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United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRAVELERS PROPERTY CASUALTY)	Case No. 11-3638-SC
COMPANY OF AMERICA, FIDELITY &)	
GUARANTY INSURANCE COMPANY, THE)	ORDER GRANTING DEFENDANT'S
TRAVELERS INDEMNITY COMPANY OF)	<u>MOTION FOR RECONSIDERATION</u>
CONNECTICUT, AND ST. PAUL MERCURY)	
INSURANCE COMPANY,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CENTEX HOMES and DOES 1 through)	
10 inclusive,)	
)	
Defendants.)	
)	
<hr/>		
CENTEX HOMES,)	
)	
Counterclaimant,)	
)	
v.)	
)	
TRAVELERS PROPERTY CASUALTY)	
COMPANY OF AMERICA, et al.,)	
)	
Counterdefendant.)	
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1 **I. INTRODUCTION**

2 On April 8, 2013 the Court issued an order granting in part
3 and denying in part the above-captioned parties' cross-motions for
4 partial summary judgment. ECF No. 170 ("Apr. 2013 Order"). Among
5 other things, the April 2013 Order vacated in part a May 10, 2012
6 Order granting Centex's prior motion for partial summary judgment.
7 ECF No. 56 ("May 2012 Order"). With the Court's leave, Defendant
8 Centex Homes ("Centex") now moves for reconsideration of the April
9 2013 Order. ECF No. 195 ("Mot."). The primary question raised by
10 the Motion is under what circumstances does an insurer forfeit its
11 right to control the defense of its insured. The Motion is fully
12 briefed, ECF Nos. 197 ("Opp'n"), 198 ("Reply"), and appropriate for
13 determination without oral argument per Civil Local Rule 7-1(b).
14 Having reviewed the arguments presented by the parties, the Court
15 finds that its April 2013 Order is inconsistent with a case decided
16 by the California Court of Appeal in May 2013, J.R. Marketing,
17 L.L.C. v. Hartford Casualty Insurance Co., 216 Cal. App. 4th 1444
18 (Cal. Ct. App. 2013). Accordingly, the Court finds that its
19 original decision was the correct one, and that its April 2013
20 Order was in error. Centex's motion for reconsideration is
21 GRANTED.

22
23 **II. BACKGROUND**

24 **A. Factual Background**

25 As this is not the first time the Court has recounted the
26 facts in this matter, the Court borrows extensively from previous
27 orders. Centex participates in the development of residential
28 communities throughout California, though it does not perform any

1 actual construction work. Instead, it hires subcontractors to
2 build the homes it sells. These subcontractors include American
3 Woodmark ("Woodmark"), Foremost Superior Marble ("Foremost"), West
4 Coast Countertops ("West Coast"), Fresno Precision Plastics
5 ("Fresno"), and Executive Landscape ("Executive"). Each of these
6 subcontractors purchased commercial general liability insurance
7 from the above-captioned Defendants (collectively, "Travelers"),
8 and the policies name Centex as an additional insured.

9 This case arises from a number of underlying construction
10 defect lawsuits filed against Centex in California state court.
11 These underlying suits include the Adkins, Garvey, Acupan, and
12 Conner actions. Centex tendered each of these actions to Travelers
13 pursuant to one or more of the insurance policies described above.
14 It is undisputed that, in each of these actions, some time elapsed
15 between Centex's tender and Traveler's decision to provide a
16 defense subject to a reservation of rights. In the interim, Centex
17 retained the law firm of Newmeyer and Dillion LLP ("Newmeyer") to
18 defend it in the underlying actions. When Travelers finally agreed
19 to provide a defense, it insisted on appointing its own counsel.
20 Centex insisted on retaining Newmeyer, arguing that Travelers
21 waived its right to control the defense by waiting too long to
22 provide one. As the facts surrounding the tender of the Adkins,
23 Garvey, Acupan, and Conner actions are pertinent to the instant
24 motion, the Court recounts them below.

25 Centex tendered the defense and indemnification of the Garvey
26 action to Travelers under the Woodmark policy on July 2, 2010.
27 Travelers subsequently requested additional information concerning
28 the lawsuit. On February 16, 2011, Travelers concluded that the

1 Garvey action was not covered under the Woodmark policy and
2 declined to participate in the defense and indemnity of Centex.
3 Travelers also indicated that it was willing to reconsider the
4 denial and that its denial should not be construed as a waiver of
5 any rights or defenses available to it under the policy. A few
6 days later, Centex filed suit against Travelers for its failure to
7 defend the Garvey action, as well as the Adkins action, which is
8 discussed below. On April 18, 2011, Travelers reversed course,
9 stating that it would agree to participate in the defense of
10 Centex, subject to a reservation of rights. Centex subsequently
11 dismissed its then-pending lawsuit without prejudice.

