new simultaneous influences. Therefore, to determine whether the statistical finding reported in Model A would hold, the author structured a "new" model. In Model B, the author kept Types of Insureds as a predictor. But he deleted Types of Third-party Victims as a predictor and substituted Federal Circuits. As illustrated in Table 1, the circuit in which an insured or insurer files a declaratory judgment action significantly influenced whether a federal or, for that matter, a state judge would award declaratory relief.

In Table 7, the Model B findings are very similar to those reported for Model A. Under Model B and under the heading Decision to Initiate a Cause of Action in State and Federal Appellate Courts (N = 103), the probit values and t-statistics indicate that Types of Insureds and Federal Circuits had no measurable influence on litigants' decision to appeal or not. Again, the corresponding t-statistics show that none of the probit values are statistically significant.

But what about the effects of these variables on disposition? Under Model B and under the heading Disposition of Declaratory Judgment Actions Among Anglo-American Victims (N = 78), we find just one statistically significant probit value (3.6018). This coefficient confirms that state and federal courts of appeals are substantially more likely to force insurance companies to defend and indemnify insureds if (1) the insureds are public or private schools and (2) only whites are the third-party victims who sued public and private schools in the underlying antidiscrimination suits. The *Lambda* Term (1.7214) in Model B is statistically insignificant, thereby suggesting the absence of any meaningful selectivity bias in the sample.

Should we expect the effects of these types of variables on the disposition of any declaratory judgment action? Should we expect such outcomes in district courts but not in courts of appeals? Or should we ever expect such

statistical findings when the controversy concerns whether insurers must defend or indemnify their allegedly racist or sexist insureds? The answer to each question is no.

X. SUMMARY—CONCLUSION

Nearly two hundred years ago, the U.S. Supreme Court decided *Marbury v. Madison*.⁴³⁴ Writing for the Court, Chief Justice Marshall embraced the following proposition appearing in *Blackstone's Commentaries*: “[W]here there is a legal right, there is also a legal remedy by [an] . . . action at law, whenever that right is invaded. . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress.”⁴³⁵

Insurance consumers, individuals and professionals, small businesses and large corporations, and religious, educational, financial, and health institutions certainly understand and appreciate the significance of the rule that Chief Justice Marshall embraced in *Marbury*. Common sense suggests that large sums of money must be spent to settle civil rights suits or to mount a solid defense when third-party complainants sue insureds for violations of their statutorily and constitutionally protected civil rights. This awareness partially explains why consumers spend billions of dollars each year purchasing liability insurance.

However, as documented in this article, it appears that many court decisions have the effect, whether intended or not, of harming third-party victims, who discover that insurance is not available to compensate them for their loss even though liability insurance is principally for the benefit of third-party victims.⁴³⁶ Clearly, when courts fail to embrace or apply the above principle, the obvious occurs: alleged victims of racial and sexual harassment, ethnic and gender discrimination, and other forms of impermissible discrimination are less likely to receive any meaningful compensation for their injuries.

This author does not adopt the view that insurers must defend or indemnify insureds whenever third-party complainants sue or accuse insureds of violating civil rights provisions. Obviously, some liability contracts clearly do not cover discrimination claims and others explicitly exclude all intentional discrimination and harassment claims. In addition,

434. 1 Cranch 137, 2 L. Ed. 60 (1803).

435. *Id.* 162–63 n.10.

436. See, e.g., *Safety Nat'l Cas. Corp. v. Pacific Employers Ins.*, 927 P.2d 748, 750–51 (Alaska 1996) (“The purpose of insurance is to protect against third-party claims. . . .”); *Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 719–20 (Cal. Ct. App. 1996) (“[T]he purpose of third-party liability insurance is to protect the insured against injuries to third parties neither expected nor intended by the insured.”); *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 827 P.2d 1024, 1035 (Wash. Ct. App. 1992) (“[I]nsurance also is for the benefit of injured victims. . . .”).

although indemnity policies often cover claims stemming from officers', directors', and professionals' errors, mistakes, and omissions, those contracts typically exclude coverage for all discriminatory conduct. But if there is debate over whether liability and indemnity contracts exclude federal and state civil rights claims, courts should require insurers to defend and/or indemnify insureds in order to satisfy the reasonable expectation of third-party victims, and the presumed intent of such third-party liability policies.

