

Eastern District of Kentucky

**FILED**

MAR 15 2004

AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 02-73-KKC

BITUMINOUS CASUALTY CORPORATION,

PLAINTIFF

v.

MEMORANDUM, OPINION,  
& ORDER

MAXXIM REBUILD COMPANY, INC.,  
HAZARD SERVICES, INC., and  
BRADLEY COMBS,

DEFENDANTS

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This matter is before the Court on cross-motions for summary judgment. The motion for summary judgment filed by Plaintiff Bituminous Casualty Corporation ("Bituminous") against Defendant Maxxim Rebuild Company, Inc., ("Maxxim") and Defendant Hazard Services, Inc. ("Hazard") is found at Record No. 95. Maxxim's motion for partial summary judgment against Bituminous is found at Record No. 99, and its motion for summary judgment against Hazard is at Record No. 97. Responses and replies on all the motions have been filed and the motions are ripe for ruling.<sup>1</sup>

FACTUAL BACKGROUND

Generally, this case concerns a dispute over insurance coverage of claims arising from a May 22, 2001, auto accident at Harold in Floyd County, Kentucky, involving two vehicles. The operator of one of the vehicles, Paula Mitchell, died as a result of the collision. The operator of the other vehicle, a Ford F-550 truck owned by Defendant

<sup>1</sup>Maxxim's response to Bituminous's summary judgment motion is at Record No. 114, and Bituminous's reply to that response is at Record No. 117. Bituminous's response to Maxxim's motion for partial summary judgment is at Record No. 112, and Maxxim's reply to that response is at Record No. 116. Hazard's response to both motions for summary judgment against it is at Record No. 120. Maxxim's reply to Hazard's response is at Record No. 122, and Bituminous's reply to Hazard's response is at Record No. 123.

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Maxxim, was Bradley Combs. At the time of the accident, Combs was on Defendant Hazard's employee payroll, but had been "leased" to Maxxim as a parts runner based at Maxxim's Ashland, Kentucky, shop (the "Ashland shop"). Combs was transporting parts from the Ashland shop to Maxxim's shop at Norton, Virginia.

As a result of the accident (hereinafter the "Bradley Combs accident"), Combs, Maxxim and Hazard were named as defendants in a wrongful death action brought by the estate of Paula Mitchell in Floyd Circuit Court. Maxxim and Hazard submitted the claims to Hazard's business and automobile insurer, Bituminous. Bituminous agreed to investigate the claim on behalf of Hazard under a reservation of rights concerning coverage, but disclaimed coverage to Maxxim or Combs. See Complaint at ¶¶ 23-24.

On February 20, 2002, Bituminous filed a complaint for declaratory relief in this court against Maxxim, Hazard, and Bradley Combs [Record No. 1].<sup>2</sup> In its complaint, Bituminous alleged that an actual controversy existed among the parties as to their respective rights, duties, and obligations pursuant to two commercial insurance policies issued by Bituminous to Hazard for the period of January 22, 2001, to January 22, 2002: (1) Commercial Lines Policy No. CLP 3 105 422 (hereinafter the "CLP")<sup>3</sup>; and (2) Commercial Auto Policy No. CAP 3 105 407 (hereinafter the "CAP").<sup>4</sup> Complaint at ¶ 5. Bituminous claimed that in its initial application for insurance made in 1997, Hazard

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<sup>2</sup>This Court sits in diversity jurisdiction, as diversity of citizenship exists between the Plaintiff and the three named Defendants and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332.

<sup>3</sup>A copy of the CLP is attached as Exhibit A to Bituminous's memorandum in support of summary judgment. [Record No. 96]

<sup>4</sup>A copy of the CAP is attached as Exhibit B to Bituminous's memorandum in support of summary judgment. [Record No. 96]

described the nature of its business as servicing and building coal mining equipment. Complaint at ¶ 10. Bituminous alleged that during the policy period in question, however, Hazard leased employees such as Bradley Combs to various businesses without the knowledge and consent of Bituminous. Complaint at ¶ 9.

Bituminous's complaint seeks the following relief:

1. A judgment against Maxxim and Bradley Combs declaring that there exists no obligation on the part of Bituminous under the CLP or the CAP to provide any defense or indemnification for or against the claims arising from the Bradley Combs accident;
2. A judgment against Hazard declaring that there exists no obligation on the part of Bituminous under the CLP or the CAP to provide any defense or indemnification for or against the claims arising from the Bradley Combs accident;
3. A judgment against Hazard declaring that coverage, if any, afforded to Hazard under the CAP is in excess to any other collectible insurance;
4. A judgment against Hazard rescinding the CLP and the CAP;
5. Alternatively, a judgment for indemnification and contribution from Maxxim and Combs for any liability and obligations of Bituminous to the Estate of Paula Mitchell, deceased, and to her surviving minor daughter; and
6. For such other and further relief as the Court deems appropriate.

In addition to defending itself against Bituminous's complaint, Maxxim brought a counter-claim against Bituminous [Record No. 4], which it then amended [Record No. 80]. Maxxim asserts that it is third-party beneficiary of the CAP and the CLP and is entitled to

a judgment declaring that Bituminous must provide coverage for Hazard's indemnification of Maxxim under an alleged Services Agreement. [Count 1 of counter-claim] Maxxim also seeks a judgment declaring that Bituminous must provide coverage to Maxxim as an additional insured.<sup>5</sup> [Count 2 of counter-claim]

Subsequent to the filing of Bituminous's complaint and Maxxim's original counter-claim, Maxxim settled the state court action with the Estate of Paula Mitchell and with her surviving minor daughter for a total sum of \$2,000,000 (hereinafter, the "Settlement Payment") in exchange for a release of all state court claims against all parties. See Maxxim's Cross-claim and Amended Counterclaim at ¶ 15 and Exhibits 3 & 4 [Record No. 80]. After settling the lawsuit, Maxxim brought a cross-claim against Hazard seeking indemnification for the Settlement Payment under an alleged Services Agreement between Hazard and Maxxim. *Id.* at ¶¶ 19-21.

Hazard is defending itself against both Bituminous's and Maxxim's claims. Defendant Bradley Combs was served on May 3, 2002, but has never responded and is in default.

#### MOTIONS FOR SUMMARY JUDGMENT

The parties have submitted lengthy and well-written pleadings on the motions for summary judgment. Instead of repeating the arguments presented by each party in full, the Court will summarize the position of each party.

Bituminous has based its motion for summary judgment on the following grounds.

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<sup>5</sup>Maxxim also seeks damages from Bituminous's failure to pay and from an alleged breach of good faith and fair dealing. [Counts 3 & 4] In a separate order issued this same day, however, the Court bifurcated all proceedings on Counts 3 & 4 until after the other issues in this case are resolved.

