APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

JULY 2023, VOLUME 11

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ARKANSAS

Insured's Notice of Occurrence and Lawsuit for Encroaching Upon Neighbor's Property Was Unreasonable as a Matter of Law

In *Emcasco Insurance Company v. NWA Grounds, Services, LLC, et al*, 2023 U.S. Dist. LEXIS 84034 (W.D. Ark. May 12, 2023), NWA Grounds Services, LLC ("NWAGS") was a developer in Northwest Arkansas that was owned and managed by Blass. In early 2019, it received permission from the City of Rogers to perform cleanup and grading work on a 5.8-acre property it owned. Blass and a subcontractor ("Bonds") performed such work at the direction of Blass. *Id*. at 1-2.

In October of 2019, the Rogers area was struck by a tornado, which felled trees and damaged equipment on the NWAGS property. After visiting the property, Blass directed Bonds to clean up downed trees on his and an adjacent property. Blass did not seek permission from the owner of the neighboring property ("HOFCO") to perform work on their land. *Id*. at 2.

Bonds entered HOFCO's property and removed downed trees, but also some living saplings and a portion of a barbed wire fence. In late October and early November of 2019, Blass directed Bonds to begin excavating and grading NWAGS's property to prepare for construction. Bonds inadvertently graded slightly over one acre of HOFCO's property. *Id*. at 3.

Blass was not aware of the encroachment upon and damage to HOFCO's property until he had the property resurveyed in late November or early December. On December 4, 2019, Blass met with the sole owner of HOFCO and suggested multiple plans to fix the property, and otherwise offered to buy the property. HOFCO refused. *Id*. at 3-4.

Months passed without a settlement, during which time Blass submitted six possible remediation plans to the City. HOFCO rejected all of them, while identifying water retention and drainage issues on its property that it attributed to NWAGS's work. In October 2020, another meeting took place to resolve the issues. In February 2021, Blass suggested another remediation meant to restore pre-encroachment issues, but HOFCO, again, rejected it. *Id*. at 4.

HOFCO filed suit against NWAGS, Bonds and others on May 19, 2021, alleging nuisance, negligence and unjust enrichment. It sought compensatory damages, punitive damages and injunctive relief. Blass became aware of the lawsuit by June 1, 2021, when he directed his counsel to accept service. Blass tendered the claims against NWAGS to its primary insurer, Emcasco Insurance Company ("Emcasco") and its umbrella insurer, Employer's Mutual Casualty Company ("EMCC") for the relevant period, on November 4, 2021.

The Emcasco and EMCC policies contained various conditions precedent to coverage under the heading "Duties In The Event Of Occurrence, Claim Or Suit." Both policies required that the insured "must see to it that [the insurer] is notified as soon as practicable of an 'occurrence' or an offense" "which may result in a claim." The policies also required written notice of the claim or 'suit' as soon as practicable:" while "immediately send[ing] [the insurer] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'" *Id*. at 8.

Emcasco and EMCC filed a declaratory judgment action NWAGS, Blass and others seeking a ruling that they owed no coverage to NWAGS and Blass for HOFCO's claims. More specifically, they moved for summary judgment on the grounds that NWAGS and Blass failed to comply with the notice provisions within the policies when it was reasonably clear that a claim or suit may arise from the encroachment on HOFCO's property. *Id*. at 1.

It was undisputed that the insurers did not receive notice for 23 months after Blass discovered the encroachment and five months after Blass became aware of HOFCO's lawsuit. Blass and NWAGS contended a genuine issue of material fact existed as to whether notice to the insurers was "as soon as practicable," where Blass asserted he had no reason to believe the encroachment would result in a claim or suit. Instead, he testified he believed the matter would be resolved without resorting to insurance coverage because NWAGS and HOFCO "engaged in numerous meetings attempting to resolve the situation and exchanged various proposed remediation plans to restore the property." *Id*. at 8.

The district court began its analysis by noting that Arkansas law requires strict compliance with a notice requirement within an insurance policy, the violation of which may result in the forfeiture of coverage. *See Am. Railcar Indus., Inc. v. Hartford Ins. Co. of the Midwest*, 847 F.3d 970, 973 (8th Cir. 2017) (quoting *Fireman's Fund Ins. Co. v. Care Mgmt., Inc*. 210 Ark. 110 (2010)). In ruling in favor of Emcasco and EMCC, the court could not look past what Blass admitted he knew of the occurrence and potential for a claim:

> Mr. Blass admitted under oath during his deposition the following relevant facts: (1) he, in carrying out his duties as manager of NWAGS, personally directed Bonds to enter HOFCO's land without permission to remove trees and a portion of fencing; (2) he personally directed Bonds to perform "grading" on NWAGS's land; (3) Bonds accidentally entered onto HOFCO's property without permission and "graded" more than an acre of land by moving direct and bringing in extra dirt; (4) Mr. Blass met with HOFCO's sole owner on December 4, 2019, and offered multiple pathways to settlement, all of which were rejected; (5) NWAGS bore responsibility for the accident; and (6) Mr. Blass also bore responsibility for the accident in his capacity as sole owner and manager of the company. Given these undisputed facts, there is no genuine, material dispute

that the encroachment qualified as an "occurrence" for which NWAGS was required to provide notice "as soon as practicable."