12 Centex tendered the Adkins action to Travelers under the
13 Woodmark and Foremost policies on April 1, 2010. On September 14,
14 2010, Travelers informed Centex that it had no defense or indemnity
15 obligation in the Adkins action under the Woodmark policy and
16 issued a declination of coverage letter. At the time, Travelers
17 indicated that it was willing to reconsider the denial and that it
18 did not waive any of its rights under the policy while
19 investigating the matter. Travelers also declined coverage under
20 the Foremost policy on January 7, 2011. Again, Travelers stated
21 that it did not waive any of its rights under the policy. Several
22 months later, after Centex sued Travelers for coverage, Travelers
23 agreed to provide a defense subject to a full reservation of
24 rights. Travelers also continued to dispute that it had an
25 obligation to provide coverage under both policies.

26 Centex first tendered the Acupan action to Travelers under the
27 Fresno policy on April 8, 2010. On September 13, 2010, Travelers
28 concluded that there was no potential for coverage under the Fresno

1 policy and declined to provide a defense. ECF No. 148-14. Several
2 months later, on June 28, 2011, Travelers reversed course and
3 agreed to provide a defense pursuant to the Fresno Policy, subject
4 to a reservation of rights. ECF No. 148-18. Centex also tendered
5 the Acupan action under the West Coast policy on January 21, 2011.
6 ECF No. 148-24. On June 1, 2011, after requesting and receiving
7 additional information, Travelers agreed to participate in Centex's
8 defense under the West Coast policy, subject to a reservation of
9 rights. ECF Nos. 148-16, 148-26.

10 Centex tendered the Conner action to Travelers under the
11 Executive policy on September 8, 2010. ECF No. 148-27. About two
12 weeks later, on September 22, Travelers requested additional
13 information. ECF No. 148-28. Centex responded to the request that
14 very same day. ECF No. 146-11. On January 21, 2011, Travelers
15 agreed to participate in the Centex's defense in the Conner action
16 under the Executive policy subject to a reservation of rights. ECF
17 No. 148-29.

18 **B. Procedural History**

19 On July 25, 2011, Travelers filed the instant action against
20 Centex. ECF No. 1. One month later Travelers filed a First
21 Amended Complaint, which asserts causes of action for (1)
22 declaratory relief, (2) breach of contract, (3) breach of the
23 implied covenant of good faith and fair dealing, and (4)
24 reimbursement. Among other things, Travelers seeks a judicial
25 declaration that it has the right to control Centex's defense in
26 the Garvey, Adkins, Acupan, and Conner actions.

27 On May 10, 2012, the Court issued an order granting Centex's
28 motion for partial summary judgment and partial judgment on the

1 pleadings. Among other things, the Court found that, since the
2 duty to defend is immediate, Travelers lost its right to control
3 the defense of the Garvey and Adkins actions when it declined to
4 participate in the defense of those actions in late 2010 and early
5 2011. May 2012 Order at 9-10. The Court also rejected Travelers'
6 argument that Centex needed to show that Travelers intended to
7 waive its right to control the defense of Garvey and Adkins
8 actions, reasoning: "[A] court need not discern an insurer's intent
9 to determine whether it has breached that duty. A delay is
10 evidence enough." Id. at 13.

11 The Court reconsidered and reversed this decision when it
12 ruled on the parties' cross-motions for partial summary judgment on
13 April 8, 2013. Centex had asked the Court to find that Travelers'
14 delay in responding to Centex's tenders of the Acupan and Conner
15 actions divested Travelers of its right to control the defense of
16 those actions. April 2013 Order at 11. Travelers responded that,
17 under Chase v. Blue Cross of California, 42 Cal. App. 4th 1142
18 (Cal. Ct. App. 1996), an insurer could only lose a contractual
19 right to arbitration under theories of waiver, forfeiture, or
20 estoppel. See id. The Court agreed, finding that "an insurer
21 cannot lose its right to control the defense of its insured through
22 delay alone. Rather, it may only lose that right through
23 waiver, forfeiture, or estoppel, none of which have been proven by
24 Centex." Id. at 13. The Court denied Centex's motion for summary
25 judgment on the issue of whether Travelers had lost its right to
26 control the defense of the Acupan and Conner actions, and vacated
27 its prior decision that Travelers had lost its right to control the
28 defense of the Garvey and Adkins actions. Id. at 16. The Court

1 also found that there were triable issues of fact as to whether
2 Travelers had a duty to defend the Garvey, Adkins, Acupan, and
3 Conner actions. Id. at 6.