Bituminous claims that under the language of the CLP and the CAP, it has no obligation to provide coverage for the Bradley Combs accident apart from any contractual indemnification agreements into which Hazard and Maxxim entered. Bituminous then contends that no valid indemnification agreement exists between Hazard and Maxxim. Finally, Bituminous contends that even if a valid indemnification agreement exists, it is not covered under the CLP or CAP because Bituminous was not aware of Hazard's employee leasing business when it issued the policies. Bituminous also seeks rescission of the policies based on Hazard's misrepresentation of its business on its application forms..

Maxxim, in its motion for summary judgment against Hazard, claims to have a valid indemnification agreement with Hazard through a 1995 Services Agreement between Hazard and Addington, Inc., ("Addington") that Maxxim alleges it received by assignment by Addington. In its pleadings vis-a-vis Bituminous,<sup>6</sup> Maxxim contends that Bituminous must provide it coverage for the Bradley Combs accident, but acknowledges that such coverage would arise solely as a result of the indemnification provision in the Services Agreement.

In its response to both Bituminous and Maxxim [Record No. 120], Hazard argues that both motions against it should be denied because (1) a genuine issue of material fact exists as whether Addington assigned the aforesaid Services Agreement to Maxxim; (2) Bituminous is not entitled to rescission of the policies as a matter of law; and (3) genuine issues of material fact exist regarding Hazard's application for insurance and Bituminous's

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<sup>6</sup>Maxxim's memorandum in support of its motion for partial summary judgment against Bituminous [Record No. 100] addresses only coverage under the CAP policy, but Maxxim addresses both insurance policies in its response to Bituminous's motion for summary judgment.

knowledge of Hazard's business.

#### Standard for Summary Judgment

Under Federal Rule of Civil Procedure 56, summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The party moving for summary judgment must support its motion by directing the Court to such pleadings, depositions, etc., but need not support the motion by "negating the opponent's claim." Celotex, 477 U.S. at 323. Where the motion for summary judgment is supported by the moving party, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Once the moving party meets its burden of production, the nonmoving party must show more than "some metaphysical doubt as to the material facts." Matsushita Electric Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In other words, any factual dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. The mere existence of some alleged factual dispute is not good enough; there must be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-8 (1986).

## LAW AND ANALYSIS

E. Bituminous's obligations in the absence of an indemnification agreement between Hazard and Maxxim

Under Kentucky law, the "construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court." E.g., Island Creek Coal Co. v. Wells, 113 S.W.3d 100, 103 (Ky. 2003) (internal quotations omitted). When interpreting a contract, the Court "first must determine whether the terms of the parties' [agreement] are ambiguous, because resolution of the ambiguity question will dictate how [the court's] interpretive analysis will proceed." Frear v. P.T.A. Industries, 103 S.W.3d 99, 105-6 (Ky. 2003). In the absence of ambiguity, however, "a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." Id. at 106 (internal quotations omitted).

After reviewing the briefs, the Court finds that, absent an indemnification agreement between Hazard and Maxxim, Bituminous is not required to provide coverage for the Bradley Combs accident under the terms of the CLP or the CAP. First, Bituminous appears to have no obligation to cover the accident under the CLP merely because Combs was listed on Hazard's payroll. Bituminous disputes whether Bradley Combs would qualify as an "employee" of Hazard under the definition of "employee" provided in the CLP because of his status as a payroll employee leased to another company. However, even if Combs were a Hazard "employee" under the CLP, that policy specifically excludes coverage for bodily injury or property damage "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned, operated by or rented or loaned to any

insured." See CLP at Commercial General Liability Coverage Form ("CGL Form"), Section I.2.g. In other words, the CLP does not provide coverage for auto accidents involving any Hazard employee.

The CAP, on the other hand, covers "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" See CAP at Business Auto Coverage Form ("BAC Form"), Section II.A. For purposes of liability, a "covered auto" includes "any auto." See CAP Declarations Page and BAC Form, Section I.A. The definition of "insured" under the CAP includes the following: "You for any covered 'auto,'" and "Anyone else while using with your permission a covered 'auto' you own, hire or borrow." See CAP at BAC Form, Section II.A.1. The term "You" is defined as the named insured, Hazard Services, Inc. See CAP at BAC Form, p.1.

Bituminous argues that the policy language quoted above does not provide coverage for the Bradley Combs accident unless Hazard is contractually obligated to pay for the accident. Absent such a contractual obligation, Bituminous claims no coverage exists for the accident because the truck driven by Combs was not "owned, hired or borrowed" by Hazard; Maxxim owned the truck and Combs was driving it at the direction of Maxxim, not Hazard. Even if the vehicle was considered "hired or borrowed" by Hazard, however, the CAP excludes from the definition of an insured "The owner or anyone else from whom you hire or borrow a covered 'auto.'" BAC Form, Section II.A.1.b.(1). Maxxim thus does not appear to be an "insured" as defined for this section of the policy, and Maxxim does not contest that.

Bituminous also argues that, absent a contractual obligation, Hazard would not be liable at common-law for Combs's actions under the "loaned servant" prong of the respondeat superior doctrine. The general rule of a "loaned servant" in Kentucky law is found in Carnes v. Department of Economic Security, 435 S.W.2d 758, 761 (Ky. 1968):

A servant may be loaned or hired by his master for some special purpose so as to become, as to that service, the servant of the person to whom he is loaned or hired, and to impose on the latter the usual liabilities of a master, the general or original master being correspondingly relieved.

The test for whether a servant performing a special service for a third party becomes the servant of that third party depends on who controls the servant while he performs the special service. Turner Construction Co. v. Garrett, 310 S.W.2d 786, 789 (Ky. 1958). In the present case, the evidence shows that Bradley Combs acted wholly under the direction and control of Maxxim employees at the time of the accident. Therefore, under common law, Maxxim would be liable for any negligence on the part of Bradley Combs in connection with the accident.

Maxxim does not dispute Bituminous's arguments on the loaned servant doctrine,<sup>7</sup> and essentially acknowledges that its claim for coverage depends entirely on the existence of an indemnification agreement between it and Hazard.<sup>8</sup> The Court agrees, and thus turns to the question of whether there was such a valid agreement.

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<sup>7</sup>Maxxim notes, however, that the lawsuit brought by the Mitchell estate was settled without any party being declared negligent.

<sup>8</sup>Maxxim briefly maintained that it was led to believe it was an additional insured on the policies, but neither Addington nor Maxxim was formally named as an additional insured on the policy, whereas other companies with whom Hazard did business were. See "Additional Insured" pages in both the CLP and CAP. The evidence in the record shows that Hazard caused a Certificate of Insurance dated "1/12/2001" to be delivered to Addington listing Addington as an additional insured, but the certificate states on its face that it was provided for informational purposes only and does not, by itself, confer any rights upon the party to whom it was issued. See Exhibit 2 to Maxxim's Cross-claim and Amended Counter-claim [Record No. 80].