Mr. Blass and NWAGS believe a jury could find that notice was provided in compliance with the policies/terms. The Court disagrees. According to the undisputed timeline of events, NWAGS, by and through Mr. Blass, knew of an "occurrence" on December 4, 2019. By that date, NWAGS – through Mr. Blass – knew that an "accident" caused by NWAGS' agent had resulted in serious damage to a neighbor's property. Mr. Blass' unsuccessful attempts at settlement lasted eighteen months and culminated in HOFCO filing a lawsuit against NWAGS to force a resolution.

An action that is "practicable" is reasonably capable of being accomplished." (Black's Law Dictionary 1361 (10th ed. 2014).

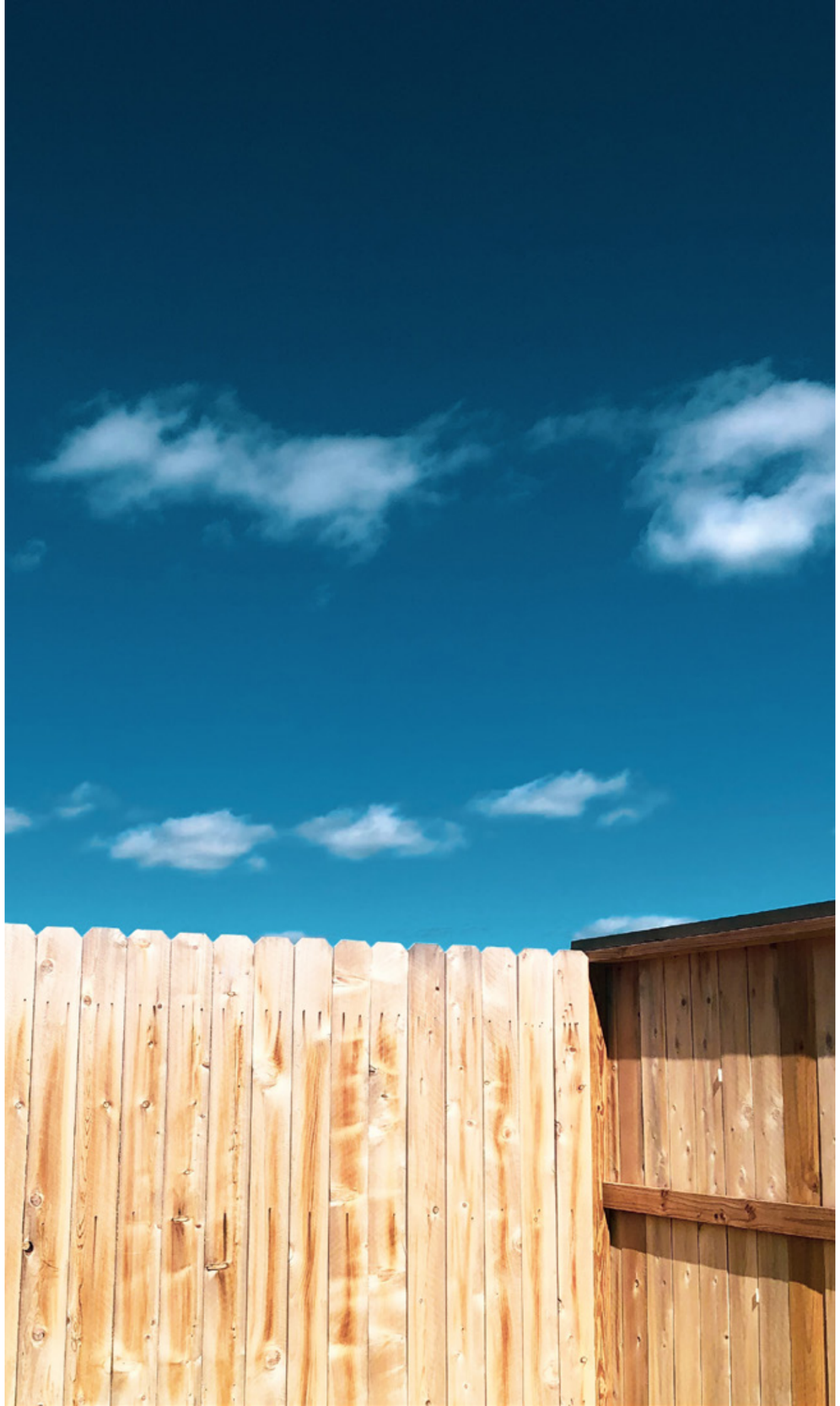
> Mr. Blass does not contend he was *incapable* of providing notice to EMCASCO and EMCC for nearly two years. He simply *decided* not to do so, and that decision has now cost his company insurance coverage. *NWAGS*, supra at 13-14.

