

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RON SIMMONS, CHARLES SCOTT §
SYKES, JR., RANDY HAUGEN, VALORIE §
HAUGEN, ORRIN WOODWARD, §
LAURIE WOODWARD, CHRIS BRADY, §
TERRI BRADY, WILLIAM FLORENCE, §
PEGGY FLORENCE, DONALD WILSON §
NANCY WILSON, TIMOTHY MARKS, §
AMY MARKS, CHUCK CULLEN, NANCY §
CULLEN, KIRK BIRTLES, CASSANDRA §
BIRTLES, JIM MARTIN, DOLORES MARTIN, §
ARON RADOSA, MARY RADOSA, §
CHUCK GOETSCHER, DAVID BRANDY, §
BRUCE GILBANK, JESSILYN GILBANK, §
MIKE MARTENSEN, and BENJAMIN DICKIE §
individually §

Plaintiffs, §

v. §

LIBERTY MUTUAL FIRE INSURANCE §
COMPANY and WESTCHESTER FIRE §
INSURANCE COMPANY §

Defendants §

**PLAINTIFFS' ORIGINAL
COMPLAINT
JURY TRIAL DEMANDED**

**PLAINTIFFS' ORIGINAL COMPLAINT &
REQUEST FOR DECLARATORY JUDGMENT**

TO THE HONORABLE JUDGE:

COME NOW PLAINTIFFS, Ron Simmons, Charles Scott Sykes, Jr., Randy Haugen,
Valorie Haugen, Orrin Woodward, Laurie Woodward, Chris Brady, Terri Brady, William

Florence, Peggy Florence, Donald Wilson, Nancy Wilson, Timothy Marks, Amy Marks, Chuck Cullen, Nancy Cullen, Kirk Birtles, Cassandra Birtles, Jim Martin, Dolores Martin, Aron Radosa, Mary Radosa, Chuck Goetschel, David Brandy, Bruce Gilbank, Jessilyn Gilbank, and Mike Martensen, with this their Original Complaint and Request for Declaratory Relief and would respectfully show the Court the following:

JURISDICTION AND VENUE

1. The court has subject matter jurisdiction over this lawsuit under 28 U.S.C. §1332(a)(1) because the plaintiffs and the defendants are citizens of different states, and the amount in controversy exceeds \$75,000, excluding interest and costs.

2. Venue is proper in the Eastern District of Texas pursuant to 28 U.S.C. § 1391(a)(3), because both defendants are subject to personal jurisdiction in the Eastern District. Defendants are both doing business within the Eastern District of Texas by virtue of the fact (a) that they are duly licensed to do business within the entire state of Texas, (b) they have insured Plaintiff Ron Simmons, who is a resident of Denton County, and (c) Collin County is within the Eastern District of Texas, 28 U.S.C. § 124(c)(3).

PARTIES

3. Plaintiff Ron Simmons is a resident of Denton County, Texas.
4. Plaintiff Charles Scott Sykes, Jr. is a resident of Dallas County, Texas.
5. Plaintiffs Randy and Valorie Haugen are residents of the state of Utah.
6. Plaintiffs Orrin and Laurie Woodward are residents of the state of Florida.
7. Plaintiffs Chris and Terri Brady are residents of the state of Florida.
8. Plaintiffs William and Peggy Florence are residents of the state of Georgia.