Some federal and state judges still refuse to compel a legal defense or indemnification, even when coverage provisions or exclusions are clearly ambiguous. It can be argued that the intent of such jurists is to punish civil rights violators for discriminating against individuals on the basis of their membership in certain protected classes.⁴³⁷ Others maintain that forcing insurers to defend or pay civil judgments would only encourage insureds to engage in additional episodes of irrational discrimination.⁴³⁸ Either intent can be considered laudatory.

These are powerful arguments that should not be summarily dismissed. But, as one jurist correctly observed, "allowing insurance coverage for acts that amount to discrimination does not validate or encourage such actions any more than allowing coverage for other wrongful acts encourages those actions."⁴³⁹ More important, when insurers do not defend or indemnify their guilty insureds or pay civil judgments, the already injured victims are the true recipients of the punishment.⁴⁴⁰

Furthermore, if punishing the insured is the objective of an adverse, duty-to-defend declaration, clearly there is a better way to achieve it.⁴⁴¹ Therefore, to consider only the insured's behavior when deciding whether to compel a defense or indemnification ignores the fact that insurance is for the benefit of injured victims, the third-party beneficiaries of liability

437. *Cf. Arco Indus. Corp. v. American Motorists Ins. Co.*, 531 N.W.2d 168, 182 n.13 (Mich. 1995) ("It has been traditional to deny insurance protection for deliberate, outrageous or irresponsible behavior as a form of punishment to the wrongdoer.")

438. *See, e.g., Western Cas. & Sur. Co. v. Western World Ins. Co.*, 769 F.2d 381, 385 (7th Cir. 1985) ("Once a person has insurance, he will take more risks than before because he bears less of the cost of his conduct. . . . Insurance therefore tends to increase the likelihood that the insured risks will come to pass. . . . If an insurance policy were to cover a city's wilful racial discrimination, the people making policy for the city could indulge their own preference for discrimination at little risk to themselves. The city would pay higher rates, but given the insurance each employee would be more likely to discriminate.")

439. *See Harbour Club, Inc.* 509 So. 2d at 948.

440. *See Arco Indus. Corp.*, 531 N.W.2d at 182 n.13 ("[Many insurance coverage decisions ignore] the fact that most of the actors involved in irresponsible behavior are also financially irresponsible and that it is the injured victim that is really being punished. . . . The interpretation of an insured's conduct is not only a dispute between the insured and his insurance company.") (concurring opinion).

441. *Id.* ("[W]rongdoers can be adequately punished under present law[s] by the imposition of punitive damages.")

contracts. Simply put, those beneficiaries' financial, emotional, and physical injuries should not be ignored.⁴⁴²

Regardless of the intent of such adverse declarations, the author repeats what appears at the beginning of this article: When a third-party civil rights victim accuses an insured of engaging in any form of irrational discrimination or harassment, the insured's liability insurer should mediate or settle the claim in a timely manner, or provide a legal defense for the insured in a timely manner. If the insured defends itself, its liability insurer should make reimbursements in a timely fashion to help pay the cost of defending the actions and settling the claim. Neither the insured nor the insured's liability carrier should commence a declaratory judgment action in federal and state courts to determine whether insurance carriers have either a duty to defend or a duty to indemnify.

442. *See id.* ("To look at only the insured's behavior ignores the fact that . . . injured victims . . . are . . . the beneficiaries of the insurance contracts. . . . The interpretation of an insured's conduct is *not only* a dispute between the insured and his insurance company.") (concurring opinion) (emphasis added).