4 Centex subsequently moved for leave to file a motion for
5 reconsideration concerning the Court's vacation of the May 2012
6 Order and the Court's findings with respect to the Garvey and
7 Adkins actions. ECF No. 183. The Court granted Centex leave to
8 file the motion. ECF No. 186.

9

10 **III. LEGAL STANDARD**

11 A party may ask a court to reconsider and amend a previous
12 order pursuant to Federal Rule of Civil Procedure 59(e) and Civil
13 Local Rule 7-9. Rule 59(e) offers "an extraordinary remedy, to be
14 used sparingly in the interests of finality and conservation of
15 judicial resources." Carroll v. Nakatani, 342 F.3d 934, 945 (9th
16 Cir. 2003) (quotations omitted). Civil Local Rule 7-9(b) provides
17 that a party moving for reconsideration must generally show: (1) an
18 intervening change in controlling law, (2) the emergence of new
19 material facts, or (3) a manifest failure by the Court to consider
20 material facts or dispositive legal arguments. "Whether or not to
21 grant reconsideration is committed to the sound discretion of the
22 court." Navajo Nation v. Confederated Tribes and Bands of the
23 Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003).

24 As Centex moves for reconsideration of a summary judgment
25 order, the Court also employs the legal standard set forth in
26 Federal Rule of Civil Procedure 56. Entry of summary judgment is
27 proper "if the movant shows that there is no genuine dispute as to
28 any material fact and the movant is entitled to judgment as a

1 matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be
2 granted if the evidence would require a directed verdict for the
3 moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251
4 (1986). Thus, "Rule 56[] mandates the entry of summary judgment .
5 . . against a party who fails to make a showing sufficient to
6 establish the existence of an element essential to that party's
7 case, and on which that party will bear the burden of proof at
8 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "The
9 evidence of the nonmovant is to be believed, and all justifiable
10 inferences are to be drawn in his favor." Anderson, 477 U.S. at
11 255.

12
13 **IV. DISCUSSION**

14 As discussed above, the Court granted Centex leave to file a
15 motion for reconsideration concerning Traveler's right to control
16 the defense of the Garvey and Adkins actions. However, the motion
17 filed by Centex goes further. Centex also seeks leave to file a
18 motion for reconsideration of the Court's decision regarding the
19 Acupan and Conner actions. Further, in the event that the Court
20 declines to reconsider its decision regarding the Garvey, Adkins,
21 Acupan, and Conner actions, Centex asks the Court to certify the
22 April 2013 Order for interlocutory appeal.

23 **A. Motion for Reconsideration Re: Centex's Right to Control**
24 **the Defense of the Garvey and Adkins Actions**

25 "[A] liability insurer owes a broad duty to defend its insured
26 against claims that create a potential for indemnity." Horace Mann
27 Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (Cal. 1993). The
28 duty is "immediate," "arising on tender of defense and lasting

1 until the underlying lawsuit is concluded or until it has been
2 shown that there is no potential for coverage." Montrose Chem.
3 Corp. v. Sup. Ct., 6 Cal. 4th 287, 295 (Cal. 1993) (internal
4 citations omitted). Once the insurer takes on the duty to defend,
5 it generally has the absolute right to manage the defense, and the
6 insured is required to surrender all control. See Safeco Ins. Co.
7 of Am. v. Sup. Ct., 71 Cal. App. 4th 782, 787 (Cal. Ct. App. 1999).
8 However, "[w]hen an insurer wrongfully refuses to defend, the
9 insured is relieved of his or her obligation to allow the insurer
10 to manage the litigation and may proceed in whatever manner is
11 deemed appropriate." Eigner v. Worthington, 57 Cal. App. 4th 188,
12 196 (Cal. Ct. App. 1997).