The court quickly dispatched with the idea ("for the sake of argument") that NWAGS complied with the notice provision in relation to the lawsuit:

> Mr. Blass cannot explain why it was impracticable for NWAGS to provide notice of suit in June 2021 – let alone for the next five months. Moreover, in view of the significant delay, no reasonable juror could find that Mr. Blass "immediately sent [the insurers] copies of any demands, notices, summonses or legal papers, received in connection with the claim or "suit." *Id*.

Finally, the court rejected Blass's argument that late notice did not apply to him, personally, given he timely forwarded an amended complaint (adding him to the underlying lawsuit) in July 2022. The court noted that (1) the Emcasco and EMCC policies only provide Blass coverage for his duties as an agent/owner/manager; and (2) it was Blass' own decisions that led to a forfeiture of coverage. *Id*. at 15-16.

Like any late notice decision, *NWAGS* involves a detailed review of the reasonableness of the insured's conduct in relation to the amount of any delay. Here, there simply was no room to suggest the insured did not know of the possibility of a claim or (eventually) the presence of a lawsuit. It speaks to the critical importance of providing timely notice of an occurrence to an insurer, even if the insured believes it can resolve a matter outside of insurance.



NEW JERSEY

Primary and Excess Insurers Suffered "Appreciable Prejudice" as a Result of First Notice of Lawsuit After Verdict

In *GEA Mech. Equip. USA, Inc. v. First State Ins. Co*., 2023 U.S. Dist. LEXIS 83206 (D. N.J. May 11, 2023), GEA Mechanical Equipment USA, Inc. ("GEA") was the successor in interest to the assets and liabilities of Centrico, Inc. ("Centrico"). In March of 2017, Charles and Constance Thornton ("Thornton") sued GEA for bodily injury as a result of exposure to asbestos from brakes and clutches in centrifuges Centrico manufactured to separate plasma from blood. These centrifuges were sold to Charles Thornton's employer and he was (allegedly) exposed to them as early as 1979. *Id.* at 2-4

Centrico was insured under various CGL policies between 1979 and 1985. Hartford Accident and Indemnity Company ("Hartford") issued primary policies which required notice of an occurrence "as soon as practicable" and "immediate" notice of a claim or suit. Each of the excess policies provided by various companies required notice of an occurrence, claim or suit "as soon as practicable" when the carrier was "reasonably likely" to be involved in the claim. There was no dispute that the insurance policies were accessible by GEA as the successor-in-interest to Centrico. *Id*. at 3-4.

No insurer was apprised of the proceedings in the two (plus) years from filing to verdict. During this period, GEA was involved in various settlement negotiations, inclusive of a $10,000 offer on December 4, 2018, a $325,000 offer on June 3, 2019, and a $750,000 offer on June 14, 2019. On June 17, 2019, the jury returned a verdict of $70.1

million in compensatory damages against GEA. On September 24, 2019, while post-trial motions were pending, GEA and Thornton reached a settlement of $15 million. *Id*. at 4-5.

On August 4 and 5, 2019, GEA provided notice to Hartford and one excess insurer (presumably the first layer excess carrier) of the Thornton action. It contemporaneously filed a declaratory judgment action against all insurers seeking coverage for the loss. After the entry of judgment, but before settlement, GEA provided Hartford and AIIC information about the claim and invited them to participate in post-trial proceedings and settlement negotiations. Neither chose to do so. However, during this period, both carriers denied coverage to GEA based upon breaches of the notice and cooperation clauses within their policies. Other excess insurers appeared to receive notice on or around January 7, 2020. *Id*. at 5.