## II. The Services Agreement and its Alleged Assignment

The CLP and the CAP provide coverage for obligations assumed by Hazard under an "insured contract." See CLP at CGL Form, Section I.2.b(2); CAP at BAC Form, Section II.B.2.b. In both policies, an "insured contract" is defined in relevant part as follows:

That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person<sup>9</sup> or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

CLP at CGL Form, Section V, ¶ 9(f).

Maxxim claims that Bituminous is obligated to provide it coverage under the "insured contract" provision of each policy through the following language found in a Services Agreement<sup>10</sup> into which Hazard and Addington entered on August 3, 1995:

Section 4(A). Indemnity. Contractor agrees to release, indemnify, defend, and hold the Company, its employees, officers, directors, and agents harmless from and against any and all suits, claims, demands, costs, loss and expense, including attorney's fees and other legal expenses, by reason of liability imposed or claimed to be imposed by law, or otherwise, upon the Company for damages due to bodily injuries, death, or damage to property (including such damages suffered by the Contractor, its agents and employees) arising out of or in consequence of the performance of the Agreement, whether or not such bodily injuries, death, or damage to property arise, or are claimed to arise, in whole or in part, out of the negligence or any other grounds of legal liability on the part of the Contractor, its agents, and employees.

In the Services Agreement, "Contractor" refers to Hazard, while "the Company" refers to Addington. The Agreement also required the Contractor to maintain insurance.

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<sup>9</sup>"Party" replaces "person" in the CAP definition. See CAP at BAC Form, Section V.G.5.

<sup>10</sup>The Services Agreement is an exhibit to numerous pleadings. See, e.g., Exhibit I to Maxxim's Amended Counter-claim and Cross-claim [Record No. 80]; Exhibit H to Bituminous's SJ Memorandum [Record No. 96]; Exhibit A to Maxxim's Response to SJ [Record No. 114].

See Section 4(B) of Services Agreement.

Under the Agreement, Hazard agreed to "supply all equipment, supplies and labor on a 'as needed' basis" for thirty dollars (\$30) an hour. Exhibit A to the Agreement. The Court notes that the Agreement does not specify the type of equipment, supplies and labor to be provided, nor does it specify a location at which the services were to be performed.

Citing deposition testimony from Roy Sharp,<sup>11</sup> who signed the agreement as Hazard's president, Bituminous and Hazard argue in their pleadings that the terms of the 1995 Services Agreement do not include leasing employees. While Sharp's testimony may indicate that leasing employees was not specifically contemplated when Hazard and Addington entered into the Agreement in 1995, Hazard agreed, as Maxxim notes, to supply "all . . . labor" on an "as-needed." Although the evidence produced indicates that the leasing of employees by Hazard to Addington did not occur before the latter half of 1998, the invoices submitted by Hazard to Addington in late 1998 for the employees leased to the Ashland Shop charge a rate of \$30 per hour, the same rate quoted in the Services Agreement. See Exhibit I to Bituminous's SJ Memorandum [Record No. 96]. The Court thus believes that the employee leasing that occurred in 1998 was in accordance with the Services Agreement.

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<sup>11</sup> Q: What was the discussion with either Mr. Newell [Addington president in 1995] or Wayne Keaton [Addington employee in 1995] with regard to the type of work they wanted you to perform?  
A: Just wanted me to do basically welding.  
Q: With Hazard employees?  
A: Yes.  
Q: Did they discuss with you at that time this contracting of employees?  
A: No.

Roy Sharp Deposition at 42, lines 1-9 [Record No. 104]

Maxxim claims that Addington assigned the Services Agreement to Maxxim when it allegedly assigned to Maxxim all of the assets and liabilities of its re-build business located at the Ashland shop effective January 1, 1999 (hereinafter the "1999 Ashland Shop Assignment"). At the time, both companies were wholly-owned subsidiaries of Pittston Coal Management Company (hereinafter "Pittston"). The transfer of assets was completed via an inter-company transfer on the ledgers of the companies. See Exhibit J to Bituminous's SJ Memorandum [Record No. 96]; Exhibit A to Hazard's Response to SJ Motions [Record No. 120]. There apparently is no other written documentation of the asset transfer, nor is there any written confirmation that the Services Agreement was among the assets transferred. The Services Agreement is not reflected on the ledgers because contracts are generally not reflected on such ledgers. See David Fields Deposition at 52 [Record No. 103].<sup>12</sup> Despite the lack of written documentation, however, Maxxim maintains that the Agreement was nevertheless assigned.

Hazard never received any formal notification of the 1999 Ashland Shop Assignment between Addington and Maxxim. Hazard continued, however, to lease employees to the Ashland Shop. Hazard invoiced Maxxim by name and received checks drawn on a Maxxim account.

Bituminous and Hazard contend that such an assignment is invalid because it was

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Q: I see no contracts of any type that are shown on [the ledger sheets], or agreements or leases or anything like that.

A: You wouldn't actually see a contract here. You might see some liabilities to a contract that we have a current liability for.

Q: Why would you not see a contract on there, on [the ledgers]?

A: Contract has no book value.

David Fields Deposition at 52, lines 3-12 [Record No. 103].

not in writing. Maxxim correctly notes, however, that the terms of the Services Agreement did not require any assignment by Addington to be in writing:

Section 6(A) Assignment. Contractor [Hazard] shall not assign its rights hereunder without prior written consent of the Company [Addington]. Subject to the foregoing, all of the terms, covenants and conditions of this Agreement shall be binding upon the successors and assigns of the parties hereto.

Bituminous and Hazard argue that the assignment was actually an amendment required to be in writing under section 6(C) of the Agreement.<sup>13</sup> However, so long as an assignment changes only the identity of one of the parties, and the contract does not require otherwise, Kentucky law generally does not require assignments to be in writing. Contracts are generally assignable under Kentucky law unless forbidden by public policy or the contract itself. See Managed Health Care Associates, Inc. v. Kethan, 209 F.3d 923, 928 (6<sup>th</sup> Cir. 2000) (citing Pulaski Stave Co. v. Miller's Creek Lumber Co., 128 S.W. 96, 101 (Ky. 1910)). Moreover, an assignment generally is not considered to modify the underlying terms of a contract. See Kethan, 209 F.3d at 927. Generally, no particular form is required for assignment, and a parol assignment may be valid. See Napier v. Duff, 136 S.W.2d 1083, 1085 (Ky. 1939).