13 The issue raised by Travelers' handling of the Garvey and
14 Adkins actions is whether an insurer can ever regain control over
15 its insured defense after it initially refuses to provide coverage.
16 Centex contends that the answer to this question is controlled by
17 J.R. Marketing, which was decided after the April 2013 Order, as
18 well as Stalberg v. Western Title Insurance Co., 230 Cal. App. 3d
19 1223 (Cal. Ct. App. 1991). The Court agrees. In light of J.R.
20 Marketing and Stalberg, the authority cited by Travelers is not
21 persuasive.

22 1. J.R. Marketing

23 In J.R. Marketing, the defendant insurer refused to defend or
24 indemnify the plaintiff insured in an underlying lawsuit. 216 Cal.
25 App. 4th at 1449. The insured hired the law firm of Squire Sanders
26 L.L.P. ("Squire") to defend it in the underlying action and bring
27 suit against the insurer for coverage. Id. The insurer then
28 reconsidered its position and agreed to provide the insured with a

1 defense, but the insurer refused to pay defense costs incurred
2 prior to a certain date and insisted that its own counsel represent
3 the insured in place of Squire, the insured's chosen Cumis
4 counsel.¹ Id.

5 On summary adjudication, the trial court found that the
6 insured was entitled to Cumis counsel from the date it tendered the
7 underlying action and that the insurer could not invoke the
8 provisions of California Civil Code section 2860 that cap the
9 amount of fees payable to Cumis counsel. Id. at 1449-50. The
10 trial court found that section 2860's protections were unavailable
11 since the insurer had breached and continued to breach its defense
12 obligations by failing to pay all reasonable and necessary defense
13 costs incurred by the insured, and by failing to provide Cumis
14 counsel. Id. at 1450. The Court of Appeal affirmed, reasoning:
15 "Where, as here, the insurer breaches its duty to defend the
16 insured, the insurer loses all right to control the defense,
17 including, necessarily, the right to control financial decisions
18 such as the rate paid to independent counsel or the cost-
19 effectiveness of any particular defense tactic or approach." Id.
20 at 1457.

21 Centex argues that J.R. Marketing shows that an insurer's
22 breach of its duty to defend leads to a forfeiture of its right to
23 control the insured's defense. Mot. at 22. Travelers responds
24 that J.R. Marketing is distinguishable, because, in that case, the
25 court found the insurer had a duty to defend, whereas here, the
26 Court denied Centex's motion for partial summary judgment on the

27 ¹ In California, an insured is entitled to independent counsel,
28 a.k.a. Cumis counsel, where a conflict exists because of an
insurer's control over the litigation. See Cal. Civ. Code § 2860.

1 issue of whether Travelers had a duty to defend Centex in any of
2 the underlying cases. Opp'n at 23-24. Thus, Travelers maintains
3 that it has a right to control Centex's defense, even though it
4 purportedly does not owe Centex any defense obligations. Under
5 this framework, Centex cannot control its defense in the Garvey and
6 Adkins actions, but Centex is still on the hook for any damages and
7 defense costs arising out of those actions. Travelers cannot have
8 it both ways. If Travelers does have a duty to defend, then its
9 denial of the Garvey and Adkins tenders was wrongful and resulted
10 in a forfeiture of its right to control the defense of those
11 actions. Alternatively, if Travelers has no duty to defend Centex,
12 it is unclear why Travelers is trying to provide Centex with a
13 defense and control its appointment of counsel.

14 Travelers also argues that even if Centex establishes that
15 Travelers had a duty to defend Centex as of the date of Travelers'
16 denial letters, Centex has not shown that the denials were
17 wrongful, unreasonable, or in bad faith. Opp'n at 21. As to
18 wrongfulness, the undisputed facts show that, prior to the initial
19 denials, Centex provided Travelers with requested information
20 regarding the Garvey and Adkins actions. Thus, if Travelers does
21 owe a duty to defend with respect to those actions, then it must
22 have erred in initially denying Centex's tenders. Moreover, Centex
23 need not establish that the denials were unreasonable or in bad
24 faith. Under J.R. Marketing, a breach of the duty to defend is
25 sufficient to trigger a forfeiture of the insurer's rights to
26 manage the insured's defense. See 216 Cal. App. 4th at 1457.