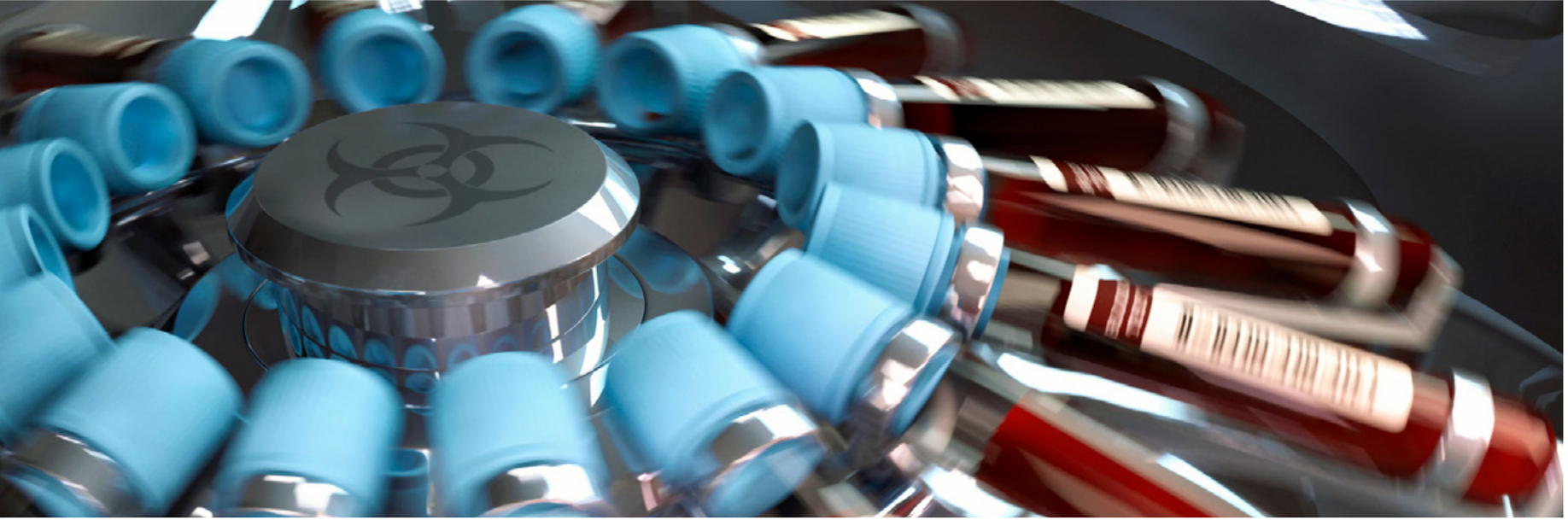
GEA sought summary judgment on the grounds that defendants (1) could not establish untimely notice with respect to their policies; and (2) failed to identify any concrete evidence of appreciable prejudice. Specifically, as to the excess insurers, GEA argued none could establish that the Thornton action was "reasonably likely" to reach their layer prior to verdict. As to all carriers, GEA argued the defendants failed to submit any evidence their involvement would have defeated the Thornton action or otherwise changed the outcome. *Id*. at 11.

The carriers themselves moved for summary judgment on the grounds that (1) notice was late as a matter of law; (2) the insured's conduct amounted to bad faith – thus negating the "appreciable prejudice" requirement; and (3) proof of "appreciable prejudice" existed regardless as a matter of law. In addition to its own motion, GEA opposed the defendant's motion on the grounds that a factual inquiry into prejudice precluded summary judgment. *Id*. at 11-12.

The district court began by addressing the standard for an insurer to prevail on late notice in New Jersey. It first noted that state courts interpret the phrase "as soon as practicable" to mean "within a reasonable time," which "depends upon the facts and circumstances of the particular case, and is ordinarily a fact issue for resolution by a jury unless the facts are undisputed and different inferences cannot be reasonably drawn therefrom." *See, e.g., Sagendorf v. Selective Ins. Co. of Am*., 679 A.2d 709, 716 (N.J. Super. Ct. App. Div. 1996). Upon proving late notice, an insurer bears the burden of proving "appreciable prejudice," whereby the insurer must prove (1) "substantial rights have been irretrievably lost" by virtue of the insured's failure to provide timely notice; and (2) the insurer would have had "the likelihood of success… defending against the accident victim's claim" had there been no breach. *GEA*, supra at 20 (citing *Hager v. Gonsalves*, 942. A.2d 160, 163 (N.J. Super. Ct. App. Div. 2008) (quoting *Sagendorf*, supra at 715).

The court quickly disposed of the notion that the insured's notice could be viewed as "as soon as practicable," either at the primary or excess layer:

> Here, GEA Mechanical failed to give notice of the actual lawsuit for over two years, as opposed to the initial occurrence, which may or may not have resulted in a claim. The lawsuit undoubtedly implicated the Primary Policies and required immediate notification. There is no "good faith" excuse for failing to comply with those Primary Policy conditions…
>
> This Court next considers whether GEA Mechanical violated the terms of the Excess Policies as a matter of law.



GEA Mechanical was required to notify the excess carriers of both an occurrence and resulting litigation "as soon as practicable," but only those "reasonably likely" to implicate the relevant policies. Whether GEA Mechanical's notice to the excess carriers was timely depends on what point in the litigation it became "reasonably likely" that the Excess Policies would be implicated...

Given the Thornton plaintiffs' $1.5 million demand, coupled with Defendants' last-ditch $750,000 counteroffer, in the face of the Primary Policies' $1 million limit, and considering other relevant and undisputed facts of this case, including the nature of injury, the failed pre-trial settlement negotiations, and the upcoming trial, it is clear to this Court that GEA Mechanical breached its notice obligations to its excess carriers, and denied them a meaningful opportunity to participate. To hold otherwise would ignore the language of the Policies and change the provision from "reasonably likely" to involve the carriers to a near certainty. Such an interpretation would be contrary to the clear language of the documents. *GEA*, supra. at 16-19.