9. Plaintiffs Donald and Nancy Wilson are residents of the state of Utah.
10. Plaintiffs Timothy and Amy Marks are residents of the state of Florida.
11. Plaintiffs Chuck and Nancy Cullen are residents of the state of Michigan.
12. Plaintiffs Kirk and Cassandra Birtles, are residents of the state of Michigan.
13. Plaintiffs Jim and Dolores Martin, are residents of the state of Michigan.
14. Plaintiffs Aron and Mary Radosa, are residents of the state of Michigan.
15. Plaintiff Chuck Goetschel is a resident of the state of California.
16. Plaintiff David Brandy, is a resident of the state of Florida.
17. Plaintiffs Bruce and Jessilyn Gilbank, are residents of the state of California.
18. Plaintiff Mike Martensen is a resident of the state of Georgia.
19. Plaintiff Benjamin Dickie is a resident of the state of Michigan.
20. Defendant Liberty Mutual Fire Insurance Company (“Liberty Mutual”) is a licensed foreign insurer organized and existing under the laws of the State of Wisconsin, whose principal place of business is Wausau, Wisconsin. Liberty Mutual may be served by serving its registered agent for service of process, Corporation Service Company, 701 Brazos Street Suite 1050, Austin TX 78701 -3232, pursuant to FED. R. CIV. P. 4(h)(1).
21. Defendant Westchester Fire Insurance Company (“Westchester”) is a for-profit corporation organized and existing under the laws of the State of New York whose principal place of business is New York, New York. Westchester is licensed to do business in the state of Texas and pursuant to FED. R. CIV. P. 4(h)(1), it may be served by serving its registered agent for service of process, Robin M. Mountain, 6600 Campus Circle Drive East Suite 300, Irving TX 75063 -2732.

FACTS

22. Plaintiffs bring this claim for a declaratory judgment under Federal Rule of Civil Procedure 57 and 28 U.S.C. §§2201, 2202.

23. All Plaintiffs are former Independent Business Owners (“IBOs”) who owned “Quixtar” distributorships. The business model employed by Quixtar is commonly referred to as “multi-level marketing.”

24. The relationship between Quixtar and many of its distributors has soured. Some IBOs believe that Quixtar’s goods are over-priced and have complained that this makes it more difficult to (1) recruit new IBOs and (2) retail Quixtar products. These complaints, and the negotiations between Quixtar and the organization purportedly representing IBOs’ interests, came to a head last year. Some IBOs filed suit against Quixtar, alleging, among other things, that its contract with them was unenforceable. The dispute went national, with Quixtar filing suit against many IBOs, many IBOs filing suit against Quixtar, and various cases being referred to arbitration.

25. The Plaintiffs here are IBOs who have been sued by or subpoenaed by Quixtar. Each of them is an insured under a Liberty Mutual Fire Insurance Company (“Liberty Mutual”) Commercial General Liability (“CGL”) policy. The policy number is TB2-681-004148-016. The Plaintiffs have demanded defense and indemnity under the policy, but Liberty Mutual has not tendered a defense, nor has it accepted its obligation to indemnify.

FIRST CAUSE OF ACTION—DECLARATORY JUDGMENT

26. The Liberty Mutual Policy

A. Eligibility, Limits and Policy Period

Policy TB2-681-004148-016¹ includes as the “named insured” the “Independent Business Owners Benefit Association” (“IBOBA”). Ex. A at 1. IBOBA is simply a group of Quixtar distributors who collectively purchase insurance at preferable rates by pooling their resources. All IBOs who participate in the pool become insureds under IBOBA’s CGL. Ex. A at 5. (“An IBO is eligible for coverage when it was purchased through IBOBA for some or all of this policy period.”)

A new CGL is purchased each year—not always from the same insurer. To do this, IBOBA appoints Alticor Holdings, Inc. (“Alticor”), Quixtar’s parent company, as its agent. Ex. A at 6. Alticor is then supposed to negotiate the best deal possible.

Here, IBOBA and Alticor purchased a CGL from Liberty Mutual with a policy period beginning on December 31, 2006 and ending on December 31, 2007. Ex. A at 1. The policy has a “per occurrence” limit of \$1,000,000 and an aggregate limit of \$2,000,000. Ex. A at 1.

B. “Named Insured”

The definition of “Named Insured” under the policy has been modified by various endorsements. The endorsement at issue here is entitled “BROAD FORM NAMED INSURED” and appears on Liberty Mutual’s Form LA 99 11 11 06. Ex. A at 3 and 5. Under the endorsement, each IBO “who elects coverage in accordance with IBOBA procedures” is a

¹ A true and accurate copy of the policy is attached as Exhibit A.

Named Insured. Ex. A at 5. While functioning as an IBO, each of the plaintiffs elected to be covered under the Liberty Mutual policy.