27 Next, Travelers argues that J.R. Marketing is inapposite
28 because the breach in that case turned on the insured's failure to

1 provide Cumis counsel and to pay all reasonable and necessary
2 defense costs. Opp'n at 24. In contrast, contends Travelers, the
3 Court has already found that Centex is not entitled to Cumis
4 counsel here, and Travelers has agreed to pay all reasonable and
5 necessary defense costs. Id. This argument is also unavailing.
6 Nothing in J.R. Marketing suggests that certain breaches of the
7 duty to defend result in a forfeit of an insurer's rights while
8 others do not. In fact, the J.R. Marketing court couched its
9 opinion in broad terms, stating that the insurer forfeited its
10 rights under section 2860 by "fail[ing] to meet its duty to defend
11 and accept tender of the defense in the [underlying] matter." 216
12 Cal. App. 4th at 1455.

13 Finally, Travelers argues that J.R. Marketing is
14 distinguishable because, in that case, the insurer did not try to
15 cure its forfeiture, whereas here, Travelers purportedly agreed to
16 pay all reasonable and necessary defense costs when it ultimately
17 accepted the Centex's tenders. Opp'n at 24. But the insurer in
18 J.R. Marketing eventually agreed to provide coverage. J.R.
19 Marketing, 216 Cal. App. 4th at 1449-50. The appellate court
20 upheld the trial court's decision to reject the insurer's argument
21 "that once an insurer breaches its duty to defend by refusing to
22 provide Cumis counsel, when that insurer is later ordered to
23 provide Cumis counsel, and continues to refuse the order, but later
24 agrees to provide that counsel, it can unilaterally take advantage
25 of the rate limitation provision of Section 2860." Id. at 1451.
26 While there was no intervening court order in the instant action,
27 Travelers did not agree to provide coverage until after Centex
28 filed a suit for coverage. Moreover, about a year elapsed between

1 the dates Centex tendered the Garvey and Adkins actions and the
2 dates Travelers agreed to provide coverage for those actions. Such
3 a delay, coupled with Travelers' initial denials, surely
4 constitutes a breach of the immediate duty to defend.

5 2. **Stalberg**

6 The court in J.R. Marketing relied in part on Stalberg, which
7 also supports Centex's position. In Stalberg, the plaintiff
8 landowners filed a quiet title action, and tendered the litigation
9 to their insurer. 230 Cal. App. 3d at 1228. The insurer, Western,
10 agreed to pay half the costs and attorney's fees incurred in the
11 action. Id. When the plaintiffs appealed the trial court's
12 decision in the underlying quiet title action, Western refused to
13 pay their attorney's fees unless the plaintiffs stayed with the
14 Warburton firm, the law firm that had represented them at trial.
15 Id. at 1229. The Stalberg opinion is not clear on what happened
16 next, but the insureds ultimately sued Western for breach of the
17 duty to defend. The appellate court found for the insureds,
18 holding: "When Western refused plaintiffs' tender of their appeal
19 in the [underlying] action, it breached the contract. Once Western
20 wrongfully denied a defense, it gave up the right to control the
21 litigation and could not insist that plaintiffs use the Warburton
22 firm in order for Western to cover attorney's fees on appeal." Id.
23 at 1233. The Court also found that Western had not adequately
24 investigated before deciding to pay only half the attorney fees and
25 costs incurred in the lower court proceedings and rejecting the
26 insured's request for attorney's fees for the appeal. Id.

27 Travelers' attempts to distinguish Stalberg are unavailing.
28 First, Travelers argues that, unlike in Stalberg, there has been no

1 determination that Travelers had a duty to defend Centex in the
2 Garvey and Adkins actions. However, as discussed above, this
3 argument is unpersuasive as it is predicated on a framework that
4 puts the insured in an impossible position. Second, Travelers
5 argues that the instant action is distinct because Travelers
6 ultimately agreed to defend Centex while the Garvey and Adkins
7 actions were still ongoing. However, the insurer in Stalberg also
8 agreed to fund its insured's case in the trial court, and attempted
9 to intervene while its insureds' appeal was pending. As in the
10 instant action, the insurer in Stalberg insisted that the insured
11 use a particular law firm. 230 Cal. App. 3d at 1233. The Stalberg
12 court found that the insurer had forfeited its right to do so by
13 breaching its duty to defend. See id.

14 Together, Stalberg and J.R. Marketing support the conclusion
15 that an insurer may not control the defense of its insured, which
16 includes controlling the selection of counsel, after the insurer
17 breaches its duty to defend.