Thereafter, the court plainly rejected the insured's argument that reasonable minds could differ on the issue of prejudice:

> There is no reasonable dispute GEA Mechanical's failure to provide notice and to cooperate with its insurers until after settlement negotiations, trial, and a jury verdict of $70.1 million appreciably prejudiced its insurers. Defendants were deprived completely of any opportunity to participate in the defense of the Thornton Action until after a verdict and judgment was entered. Where "notice has been given after the entry of judgment, it cannot reasonably be argued that the carrier has not been prejudiced."...
>
> While in some cases there remains a question of whether those rights were "irretrievably lost," under these circumstances reasonable minds cannot disagree that Defendants were irreversibly deprived of any meaningful participation in this case...Defendants have clearly established they were appreciably prejudiced by GEA Mechanical's failure to provide timely notice of the Thornton Action to Defendants, as a matter of law. *Id*. at 22-24 (citing *Morales v. Nat'l Grange Mut. Ins. Co.*, 423 A.2d 325, 329-30 (N.J. Super. Ct. Law. Div. Oct. 5, 1980).

The *GEA* decision is interesting for a couple of reasons. First, it isn't clear from the opinion that the outcome of the litigation would have been different had the carriers received timely notice or what other rights were "irretrievably lost." Appreciable prejudice appears to have been presumed on the grounds of notice post-verdict. The most important lesson from *GEA* is that no insured that expects coverage should gamble with notice of any significant occurrence or claim.

NEW YORK

Tenant's Failure to Amend Policy to Name New Owner as Additional Insured Warranted Reformation Based Upon Clear Intent to Cover Risk

In *Wesco Ins. Co., v. Fulmont Mut. Ins. Co.*, 2023 N.Y. App. Div. LEXIS 2650 (N.Y. App. 1st Dept. May 11, 2023), a tenant, JD's Fix Flat ("JD"), rented commercial space in New York City from the (then) owners SC2284 LLC and EFE Realty LLC (collectively "SC2284). Pursuant to the commercial lease, JD added SC2284 as an additional insured under its commercial general liability policy issued by Fulmont Mutual Insurance Company ("Fulmont"). SC2284 later conveyed the premises to 501 West 173rd Street LLC ("501 West") and JD updated the policy to replace SC2284 with 501 West as an additional insured. *Id* at 1-2.

On January 6, 2016, 501 West conveyed the property to Beyond 501 SPE ("Beyond"). JD did not seek to update the additional insured endorsement and 501 West remained the additional insured (owner) on the Policy. Sometime thereafter, an individual was

injured on the sidewalk adjacent to premises leased by JD, who sued Beyond and JD. *Id*. at 2.

Beyond was insured under a CGL policy issued by Wesco Insurance Company ("Wesco") for the relevant period. It appears Beyond tendered the underlying claim to Wesco, which then tendered the claim to JD for defense. JD failed to respond to Beyond/Wesco's demands for coverage.

On October 2, 2019, Wesco and Beyond tendered the claim to Fulmont for defense and indemnity. Fulmont issued disclaimers dated November 7, 2019 and May 18, 2020, arguing (1) Beyond was not an insured or additional insured on the policy; and (2) it could not be determined if the alleged accident occurred within the demised premises or based upon the operations of JD. *Id*. at 2.

On April 13, 2021, Wesco wrote Fulmont stating that an "innocent mistake" was the reason the policy was not updated and the policy should be reformed to substitute Beyond for 501 West. Past that, Wesco disputed Fulmont's assertion it could not identify the location of the accident given photographic evidence placed it immediately adjacent to JD's rental space – thus exposing it to liability. Wesco and Beyond thereafter filed a declaratory judgment action seeking to reform the policy to add Beyond as an additional insured and a ruling that Beyond was owed coverage for the loss. The trial court granted Wesco/Beyond's motion for summary judgment, and Fulmont appealed. *Id*. at 2-3.

Fulmont appeared to rely only upon the fact its policy did not identify Beyond as an additional insured. In affirming the trial court's ruling, the appellate court focused on what it concluded was the obvious intent of the parties:

> The Supreme Court correctly granted plaintiffs' motion for summary judgment to reform the policy to merely replace the prior owner with Beyond as the additional insured. The underlying circumstances clearly establish that the Fulmont insurance policy always extended coverage to the building and its owner as additional insureds. Thus, under these circumstances, the fact that the endorsement was never updated by the tenant to reflect a mere change of ownership is of no moment. The named of the insured in the policy is not dispositive if the intent to cover the risk, as here, is clear. *Id*. at 3-4 (citations omitted).

The appellate court likewise affirmed a trial court ruling that estopped Fulmont from relying upon a vicarious liability exclusion it first raised in its answer to the declaratory judgment complaint. "(New York) Insurance Law Section 3420 (d) precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid … while investigating other possible grounds for disclaiming." The court determined that Fulmont knew of this exclusion when it issued its initial disclaimer and there was no way waiting one to two years to raise the defense could be viewed as "as soon as practicable." *Id*. at 4 (citing *Endurance Am. Specialty Ins. Co. v. Utica First Ins. Co*., 132 AD3d 434, 436 (1st Dept. 2015).