C. Coverage

The policy provides broad coverage for various personal injuries. This coverage extends to “sums the insured becomes legally obligated to pay as damages because of a “personal and advertising injury” to which this insurance applies. Ex. A at 42, §1.a. An endorsement (Form LN 29 04 06 05) to the policy changes the definition of “personal and advertising injury” from that stated in the policy. In the endorsement, personal or advertising injuries are defined as “injury, including consequential “bodily injury”, arising out of “[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” Ex. A at 15, §B.2.d.

D. Covered Allegations

(1) *Simmons v. Quixtar*

The allegations made in Quixtar’s counter-claim² in *Simmons et al. v. Quixtar, Inc.*, JAMS Ref. No. 1310017134, clearly include both facts and legal theories that fall within the four corners of CGL TB2-681-004148-016. For example, in Counter-Claim V, entitled “Violations of the Lanham Act,” Quixtar alleges that insureds Ron Simmons and Charles Sykes:

“have made false and/or misleading statements about the pricing of Quixtar products”

and

² A true and accurate copy of Quixtar’s counter-claim is attached as Exhibit B. Because the arbitration is subject to confidentiality provisions, Exhibit B is filed under seal.

have “created a false impression among those attending meetings that those who join Quixtar as IBOs are instead joining [another organization], and that Quixtar is merely a vendor, supplier or subcontractor of [the other organization].”

(2) *Quixtar v. Woodward*

The allegations made in Quixtar’s Amended Statement of Claims³ in *Quixtar, Inc. v. Woodward et al.* clearly include both facts and legal theories that fall within the four corners of CGL TB2-681-004148-016. For example, in ¶70, page 19; ¶77, page 21, Quixtar alleges that insureds Randy Haugen, Orrin Woodward, Don Wilson, Chris Brady, William Florence, Chuck Goetschel, Timothy Marks, and Chuck Cullen had engaged, or were threatening to engage, in “activities injurious to the reputation of Quixtar including, but not limited to, disparagement of the Quixtar opportunity.”

E. Notice of Claim

The Liberty Mutual policy provides that it must be notified about a suit covered by the policy “as soon as practicable.” Ex. A, p. 51. Plaintiffs have complied with this condition by providing notice of their claims to Marsh USA Inc., Liberty Mutual’s agent and claims administrator, in accordance with standard industry practice.

F. Duty to Defend

Liberty Mutual’s policy provides that it “will have the right and duty to defend the insured against any ‘suit’ seeking those damages” [referring to damages arising from “personal

³ A true and accurate copy of Quixtar’s amended statement of claims is attached as Exhibit C. Because the arbitration is subject to confidentiality provisions, Exhibit C is filed under seal.

and advertising injury”]. See Ex. A, p. 46 [Section I, Coverages, Coverage B, Personal and Advertising Injury, ¶1].

G. Liberty Mutual’s Refusal

In spite of Plaintiffs’ notice to Liberty Mutual of Quixtar’s claims against them and Plaintiffs’ request for a defense and indemnity under the policy, Liberty Mutual has refused to meet with Plaintiffs to discuss these claims and has otherwise failed to respond to Plaintiffs’ request for a defense under Liberty Mutual’s policy No. No. TB2-681-004148-016.

27. Westchester Insurance Company’s Policy

A. Eligibility, Limits and Policy Period

Defendant Westchester Fire Insurance Company (“Westchester”) issued a Directors and Officers (“D&O”) liability insurance policy to the IBOBA for the benefit of its members. Upon information and belief, Plaintiffs allege that as with the CGL policy issued by Liberty Mutual, and all IBOs who participate in the pool become insureds under the D&O policy. It is further believed that a new D&O policy is purchased each year (not always from the same insurer) and in doing this, the IBOBA appoints Alticor Holdings, Inc. (“Alticor”), Quixtar’s parent company, as its agent. Ex. A at 6. Alticor is then supposed to negotiate the best deal possible.