Bituminous and Hazard contend, however, that even if Addington could assign most of the Services Agreement without a written instrument, Addington could only assign the indemnification provision of such Agreement in writing because Kentucky's statute of frauds requires that a promise to answer for the debt, default, or misdoing of another be in writing and signed for anyone to take action upon it. KRS 371.010(4); see, e.g., Thompson

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<sup>13</sup>Section 6(c) of the Services Agreements provided, "Any amendments or changes in the terms of the Agreement shall be valid only if contained in a written instrument executed by both parties."

v. Budd Co., 199 F.3d 799, 810 (6<sup>th</sup> Cir. 1999) (“Under [KRS 371.010(4)], an indemnity provision generally must be in writing and signed by the indemnitor.”)

Maxxim claims that the indemnity provision in the Services Agreement is not a contract to answer for the debt or default of another, but is rather a promise by Hazard to pay claims arising from the labor and services it provides under the Agreement. Essentially, Maxxim argues that the indemnity agreement is Hazard’s promise to pay for its own misconduct. Maxxim reads the indemnification provision too narrowly, however. While the provision does apply to any claims arising from Hazard’s conduct under the contract, it also provides that Hazard will pay claims “arising out of or in consequence of the performance of the Agreement, *whether or not* such bodily injuries, death, or damage to property arise, or are claimed to arise, in whole or in part, out of the negligence or any other grounds of legal liability on the part of the Contractor, its agents, and employees.” (Emphasis added.) The Court interprets this language as a promise to pay all claims arising from the performance of the Agreement regardless of whether such claims were caused by Hazard’s negligence or by “the Company’s” negligence. Other courts have given the same interpretation to similar contractual provisions. See Fosson v. Ashland Oil & Ref. Co., 309 S.W.2d 176, 177-78 (Ky. 1958); Thompson, 199 F.3d at 808-09.

However, even if the indemnity provision in the Agreement is construed as a promise to answer for the debt or default of another, the Kentucky Court of Appeals has ruled in Barnett v. Stewart Lumber Co., 547 S.W.2d 788, 790 (Ky.Ct.App. 1977), that such a promise “is not within” that statute of frauds at section 371.010(4) if the promisor made the promise to “further some purpose of his own.” Id. The Sixth Circuit interprets the

Barnett decision to mean that an agreement to indemnify made as part of the consideration for being awarded a service contract is not subject to Kentucky's statute of frauds. Thompson, 199 F.3d at 809. Because the indemnification provision in the Services Agreement appears to be part of the consideration for receiving work under the Agreement, the Court does not find that Kentucky's statute of frauds at 371.010 prohibits a non-written assignment of the type of indemnity provision contained in the Services Agreement.

Having found that the Services Agreement may be assigned without executing a written instrument, the Court is left with the issue of whether the Agreement was actually assigned. Maxxim insists that Addington assigned the Agreement to Maxxim as part of a larger assignment of "all" the assets of the Ashland Shop. In other words, Maxxim contends that the assignment of the Services Agreement was a "term" of the 1999 Ashland Shop Assignment, which is a contract in and of itself. Under Kentucky law, the "construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court." E.g., Frear v. P.T.A. Industries, 103 S.W.3d 99, 105-6 (Ky. 2003); Island Creek Coal Co. v. Wells, 113 S.W.3d 100, 103 (Ky. 2003) (internal quotations omitted). When interpreting a contract, the Court "first must determine whether the terms of the parties' [agreement] are ambiguous, because resolution of the ambiguity question will dictate how [the court's] interpretive analysis will proceed." Frear, 103 S.W.3d at 105-06. "An ambiguous contract is one capable of more than one different, reasonable interpretation." Id. at 106 n.12 (quoting Central Bank & Trust Co. v. Kincaid, 617 S.W.2d 32, 33 (Ky. 1981)).

The evidence presented by Maxxim shows that the 1999 Ashland Shop Assignment

was meant to include every asset of the Ashland Shop's rebuild business. Maxxim has cited the following testimony of the vice-president of Addington:

Q: Okay. And you heard Mr. Fields's testimony that on January 1<sup>st</sup>, 1999, the shop assets of Addington, Inc., went to Maxxim Rebuild.

A: Along with anything attached to the Addington shop went to Maxxim Rebuild. Not only the shop assets, but all of our work, all of our vendor lists, everything, our people, everything about the Addington Ashland shop went to Maxxim Rebuild.

Walt Crickmer Deposition at 53-54 [Record No. 102].

While it is clear that the 1999 Ashland Shop Assignment included all of the Ashland Shop assets, it is not clear that the Services Agreement was one of those assets. As the Court has already noted, the strict terms of the Agreement did not limit the services to be provided by Hazard under the Services Agreement to just the Ashland Shop or just the rebuild business. Instead, the Agreement simply states that Hazard was to supply all equipment, supplies and labor to Addington on an "as needed" basis. According to Maxxim's own representatives, Hazard performed services for Addington at other locations before the 1999 Ashland Shop Assignment. See Walt Crickmer Deposition at 23 [Record No. 102].<sup>14</sup>

As evidence that the 1999 Ashland Shop Assignment indeed included the Services Agreement as an asset, Maxxim has cited (1) a sworn answer to an interrogatory made in the course of this litigation, see Exhibit A to Maxxim's Reply to Hazard's Response

<sup>14</sup> A: I don't know when [leasing employees] started. I know this: That Addington, Inc., utilized personnel from Hazard Services throughout the mid-'90s at both our shop [the Ashland shop] and on the jobs operating in the UK, UK-1 and UK-2 [mining locations] from not only doing maintenance, to running equipment, dozer operators on the job, to all kinds of different functions that we covered with this agreement.

Walt Crickmer Deposition at 23, lines 11-18 [Record No. 102].

[Record No. 122]; (2) Walt Crickmer's deposition testimony at pages 53 and 54 quoted above; and (3) the following following deposition testimony from Walt Crickmer: "We never broke one day's stride in working under the Addington, Inc., agreement when the name change was made to Maxxim, when the two shops were merged together, and Maxxim was somewhat created out of just combining of two shops. . . ." Crickmer Deposition at 53, as quoted by Maxxim in its Reply to Hazard's Response at 9 [Record No. 122]

The 1999 Ashland Shop Assignment was not, however, a mere name change; the evidence shows that Addington continued to operate after that transfer. See, e.g. Anthony Wayne Keaton 10/14/2003 Deposition [Record No. 106] at 21,<sup>15</sup> 33;<sup>16</sup> David Fields 9/4/2003 Deposition [Record No. 103] at 31-32.<sup>17</sup>

Though not cited in Maxxim's pleadings, Crickmer later testifies, "No, the agreement was in place. We never missed a day. We never broke stride on using Hazard

<sup>15</sup> Q: Do you know if Addington, Inc. still conducts business in Kentuck

A: Yes.