The outcome on reformation in *Fulmont* is less interesting than how the decision appears to have been reached. There is no detailed discussion of the evidence supporting an "innocent mistake" or a "clear" understanding as to parties' mutual intent to cover the owner of the building in perpetuity. One is left to assume such information was sufficient to meet the "clear and convincing" standard tied to proving reformation.

WASHINGTON

Contractor's Insurer Not Entitled to Equitable Subrogation Where Subcontractor's Insurer Paid Full Limits Towards Settlement

In *Colony Ins. Co. v. Gemini Ins. Co*., et al., 2023 U.S. Dist. LEXIS 94891 (W.D. Wash. May 31, 2023), Saltaire Craftsmen ("Saltaire") was the general contractor hired to remodel an apartment building. It hired Superior Sole Fabrication & Welding, Inc. ("Superior") as a subcontractor on the project. In early 2020, an individual fell through the rooftop deck of the building and was injured. He thereafter filed a lawsuit against Superior and Saltaire to recover for his injuries. *Id*. at 1.

At the time of the incident, Superior was covered under a general liability policy issued by Gemini Insurance Company ("Gemini"). The Gemini policy had a $1,000,000 per occurrence limit. Navigators Specialty Insurance Company ("Navigators") issued a $4,000,000 commercial excess policy to Superior for the same period. *Id*. at 2.

Saltaire was insured under general liability and excess policies issued by Colony Insurance Company ("Colony"). Upon receipt of tender, Gemini agreed to defend Saltaire under its policy as an additional insured. The parties in the underlying case (plaintiff, Saltaire and Superior) agreed to mediation. *Id*.

During negotiations, Gemini's representative told defense counsel that the full limit of the Gemini policy was available, but only to resolve all claims against Saltaire and Superior. Superior and Saltaire ultimately reached a settlement with plaintiff requiring each to pay $2,875,000 to resolve all claims. Pursuant to the settlement agreement, Gemini issued a check for $1,000,000 to the trust account of the attorney representing the plaintiff. *Id*. at 2-3.

Colony, under its primary and excess policies, contributed $2,875,000 to the settlement on behalf of Saltaire. Colony thereafter filed suit against Gemini and Navigators seeking equitable contribution and equitable subrogation, suggesting it was improperly required to pay the entire settlement on behalf of Saltaire. Colony sought a declaration that Gemini was obligated to reimburse Colony for $1,000,000 (i.e. an amount equal to Gemini's per occurrence limit). Gemini moved for summary judgment on the grounds that it owed Colony no amount as a matter of law. *Id*. at 3.

The court noted that equitable subrogation is an insurer's right to recover what it has paid from the party responsible for the loss (including any co-obligor owing a

proportionate share of any loss). Colony argued that Gemini needed to pay an additional $1,000,000 because it had made "representations" that its policy limit would be available to both Superior and Saltaire (but only paid its limit on behalf of Superior). *Id*. at 3-4 (citing *Mut. Of Enumclaw Ins. Co*. v. USF Ins. Co., 153 P.3d 877, 871 (Wash. Ct. App. 2007).

In granting Gemini summary judgment, the court focused largely on the fact that it had paid its policy limit:

> Even if the Court were to conclude that the entirety of Gemini's payment under its policy covered Superior's obligations, and did not cover Saltaire, it is unclear why Gemini would be required to make any additional payments. It remains undisputed that Gemini did in fact pay $1,000,000, the maximum required under the policy at issue, to help settle claims in the underlying lawsuit. Colony points to no authority that supports its assertion that an insurer who has made contributions up to its policy limit can be liable beyond that amount. This case is unlike the cases Colony cites, where the excess insurers were able to claim contribution or subrogation against a primary insurer who had not yet paid its fair share. Here, Gemini already contributed its maximum policy limit. *Gemini*, supra. at 4-5.

The court summarily dismissed Colony's efforts to conduct additional discovery with regard to Gemini's "bad faith," finding that no bad faith could arise out of a subrogation claim that had no merit in the first place. It further found that Colony had presented no other facts to justify denying summary judgment. *Id*. at 5-6

The *Gemini* opinion suggests Colony believed Gemini was required to preserve some or all of its limits for Saltaire (its additional insured) during settlement negotiations, regardless of how negotiations developed. The fact Gemini sought finality for both of its insureds while offering its full limits to defense counsel is hardly evidence of bad faith, particularly where it was clear Gemini's $1,000,000 limit was not sufficient to settle the case on behalf of either party.