Plaintiffs believe that the IBOBA and Alticor purchased the D&O policy from Westchester for the policy period beginning on December 31, 2006 and ending on December 31, 2007. Plaintiffs provided notice of their claims to Universal Insurance Services, Inc., agent and claims administrator for Westchester, with the expectation that, in accordance with standard industry practice, Universal would open a claim file and forward the notice to Westchester.

B. “Named Insured”, Coverage, Covered Allegations and Westchester’s Refusal (through its agent’s conduct)

Plaintiffs have attempted several times unsuccessfully to obtain a copy of Westchester’s D&O policy through Universal, but because of Universal’s refusal to cooperate with Plaintiffs, Plaintiffs are unable to allege any specifics with respect to their status as named insureds under the D&O policy, that policy’s coverage and allegations by Quixtar in *Simmons v. Quixtar* and *Woodward v. Quixtar*.

In spite of Plaintiffs’ notice to Universal of Quixtar’s claims against Plaintiffs and Plaintiffs’ request for a defense and indemnity under the D&O policy, Universal has failed to cooperate with Plaintiffs and engaged in obstructionist conduct by refusing to meet with Plaintiffs or Plaintiffs’ counsel and refusing to provide a certified copy of the policy. As agent and third-party administrator for Westchester, Universal has acted for and on behalf of Westchester.

28. Request for Declaratory Judgment

a. Quixtar has asserted claims against plaintiffs seeking remedies for disparagement that it alleges Plaintiffs have committed against Quixtar’s business operations. Such allegations present claims falling within the coverage of Liberty Mutual Policy No. TB2-681-004148-016 and Plaintiffs have fulfilled all conditions necessary for coverage to attach. Liberty Mutual has failed to respond to Plaintiffs’ requests that it defend them on Quixtar’s claims against them, despite numerous requests from Plaintiffs.

b. Plaintiffs’ attempts to present a claim for coverage under Westchester’s D&O policy have been frustrated by the refusal of Westchester’s agent, Universal Insurance Services,

to cooperate with Plaintiffs and provide Plaintiffs with a copy of the D&O policy and refer their claim to Westchester.

c. Plaintiffs have borne the expense of defending against Quixtar's claims, and they are entitled to have Liberty Mutual and Westchester reimburse them for the costs of defending these claims thus far and to have Liberty Mutual and Westchester pay all future costs of defending against Quixtar's claims in accordance with its policy.

d. Plaintiffs request that the Court enter a declaratory judgment declaring the rights of the parties under Liberty Mutual's policy No. No. TB2-681-004148-016 and under Westchester's D&O policy. More specifically, Plaintiffs request that the court issue a declaratory judgment:

- (i) Stating that Liberty Mutual and Westchester each have an obligation to defend Plaintiffs on Quixtar's claims against them;
- (ii) Ordering Liberty Mutual and Westchester to reimburse Plaintiffs for their costs of defending these claims thus far; and
- (iii) Ordering Liberty Mutual and Westchester to assume responsibility for the costs of defending Quixtar's claims against Plaintiffs henceforth.

PLAINTIFFS RON SIMMONS AND CHARLES SCOTT SYKES, JR.'S
SECOND CAUSE OF ACTION AGAINST LIBERTY MUTUAL AND WESTCHESTER
INSURANCE COMPANY: UNFAIR SETTLEMENT PRACTICES UNDER THE
TEXAS INSURANCE CODE

Plaintiffs Ron Simmons and Charles Sykes hereby adopt and incorporate by reference all of the above allegations and further states as follows:

29. Plaintiffs are individuals insured under policies of insurance issued by Defendants Liberty Mutual and Westchester Insurance Company and is therefore a person as defined in Tex. Ins. Code § 541.002(2).

30. Defendant Liberty Mutual is a corporation engaged in the business of insurance and is therefore a person as defined in Tex. Ins. Code § 541.002(2).

31. Defendant Westchester Insurance Company is a corporation engaged in the business of insurance and is therefore a person as defined in Tex. Ins. Code § 541.002(2).