Q: What does Addington, Inc., do in Kentucky? Surface mines and deep mines?

A: I believe they have the continued surface operation. I'm not sure productionwise, but, I mean, I know that they still have properties and doing reclamation.

Keaton Deposition [Record No. 106] at 21, lines 1-9.

<sup>16</sup> Q: But you just told me that Addington, Inc., continued operations. You told me about equipment, you told me about mines, after '99.

A: Yes.

Q: So Addington, Inc., is still over here, right, doing business, right?

A: (Witness nods head affirmatively.) Yes.

Keaton Deposition [Record No. 106] at 33, lines 3-9.

<sup>17</sup> Q: In May of 2001, was Addington, Inc., still having obligations and some responsibilities with respect to the reclamation bonds for the UK mine and perhaps other mines?

A: Yes.

David Fields 9/4/2003 Deposition [Record No. 103] at 31, line 25, and 32, lines 1-4.

Services people, invoicing them, paying the bills, back and forth on the work that was performed up to and including them furnishing us up-to-date insurance certificates from Bituminous for the work they were doing and their people." Crickmer Deposition at 54. The certificate of insurance provided by Hazard in 2001, however, listed Addington, not Maxxim.

When specifically asked in depositions whether the Services Agreement was transferred as part of the 1999 Ashland Shop Assignment, moreover, the Maxxim/Addington/Pittston officials have vague memories. From the deposition of David Fields, vice-president and chief financial officer of Pittston:

Q: And it's correct, isn't it, that not all contracts of Addington, Inc., went to Maxxim Rebuild Company, Inc., isn't it?

A: Correct.

Q: And as you sit here today, you can't tell me what contracts of Addington, Inc., you believe went to Maxxim Rebuild Company, Inc., and which ones didn't go, correct?

A: I cannot.

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Q: So as we sit here today, you can't tell me whether the Services Agreement . . . went from Addington, Inc., to Maxxim Rebuild Company, Inc.?

A: My knowledge of the workings under this [Agreement], they were assumed with the transfer of the assets and liabilities of Addington, Inc., to Maxxim rebuild because the performances under this agreement continued and were both invoiced and paid by - from Hazard Service [sic] to Maxxim and paid by Maxxim Rebuild Company, Inc.

Q: But, Mr. Fields, as you sit here today, you can't tell me whether the Services Agreement was specifically assumed by Maxxim Rebuild or was specifically assigned by Addington to Maxxim Rebuild?

A: I can tell you that the performance of this contract continued under Maxxim Rebuild, Inc. Thereby, I would assume, yes.

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A: Well, I'm assuming that Hazard continued doing the same services under this agreement, both prior to and after the establishing of Maxxim Rebuild

and the fact that the continued invoicing to Maxxim - to Maxxim specifically from Hazard and payment of Hazard specifically from Maxxim, to me, indicates there's an acceptance [sic] of assumption of this agreement."

David Fields 9/4/2003 Deposition [Record No. 103] at 52, lines 13-21; at 53, lines 7-25; at 54, lines 1-2; 61, lines 5-13 (emphasis added).

From the deposition of Walt Crickmer, vice-president of Addington at the time of the 1999 Ashland Shop Assignment:

Q: Do you have any idea whether that Services Agreement . . . was transferred by Addington, Inc., to Maxxim Rebuild Co., Inc.?

A: I assume that it was.

Crickmer 9/4/2003 Deposition [Record No. 102] at 21, lines 16-20.

From the deposition of Wayne Keaton, president of Maxxim at the time of the 1999 Ashland Shop Assignment:

Q: The question was, as president of Maxxim Rebuild Company, Inc., you chose or made a decision not to get a services agreement executed in a form similar to [the 1995 Services Agreement] between Maxxim Rebuild Company, Inc., and Hazard Services, Inc.; correct?

A: I was under the impression that this agreement carried forward to Maxxim. We were all one company was the way that it was viewed by us.

Q: So you made a decision that Maxxim Rebuild Company, Inc., did not need to obtain a services agreement such as [the 1995 Services Agreement] from Hazard Services, Inc. Is that what you're telling me?

A: It was felt that we had an agreement in place when Addington, Inc., became Maxxim.

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A [After counsel points out that Addington, Inc., still exists]: When Maxxim became Maxxim, any new service or any new vendors that we used, we incorporated service agreements into that. Preexisting is what was considered -- we considered -- I'm not sure there was a lot of thought given to that process.

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Q: There really wasn't any thought on your part that the services agreement somehow went from Addington, Inc., to Maxxim Rebuild . . . ? You really

just didn't think about it, did you? Because you saw all this Pittston big conglomerate, and you just didn't think about it, right?

A: Well, I mean, I feel like we thought about it. I just assumed, and I viewed us as being part of Addington. I mean, we were part of the assets. I just - - it was viewed to be part of Addington. I mean, there was a name recognition, and we perceived that contract to still be in place.

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Q: . . . [T]hen there wasn't a services agreement that said Maxxim Rebuild Company, Inc., based on your understanding of the company policy?

A: I was under the understanding that the agreement, Addington, Inc., still covered Maxxim.

Q: Listen to my question, please, Wayne. We're not arguing about what you understand of, you know, legal interpretations. I'm asking you about company policy.

A: But I'm interpreting Addington, Inc., as being part of Maxxim.

Keaton Deposition [Record No. 106] at 32, lines 12-25; at 33, lines 1-2, 21-25; at 34, lines 1, 14-25; at 35, line 1; at 63, lines 2-12.

In summary, the Maxxim/Addington/Pittston officials deposed can only say at best, in hindsight, that they assumed the Services Agreement was one of the assets transferred as part of the 1999 Ashland Shop Assignment. They admit, however, that they did not give the matter a lot of thought in 1999.

Bituminous and Hazard, however, have pointed to evidence showing that Hazard continued to perform work for Addington at another location after the 1999 Ashland Shop Assignment to Maxxim. This was confirmed in depositions with Maxxim/Addington/Pittston officials. See Fields Deposition at 132-37 (discussing work at "UK strip job" billed by Hazard to Addington, Inc., as late as October 1999); Crickmer Deposition at 53 (agreeing that Hazard paid both Maxxim and Addington in 1999). In other words, Hazard performed services for both Maxxim and Addington after 1999 Ashland

Shop Assignment. See Pamela Clay Hall Deposition [Record No. 101] at 24.<sup>18</sup> This fact, taken with the other evidence presented by the parties, leads the Court to two reasonable interpretations of the 1999 Ashland Shop Assignment:

(1) Addington did not assign the Services Agreement to Maxxim, Hazard continued to perform services for Addington under such Agreement, and Hazard leased employees to Maxxim without a written agreement; or

(2) Addington assigned the Agreement, Hazard leased employees to Maxxim under such Agreement, and Hazard performed services for Addington without any written agreement.