WASHINGTON

No Additional Insured Coverage Available Under Excess Policy Where Coverage Required by Subcontract Satisfied by Primary Policy

In *Colony Ins. Co. v. Gemini Ins. Co., et al.,* 2023 U.S. Dist. LEXIS 94890 (W.D. Wash. May 31, 2023) (a companion decision to that referenced above), Colony Insurance Company ("Colony") also sought to recover $1,000,000 from Navigators Specialty Insurance Company ("Navigator's") for the settlement it (Colony) paid on behalf of Saltaire. Specifically, Colony asserted Saltaire was an additional insured under the Navigators excess policy and was (therefore) obligated to contribute to Saltaire's share of the settlement. *Id*. at 2-4.

The subcontract between Saltaire and Superior required Superior to obtain general liability insurance with limits of $1,000,000 per occurrence. It likewise included the following Additional Insured provision:

> Subcontractor's General Liability policy must name [Saltaire] as an Additional Insured. The additional insured wording must be noted on the Certificate of Insurance provided to Saltaire prior to commencing work, and maintained throughout the duration of the work. *Id*. at 5.

The Navigator's policy defined an "insured" as it is defined in the "controlling underlying insurance" policy issued by Gemini Insurance Company ("Gemini"). The Gemini policy defined "who was an insured" as "any person or organization when you have agreed in a written and executed contract, prior to an 'occurrence', that such person or organization be added as an additional insured on your policy." However, the Gemini policy also stated that coverage required by contract "will not be broader than that which you are required by the contract or agreement to provide for such additional insured." The Navigator's policy similarly stated that "the Limits of Insurance available for the additional insured will be the lesser of ... the amount of insurance [Navigators] is required to provide the additional insured in the written contract or agreement. *Id*. at 5-6.

Navigator's moved for summary judgment by arguing Saltaire did not qualify as an additional insured under its policy because the $1,000,000 additional insured "condition" within the subcontract was fulfilled by Superior's policy with Gemini. Colony argued the subcontract and policy read together were ambiguous, particularly where the subcontract specifically stated "Umbrella insurance may be used to fulfill parts of these requirements." Colony maintained that a reasonable interpretation of the contracts was that Navigators had to cover Saltaire as an additional insured up to $1,000,000 if the primary policy did not provide the $1,000,000 in liability coverage. *Id*. at 7.

In ruling in favor of Navigators, the district court found that Colony plainly misinterpreted the subcontract and the relevant policy provisions:

> Under the terms of the subcontract, Superior was required to obtain general liability insurance covering at least $1,000,000 per occurrence. Superior obtained such insurance through the Gemini policy. Nowhere in the subcontract does it require an umbrella or excess policy. Additionally, the Navigators policy explicitly states it only provides coverage to an additional insured to the extent required by the contract. Because the subcontract did not require Superior to obtain insurance for Saltaire as an additional insured beyond $1,000,000 in general liability per occurrence, Navigators was under no obligation to cover Saltaire as an additional insured....
>
> Because the contract here is unambiguous, the Court's interpretation of the contract is a question of law, and the Court need not consider Colony's extrinsic evidence. Because Saltaire is not an additional insured under the Navigators policy, Colony's claims necessarily fail. Accordingly, the Court GRANTS summary judgment to Navigators. *Id*. at 7-9.

One can understand Colony's frustration with both district court decisions, where additional insured status for its named insured (Saltaire) yielded no contribution to resolving any claims against it. However, as to Navigators, its policy language was clearly unambiguous and Colony's failed argument stemmed largely from a deficiency in Saltaire's subcontract.

Federal Appellate Cases

5TH CIRCUIT

Endorsement Modifying Employee Exclusion Broadly Interpreted to Provide Coverage For Injuries Caused By All Fellow Employees

In *Allied World Nat'l Assurance Co. v. Old Republic Gen. Ins. Corp*., 2023 U.S. App. LEXIS 12564 (5th Cir. May 22, 2023), Tarrant Regional Water District ("Tarrant") hired IPL Partners ("IPL") to work on an integrated pipeline in Venus, Texas. IPL hired Oscar Renda Contracting, Inc. ("Renda") to perform excavation and pipelaying duties on the project. Nabor Machura-Mercado ("Mercado") was a worker employed by Renda. *Id*. at 1.

While working on the project, Mercado went missing and his body was discovered buried in pea gravel. His children sued Renda for damages, alleging Renda was negligent, grossly negligence, negligent per se and violated various OSHA standards. Such allegations included those related to negligent training and supervision, inclusive of Renda being vicariously liability for the negligent acts of its employees. (One presumes Renda did not maintain workers compensation insurance - voluntary in Texas, the absence of which allows family members to pursue a regular wrongful death claim). *Id*. at 2.

Tarrant maintained a wrap-up (general liability) policy for the project through Old Republic General Insurance Company ("Old Republic"). Renda was an enrolled contractor covered under the policy with coverage up to $1,000,000 per occurrence. Old Republic also issued an employer's liability policy direct-ly to Renda for the relevant period. Allied World National Assurance Company issued a $5,000,000 excess policy to Tarrant above the Old Republic CGL policy. *Id*.