32. Defendants Liberty Mutual and Westchester have engaged in unfair settlement practices as defined in Tex. Ins. Code § 541.060(2)(A). Specifically, Defendants Liberty Mutual and Westchester have failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of Plaintiffs' claim, even though Defendants knew or should have known that their liability under their policies is reasonably clear.

33. Defendants acted knowingly in failing to act in good faith to defend Quixtar's claims against Plaintiffs because they were actually aware from the circumstances that its conduct was unfair.

34. Plaintiffs provided Defendants with adequate documentation to show that the Quixtar's claims against Plaintiffs fell within the terms and conditions of Defendants' policies.

35. Knowing these facts, Defendants have unreasonably persisted in refusing to defend Plaintiffs in the third-party claims brought against Plaintiffs by Quixtar.

36. Defendants have persisted in maintaining this position even though they know that Plaintiffs expect to incur substantial future attorneys' fees and expenses in their defense against the claims brought by Quixtar against them.

37. Defendants' wrongful conduct was a producing cause of Plaintiffs' damages, including but not limited to increased attorneys' fees and litigations costs, and costs associated with Defendants' delay in performance.

**PLAINTIFFS RON SIMMONS AND CHARLES SCOTT SYKES, JR.'S THIRD CAUSE
OF ACTION AGAINST LIBERTY MUTUAL AND WESTCHESTER INSURANCE
COMPANY: TEXAS DECEPTIVE TRADE PRACTICES ACT**

Plaintiffs Ron Simmons and Charles Sykes hereby adopt and incorporate by reference all of the above allegations and further states as follows:

38. Plaintiffs are business consumers under the Texas Deceptive Trade Practices Act ("DTPA"), TEX. BUS. & COM. CODE §§ 17.41 et seq. because Plaintiffs are individuals who acquired insurance coverage under insurance policies through their membership in the IBOA, which obtained for their benefit the insurance policies at issue, by purchase from Liberty Mutual and Westchester.

39. Defendants Liberty Mutual and Westchester are corporations that can be sued under the DTPA.

40. Defendants violated the DTPA when they used or employed an act or practice in violation of Texas Insurance Code chapter 541. Specifically, Defendants have failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which their liability as insurers has become reasonably clear.

41. Defendants' wrongful conduct was a producing cause of Plaintiffs' damages, including but not limited to increased attorneys' fees and litigations costs, and costs associated with Defendants' delay in performance.

42. Pursuant to TEX. BUS. & COM. CODE 17.506(c), Plaintiffs are entitled to an award of attorneys fees and other expenses incurred in presenting this claim against them.

43. Plaintiffs therefore seek recovery of unliquidated damages, costs and attorneys fees associated with this action.

WHEREFORE, Plaintiffs asks for judgment against Defendants for the following:

(a) a declaratory judgment:

(1) Stating that Liberty Mutual and Westchester have an obligation to defend Plaintiffs on Quixtar's claims against them;

(2) Ordering Liberty Mutual and Westchester to reimburse Plaintiffs for their costs of defending these claims thus far; and

(3) Ordering Liberty Mutual and Westchester to assume responsibility for the costs of defending Quixtar's claims against Plaintiffs henceforth.

b. Reasonable attorney fees pursuant to the Texas Insurance Code and the Texas Deceptive Trade Practices Act.

c. Costs of court.

d. All other relief the court deems appropriate.

Respectfully submitted,

MCCORMICK, HANCOCK &
NEWTON



Michael Y. McCormick
State Bar No. 13461030
Anthony E. Spaeth
State Bar No. 24027875
1900 West Loop South, Suite 700
Houston, Texas 77027
Telephone: (713) 297-0700
Facsimile: (713) 297-0710
ATTORNEYS FOR PLAINTIFFS

WM. CHARLES BUNDREN &
ASSOCIATES
Wm. Charles Bundren, Esq.
Attorney-in Charge
State Bar No. 03343200
2591 Dallas Parkway, Suite 300
Frisco, Texas 75034
(972) 624-5338 Telephone
(972) 624-5340 Facsimile
ATTORNEY FOR PLAINTIFFS