Having found two different but reasonable interpretations<sup>19</sup> of the 1999 Ashland Shop Assignment, the Court finds that the terms of that Assignment are ambiguous. Finding this ambiguity means that a material issue of fact exists that would preclude summary judgment. See Frear, 103 S.W. 3d at 106, n. 17 (equating the trial court's granting of summary judgment as finding that contract terms were unambiguous, stating "If the trial court had perceived an ambiguity, a material issue of fact would have existed to preclude summary judgment.") (citing Cook United, Inc. v. Waits, 512 S.W.2d 493, 495 (1974)). See

- <sup>18</sup> Q: Did they [Hazard] contract employees to anybody else at that time?  
 A: For a short period of time they did with Maxxim and Addington both.  
 Q: Was this in 1995?  
 A: '99 was with both of them at one time.

Pamela Clay Hall Deposition [Record No. 101] at 24, lines 20-25. Pam Hall has been a secretary at Hazard Services since before 1995.

<sup>19</sup>The deposition testimony from Maxxim/Addington/Pittston officials suggests that these officials thought that Addington's rights under the Services Agreement were split and thus shared by both Addington and Maxxim after the 1999 Ashland Shop Assignment. See Fields Deposition at 134, lines 24-25, to 135, lines 2-4; Crickmer Deposition at 55, lines 7-19; and Keaton Deposition at 34, lines 21-25. Splitting the rights under the Agreement between Maxxim and Addington, however, would have been a modification of the Agreement that, under section 6(C), was required to be in writing. Maxxim, moreover, has not argued for such an interpretation.

also Hunter v. Wehr Constructors, Inc., 875 S.W.2d 899, 901 (“The question of interpretation in these circumstances is to be determined by the trier of fact if it depends on a choice among reasonable inferences to be drawn on the extrinsic evidence admissible apart from the application of the parol evidence rule. Otherwise, the question of interpretation is a question of law.”)

Because a genuine issue of material fact exists as to whether the Services Agreement was assigned as part of the January 1999 assignment of the Ashland Shop assets, Maxxim’s motions for summary judgment against both Hazard and Bituminous will be denied.

III. Whether the Services Agreement, if validly assigned to Maxxim, qualifies as an “insured contract” under the policy.

Although a genuine issue of material fact exists as to whether Hazard has an agreement to indemnify Maxxim under the allegedly assigned Services Agreement, the Court will proceed with a discussion of whether such Agreement qualifies as an “insured contract” for which Bituminous agreed to provide coverage under the CLP and the CAP. Bituminous claims that even if Hazard has agreed to indemnify Maxxim for claims arising out of the performance of leased employees acting at Maxxim’s direction, Bituminous is not required to cover such claims because it was unaware of Hazard’s employee leasing business when it issued the policies. While the CLP and CAP provide coverage for liabilities assumed by Hazard under an “insured contract,” such contracts, by definition, must “pertain” to Hazard’s “business.” Bituminous claims that Hazard’s “business” for purposes of the definition of an “insured contract” should not include its employee leasing business because that particular line of business was not listed on the applications of insurance provided to Bituminous.

Maxxim counters that Bituminous's argument fails in part because "the description of business contained in any application is not conclusive as to what the business actually is." Maxxim's Response to SJ at 9. However, Maxxim does not cite any authority for this statement. Maxxim also contends that Bituminous had actual or imputed knowledge of Hazard's employee leasing business through its agent, the Center of Insurance.

With regard to Maxxim's first argument, the Court notes that while the policies in question provide definitions for terms such as "you," (the named insured), "we" (the insurance company), "employee," "auto," "bodily injury," "property damage," and even "suit" (as in legal proceeding), the policies do not provide a standard definition for the term "business." The lack of such a definition within the form implies that the definition of "business" for purposes of where it appears in the policy terms should be the "business description" included on the declarations page. In the declarations page for the CLP at issue, the "business description" listed for Hazard is "Mach. & Equip. Install." See Exhibit A to Bituminous's SJ Memorandum [Record No. 96]. This description is consistent with the descriptions of Hazard's business provided on the 1997 ACORD application submitted to Bituminous. See Exhibit C to Bituminous's SJ Memorandum.<sup>20</sup>

There is no line for a business description on the declarations page of the CAP, but there is a schedule listing the make, model, and VIN numbers of automobiles covered by the policy. No litigant has alleged that the Maxxim-owned truck driven by Bradley Combs

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<sup>20</sup>On page 1 of the 1997 ACORD application, Hazard's business is described as follows: "Services/builds coal mining equipment at strip mines; they are not in coal mines; equipment is brought out of mine to location for repairs; 30% away from premises and 70% in shop."

On page 3, under the "Schedule of Hazards," the business is described as "Mach. Or Equip. Instl; Service and Repair." See Exhibit C to Bituminous's SJ Memorandum.

is listed among the autos on the schedule, and Hazard president Roy Sharp has acknowledged that Combs was never listed as a driver. See Roy Sharp Deposition [Record No. 104] at 97.<sup>21</sup> As there is no other definition for "business" in the policy declarations, it is reasonable to conclude that the insurance company issued the CAP based on what the insurer knew Hazard's "business" to be from the applications and any other information provided by the insurance agent.

Moreover, commercial insurance policies, unlike individual home or automobile insurance, tend to be tailored to the insured's needs depending on the nature of the insured's business. After reviewing the policies, the Court believes that, unless Bituminous was aware of Hazard's employee leasing business when it issued the policies, the terms of those policies are not otherwise drafted to cover such a business. The policies provided coverage for "employees" – the definition of employees includes those employees leased to the insured by another company to perform "duties related to the conduct of your business." (Emphasis added.) The definition says nothing about employees leased out to other companies as part of a leasing business akin to that conducted by well-known companies such as Manpower and Workforce One.<sup>22</sup> In other words, the terms of the policies, on their

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<sup>21</sup> Q: So if a driver such as Bradley Combs was working actually for Maxxim or Addington, he would not have been on the list of drivers submitted to Center of Insurance; is that correct?

A: He would not have been. He didn't drive my truck.

Q: Was there some other means by which persons in the position of Bradley Combs, their names were ever submitted to Center of Insurance?

A: No.

Roy Sharp Deposition [Record No. 104] at 97, lines 13-22.