Renda tendered the underlying lawsuit to Old Republic under the wrap policy and employer's liability policy. Old Republic denied coverage to Renda under the wrap policy based upon its employer's liability exclusion, but acknowledged that its employer's liability policy covered the claim. Allied World filed a declaratory judgment action seeking a ruling

that Old Republic's wrap-up (CGL) policy covered the Mercado lawsuit. *Id*. at 3.

Old Republic's CGL policy included an exclusion 2. e. (Employer's Liability) stating that the policy did not apply to "bodily injury" to:

> (1) an "employee' of the insured arising out of and in the course of:
>
> (a) Employment by the insured; or
>
> (b) Performing duties related to the conduct of the insured's business; or
>
> (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of paragraph (1) above.
>
> This exclusion applies whether the insured may be liable as an employer, or in any other capacity, and to any obligation to share damages with or repay someone else who must pay damages because of the injury. *Id*. at 5.

The policy included an endorsement entitled "Fellow Employee Wrap-Up Exclusion Deleted", the text of which stated:

> With respect to Supervisory personnel, SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILTY, 2.Exclusions, e. Employer's Liability is amended to include:
>
> This paragraph e. does not apply to "bodily injury" to an "employee" when such "bodily injury" is caused by another "employee."

Old Republic moved for partial summary judgment on the grounds that the exception to the exclusion only applied to the extent supervisory personnel were sued. The district court granted Old Republic's motion by concluding that the wrap/CGL policy barred coverage for the underlying lawsuit. Allied World appealed. *Id*. at 3, 5.

The Court of Appeals reversed the district court and concluded Old Republic owed Renda a duty to defend under the wrap up policy. It began its analysis by asserting a different interpretation of the Fellow Employee Wrap-Up Exclusion Endorsement than that offered by any party - based largely on policy structure and construction:

> The Endorsement also includes the prefatory phrase that reads "[w]ith respect to Supervisory personnel." But it's clear from the Endorsement's structure that the prefatory phrase has no effect whatsoever on the CGL policy. That's because the Endorsement amends the Exclusion by adding the *indented text* only to the Exclusion. The prefatory phrase, by contrast is located at the beginning of an un-indented line of text that ends by stating the Exclusion is "amended to include," followed by a colon, and then the indented Carveout Sentence. The effect of the Endorsement couldn't be plainer. Only the indented language *after* the colon gets added to the policy. The prefatory phrase is located *before* the colon. So the prefatory phrase "[w]ith respect to Supervisory personnel" is not added to the policy and has no legal effect.
>
> Under our reading, the Endorsement's sole addition to the Exclusion is the Carveout Sentence…The practical effect is that any on-the-job injuries to employees caused by other employees received coverage under the CGL policy post-Endorsement. *Id*. at 6-8.

Beyond its own interpretation of the Endorsement, the court found any deference to the prefatory phrase did not change the outcome on the duty to defend:

> Given the agreed-on definitions, the most natural way to read the disputed phrase (assuming, of course, that it has any effect at all) is that the Endorsement carves from the Exclusion lawsuits that "concern supervisory personnel." Even though it came to the opposite conclusion, the district court seems at times to read the endorsement this way too. For example, in describing "the result" of the Endorsement, the district court stated that "if a supervisor *allegedly contributes to a fellow employee's injury*, the supervisor qualifies as an insured and the CGL policy covers liability for that injury." This statement is more in line with Allied World's understanding of the prefatory phrase than Old Republic's. Assuming the prefatory phrase applies at all, Allied World's proposed reading is at least reasonable.

Further, Allied World's proposed interpretation does not create surplusage. That's because the result of the Endorsement under Allied World's view is that there is coverage in instances like the *Valera* suit – where a supervisor allegedly contributes to a fellow employee's injury and the employer is sued.

Old Republic's reading of the prefatory phrase, by contrast, does create

> surplusage. Old Republic would read it as limiting the Carveout Sentence to underlying lawsuits that name supervisory personnel as defendants. But Old Republic effectively concedes that under its preferred reading, the Exclusion doesn't apply to individual supervisory personnel in the first place...
>
> As we held above, the CGL policy clearly covers the *Valera* suit. But even assuming that the CGL policy is "susceptible to more than one reasonable interpretation," we "resolve any ambiguity in favor of" Allied World and coverage. *Id*. at 11-12 (citing *Don's Bldg. Supply, Inc. v. One Beacon Ins. Co*., 267 S.W.3d 20, 23 (Tex. 2008).

The 5th Circuit in *Old Republic* offers a hyper-technical reading of the amendment to the Employer's Liability exclusion. One presumes there was some intent on the part of Old Republic to limit the "carveout" to employee injuries caused by "supervisory personnel." While some deference to this prefatory phrase did not affect the outcome, if Old Republic intended something else, it has only itself to blame.

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