18 3. Travelers' Authority

19 Travelers once again relies on Chase for the proposition that
20 an insurer cannot forfeit a contractual right absent a showing of
21 bad faith. Opp'n at 16-17. The issue in Chase was whether an
22 insurer had lost its right to compel arbitration because its
23 communications with the insured did not mention the arbitration
24 provision in the parties' insurance contract. 42 Cal. App. 4th at
25 1148. The court found that an insurer could only lose a
26 contractual right to arbitration under theories of waiver,
27 forfeiture, or estoppel, and that forfeiture applied where an
28 insurer "engage[ed] in bad faith conduct designed to mislead the

1 insured." Id. In its April 2013 Order, the Court found that
2 "while the Chase court was primarily concerned with an arbitration
3 clause, its holding has broader implications," at least with
4 respect to an insurer's duty to defend. Apr. 2013 Order 15.
5 However, since J.R. Marketing and Stalberg directly address
6 breaches of the duty to defend and enunciate a different rule with
7 respect to forfeiture, that finding was in error.

8 Travelers also argues that Karsant Family Limited Partnership
9 v. Allstate Insurance Co., C 08-01490 SI, 2009 WL 188036 (N.D. Cal.
10 Jan. 27, 2009), shows that an insurer can cure a breach of the duty
11 to defend where it later agrees to assume the insured's defense.
12 Opp'n at 20. In Karsant, this Court held that an insurer's delay
13 in accepting an insured's defense did not preclude it from invoking
14 the attorney rate protections afforded by California Civil Code §
15 2860. 2009 WL 188036, at *5. Karsant is arguably inconsistent
16 with J.R. Marketing, which was decided years later. In any event,
17 since the Court now sits in diversity, J.R. Marketing is binding,
18 while Karsant is not.

19 Nor is Petersen v. Hartell, 40 Cal. 3d 102 (Cal. 1985),
20 controlling or persuasive in the insurance context. That case
21 concerned whether a vendee was entitled to completion of
22 performance on a land sale contract where it had willfully
23 defaulted in making payments after having paid a substantial part
24 of the purchase price. Id. at 105-06. The court concluded that
25 the vendee retained an absolute right to redeem the property by
26 paying the entire balance of the price and any other amounts due.
27 Id. at 114. As the instant action concerns an insurance contract,
28 not the sale of land, the equitable principles and policy

1 rationales considered in Petersen have little relevance here.

2 **4. Conclusion as to the Garvey and Adkins Actions**

3 In sum, the Court does not find persuasive Chase, Karsant,
4 Petersen, and the other authority cited by Travelers. J.R.
5 Marketing and Stalberg are more on point, and they indicate that an
6 insurer forfeits its right to control an insured's defense when the
7 insurer breaches the duty to defend. Accordingly, Centex's motion
8 for reconsideration is GRANTED. The Court finds that Travelers
9 forfeited its right to control the defense of the Garvey and Adkins
10 actions.

11 **B. Motion for Leave to File Motion for Reconsideration Re:**
12 **the Acupan and Connor Actions**

13 Centex requests leave to file a motion for reconsideration of
14 the April 2013 Order as that order relates to Travelers' right to
15 control the defense of the Acupan and Conner actions. Contrary to
16 Traveler's argument, Centex's request is not procedurally improper.
17 Pursuant to Civil Local Rule 7-9, a party is permitted to seek
18 leave to file a motion for reconsideration, which is exactly what
19 Centex has done here. In light of the authority discussed above
20 and the similarities between the Garvey, Adkins, Acupan, and Conner
21 actions, Centex's motion for leave is GRANTED.

22 **C. Motion for Certification of Interlocutory Appeal**

23 Centex alternatively moves the Court to certify its May 2012
24 Order for interlocutory appeal. As the Court has granted Centex's
25 motion for reconsideration regarding the Garvey and Adkins actions,
26 and has also granted Centex leave to file a motion for
27 reconsideration regarding the Acupan and Connor actions, see
28 Sections IV.A-B supra, Centex's motion for interlocutory appeal is

1 DENIED as moot.

2

3 **V. CONCLUSION**

4 For the foregoing reasons, the Court GRANTS Centex's motion
5 for reconsideration, and finds that Travelers forfeited its right
6 to control the defense of the Garvey and Adkins actions. Centex's
7 motion for leave to file a motion for reconsideration as to the
8 Acupan and Conner actions is also GRANTED. Centex's motion for
9 certification of an interlocutory appeal is DENIED as moot.

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11 IT IS SO ORDERED.

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13 Dated: August 21, 2013

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UNITED STATES DISTRICT JUDGE

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