<sup>22</sup>In his deposition testimony, Walt Crickmer stated, "We paid Hazard Services for the work, no different than we would any other contract labor person, be it Workforce One, be it Manpower, be it anybody else that we could utilize. Hazard Services had a service that furnished labor, when we needed it, up and beyond our normal workforce, workload." Crickmer Deposition [Record No. 102] at 36, lines 4-10.

face, do not appear to contemplate coverage for employees on the insured's payroll but leased out to others and acting exclusively under others' direction.<sup>23</sup>

IV. Whether Bituminous knew or should have known of Hazard's employee leasing business

Maxxim and Hazard claim, however, that Bituminous knew or should have known of Hazard's leasing business through the following means:

(A) an 1997 application for workers' compensation submitted to another insurer but signed by the same insurance agent that stated that Hazard leased employees to other businesses;

(B) a review of the Services Agreement in 2000 by the insurance agents; and

(C) a November 2000 phone conversation between Hazard's secretary and the agent concerning coverage for a worker driving one of Maxxim's trucks.

A. *The 1997 Workers' Compensation Application*

Around the same time that Hazard submitted its ACORD applications for liability and auto insurance to Bituminous, Hazard also applied for workers' compensation insurance from ABC Safety and Workers' Comp Fund ("ABC"). The agent handling both applications was David Sears, an agent with the Center of Insurance agency located in Bowling Green, Kentucky. Center of Insurance was authorized to sell insurance for approximately seven (7) different commercial insurance carriers and many different personal lines carriers and workers' compensation funds. See Bruce Barrick Deposition at 13-14 (attached as Exhibit B to Bituminous's Reply [Record No. 117]). Hazard's first

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<sup>23</sup>Presumably there exists specialized liability and auto policies for businesses such as Manpower, but the policies at issue do not appear to be designed for the employee leasing business.

application for workers' compensation insurance from ABC was on a standard ACORD form dated December 26, 1996. That form, like the one submitted to Bituminous, stated "No" for the question of whether Hazard leased employees. See Exhibit 2 to Linda Lamar Deposition [Record No. 126].

ABC, however, also required a second form to be completed and signed by Hazard's president, Roy Sharp. On that second workers' compensation application (hereinafter the "1997 Workers' Compensation Application"), signed on January 14, 1997, by David Sears and on February 4, 1997,<sup>24</sup> by Roy Sharp, Sharp checked "yes" to a question on whether or not Hazard "lease(s) workers from a non-contractor or to a client company." See Exhibit C to Hazard's Response to SJ [Record No. 120].

Though signed by Sears, the 1997 Workers' Compensation Application was not kept in Hazard's file at the Center of Insurance; the parties apparently obtained the application from ABC during discovery. See David Sears 2/24/2003 Deposition [Record No. 130] at 11; Lamar Deposition [Record No. 126] at 121-122. The only applications to ABC contained in Hazard's file at Center of Insurance were the 1996 ACORD application and a subsequent 2000 ACORD application, which also answered "No" to the employee leasing question. See Exhibit 25 to Patricia Bryant Deposition [Record No. 129].<sup>25</sup> There is no

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<sup>24</sup>Linda Lamar, Hazard's initial customer service representative at the Center of Insurance, testified in a 2003 deposition that the 1997 Workers' Compensation Application was submitted to ABC and then returned because it was missing a signature, though Lamar could not remember whose signature was missing. It appears from documents reviewed at the deposition, however, that the application was returned for Roy Sharp's signature, but that he had filled out his part of the questionnaire on the application before it was returned for the signature. See Lamar Deposition [Record No. 126] at 129, 131.

<sup>25</sup>When Bituminous filed its motion for summary judgment, it tendered copies of certain depositions to the clerk along with a motion to file those depositions. The Court granted that motion at Record No. 125. Although the deposition of Patricia Bryant, the customer service representative who serviced Hazard's account from mid-1998 until the present, was purportedly tendered by Bituminous and docketed as such at Record No.

evidence that the 1997 Workers' Compensation Application or any information contained therein was ever transmitted to Bituminous.

In deposition testimony, Sears acknowledged that his signature on the 1997 Workers' Compensation Application implies that he reviewed it, see Sears 2/5/2003 Deposition [Record No. 131] at 91-92, though he does not specifically recall it, see Sears 2/2/4/2003 Deposition [Record No. 130] at 11.. Maxxim and Hazard contend that his knowledge should be imputed to Bituminous under United Fuel Gas Co. v. Jude, 355 S.W.2d 664, 666 (Ky. 1962), which provides, "[A] principal is affected with constructive knowledge of all the material facts of which his agent received or acquired knowledge while acting in the course of his employment and in reference to a matter over which his authority extended, even though the agent may fail to inform his principal thereof." (Emphasis added.) A similar principle is codified at KRS 304.9-035, which provides, "Any insurer shall be liable for the acts of its agents when the agents are acting in their capacity as representatives of the insurer and are acting within the scope of their authority." (Emphasis added.)

As Bituminous correctly argues, however, Sears and the Center of Insurance were not acting in their capacity as an agent for Bituminous when Sears would have reviewed the 1997 Workers' Compensation Application; Sears was acting as ABC's agent. The parties have not cited any Kentucky authority on the issue of whether knowledge acquired by an independent agent while working in his capacity for one insurer should be imputed to

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129, the Court has discovered that Record No. 129 is only the "Exhibits" volume of the deposition. The Court has checked with the clerk's office, and it appears that the actual deposition testimony of Patricia Bryant was not tendered to the Court.

another insurer for whom he also acts as an agent.<sup>26</sup> Through its own research, the Court could not find authority to impute knowledge in this situation.<sup>27</sup> Given the statutory language limiting liability to actions by agents while "acting in their capacity as representatives of the insurer," however, the Court does not believe any knowledge of the 1997 Workers' Compensation Application can be imputed to Bituminous. This conclusion is bolstered by the fact that the Center of Insurance's agency agreement with Bituminous restricted Bituminous's access to agency files solely to those files relating to transactions on behalf of Bituminous.<sup>28</sup> If Bituminous suspected that the Center of Insurance was keeping information about Hazard from them, therefore, they would not have been able to demand an examination of Hazard's applications to other carriers. Under such circumstances, the Court does not find that knowledge of the ABC application should be imputed to Bituminous.

*B. The Review of the Services Agreement in 2000*

Maxxim and Hazard claim that while Sears and the Center of Insurance were acting as Bituminous's agent, they received a copy of the Services Agreement to review in March

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<sup>26</sup>The only attempt to cite any case law for this issue comes from Hazard, whom in its response to Bituminous's summary judgment motion on the rescission issue, cites a North Carolina case, City of Greensboro v. Reserve Ins. Co., 321 S.E.2d 232, 235-36 (N.C. App.1984). In that case, which concerned imputation of notice to an insurer through an agent, the court's finding was based on the fact that the agent was a general agent for the insurer. The insurer tried to argue that the agent represented two principals, but the second alleged "principal" appears to have been the agency through whom the insured purchased the policy from the insured. Therefore, the Court does not find the case applicable to the present situation.

<sup>27</sup>The Court did find authority for imputing an agent's knowledge that the insured has duplicate insurance for the same risk. See cases cited in 3 Couch on Insurance § 49:41, n. 57.

<sup>28</sup>Specifically, the agency agreement provides, "The Company shall be permitted to examine [the agent's] books and records and to make such extracts from or copies thereof as it may desire and to examine such other of the Agent's books and records only as far as they relate to transactions on behalf of the Company." Agency Agreement attached as Exhibit B to Hazard's Response to SJ [Record No. 120].

or April 2000 to determine if Hazard had the insurance coverage required in section 6(B) of the Agreement. Sears testified in his deposition that he and his boss, Bruce Barrick, reviewed that section of the Agreement, which called for Hazard to maintain certain amounts of certain types of insurance. Sears testified that he assured Hazard that it had those coverages, though Sears believes that he told Hazard that vehicles not owned by Hazard would not be covered. See Sears 2/5/2003 Deposition at 111-112.

When shown the cover sheet (which stated "David, call Roy at the office please") placed on the Agreement to the Center of Insurance by facsimile, Hazard's president Roy Sharp could not remember any conversation with David Sears at that time, nor could he remember why it was sent to the Center of Insurance. See Sharp Deposition [Record No. 104] at 143-46. Hazard's secretary, Pamela Hall, whose handwriting was on the fax cover sheet, did not recall the circumstances surrounding why the Agreement was sent to the Center of Insurance. See Hall Deposition [Record No. 101] at 67-69.

The testimony regarding this particular occurrence, therefore, does not indicate that Hazard specified to Sears or anyone else at the Center of Insurance at that time that the "labor" to be supplied under the Agreement included leasing employees who worked exclusively under Maxxim's control and had nothing to do with Hazard's machinery and equipment business. Sears and Barrick testified that they reviewed the Services Agreement solely to determine if Hazard had the insurance coverage required in Section 6(B) of the Agreement. As such, there is nothing in the very broad terms of the Agreement that put Bituminous on notice of the employee leasing business. Therefore, the Court will not impute knowledge to Bituminous from this occurrence.

C. *November 2000 Conversation with Pamela Hall*

In a deposition, Pamela Hall testified that she called David Sears on November 3, 2000, to ask if Hazard needed to change its insurance to cover employees working at Maxxim's Ashland Shop and driving vehicles owned by Maxxim. See Hall Deposition at 77-80. A note of the conversation that Hall wrote that same day describes the content of the conversation as follows: "We have parts runner at Ashland that are [sic] driving trucks all the time but are not our truck [sic] how are they covered if they get killed? Should Maxxim put them on there [sic] auto policy[.] David said leave as is." Exhibit 1 to Pam Hall Deposition [Record No. 101].

Sears "vaguely" recalled this conversation and said his response to the inquiry was that vehicles not owned by Hazard could not be on Hazard's auto policy. See Sears 2/5/2003 Deposition [Record No. 131] at 116-17.

It is not clear from the testimony on this conversation, however, that Sears knew that the parts runners to whom Hall referred were employees leased to Maxxim to work under Maxxim's exclusive control. In other words, if Hall used the same language in the conversation that she used in the note (and Hall has not testified otherwise), Sears may have assumed that they were parts runners connected to Hazard's machinery and equipment business. The Court therefore finds that knowledge cannot be imputed to Bituminous through this conversation.

The evidence presented by Maxxim and Hazard in the pleadings on the summary judgment motions, therefore, do not show that Bituminous was aware of the nature of Hazard's employee leasing business. Because Bituminous was not aware of this line of

business, the Court finds that the policies cover only the lines of business described on Hazard's applications. Therefore, the Court finds that the definition of an insured contract "pertaining to your business" does not include that portion of the Services Agreement that covered indemnification for leased employees. Accordingly, the Court finds that Bituminous is not required to provide coverage under either the CLP or the CAP for claims arising from the Bradley Combs accident.<sup>29</sup>

Having found that Bituminous owes no coverage for the Bradley Combs accident, the Court declines to address the rescission claim Bituminous has against Hazard. These parties may, however, request that the Court address this issue if necessary for the resolution of this litigation.

#### CONCLUSIONS

For the foregoing reasons, the Court **HEREBY ORDERS** as follows:

1. Bituminous's motion for summary judgment is hereby **GRANTED** as to Maxxim and **GRANTED IN PART** as to Hazard. The Court declines to rule on the requested rescission of the policies at this time.
2. Maxxim's motion for partial summary judgment against Bituminous is hereby

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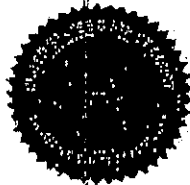
<sup>29</sup>Maxxim and Hazard also have tried to argue that Bituminous and the Center of Insurance would have learned of Hazard's employee leasing business had they not been so lax in examining Hazard's business and asking the right questions at policy renewal time. The only case law cited for this argument, however, comes from Hazard's response, which cited Miller v. Pacific Indemnity Insurance Co., 267 B.R. 785 (Bankr. W.D. 2000). In the Miller case, the court found that an insurance company's practice of not requiring an applicant to sign or review an application may have contributed to material inaccuracies in the application. The Miller case is distinguishable from the present case, however, because, in Miller, the applicant emphatically testified that he provided the agent with information that the agent did not include. In the present case, the applicant appears never to have provided the key information about its employee leasing practices. Moreover, it is doubtful that having more questions asked at renewal time would have revealed this information - when both Pam Hall and Roy Sharp were asked what Hazard's business was throughout the time period in question, both described Hazard as either a welding business or a heavy equipment repair business. See Hall Deposition at 8; Sharp Deposition at 15-16.

**DENIED.**

3. Maxxim's motion for summary judgment against Hazard is hereby **DENIED**.
4. Because the attorneys for all litigants are located in Lexington, Kentucky, the Court hereby refers this matter to United States Magistrate Judge James Todd for mediation on the indemnification cross-claim between Maxxim and Hazard.
5. In order to allow the parties additional time to mediate the dispute and/or prepare for trial, the current trial date of April 12, 2004, is hereby **SET ASIDE**.
6. This matter shall be scheduled for a telephonic status conference on April 12, 2004 at 1:30 p.m.

In addition to regular service by mail, a copy of this Order shall be transmitted forthwith to counsel of record by facsimile.

This the 15th day of March, 2004.



**Signed By:**

Karen K. Caldwell *KKC*

**United States District Judge**