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Supreme Court, Appellate Division, First Department, New York.
Alphonse FLETCHER, Jr., et al.,
v.
The DAKOTA, INC., et al., Defendants–Appellants,
Pamela Lovinger, et al., Defendants.

July 3, 2012.

Background: African–American cooperative resident brought action against the cooperative corporation and two of its directors, alleging that defendants discriminated against him on the basis of race in refusing to approve his purchase of an apartment adjacent to one he owned for the purpose of combining the two. The Supreme Court, New York County, Eileen A. Rakower, J., denied defendants' motion to dismiss certain causes of action. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, Acosta, J., held that:
(1) resident stated claims against corporation for violations of state and city Human Rights Laws;
(2) resident failed to state claims against director for violations of state and city Human Rights Laws;
(3) resident failed to state a retaliation claim against corporation under state and city Human Rights Laws;
(4) statements contained in affidavits submitted in opposition to resident's preliminary injunction motion were privileged, precluding defamation and breach of fiduciary duty claims based on those statements;
(5) resident stated a claim for tortious interference with contract against corporation; and
(6) resident failed to state a claim against director for tortious interference with contract.

Affirmed as modified.

West Headnotes

[1] Corporations and Business Organizations 101 ⚿1971

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1971 k. Tortious acts in general. Most Cited Cases

Although participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability.

[2] Corporations and Business Organizations 101 ⚿1842

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 k. Business judg-

ment rule in general. Most Cited Cases

Arbitrary or malicious decision making or decision making tainted by discriminatory considerations is not protected by the business judgment rule.

[3] Corporations and Business Organizations 101 ⚿1971

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1971 k. Tortious acts in general. Most Cited Cases

There is no principle of corporate law that director liability arises only when the director commits a tort independent of the tort committed by the corporation itself; on the contrary, a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the corporate veil is pierced.

[4] Corporations and Business Organizations 101 ⚿1971

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1971 k. Tortious acts in general. Most Cited Cases

The rule that a director may be held individually liable to third parties for a corporate tort if he either participated in the tort or else directed, controlled, approved, or ratified the decision that led to the plaintiff's injury protects individual board members who did not participate or aid and abet the tortfeasors from being held vicariously liable for the tortfeasors' action.

[5] Corporations and Business Organizations 101 ⚿1971

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1971 k. Tortious acts in general. Most Cited Cases

To state a claim for director liability for an intentional tort, the plaintiff is not required to allege independent tortious conduct by the individual directors in order to overcome the public policy that supports the business judgment rule; overruling *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 825 N.Y.S.2d 28.

[6] Civil Rights 78 ⚿1031

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1031 k. In general. Most Cited Cases

To make out a claim of retaliation under the Human Rights Law, the complaint must allege that: (1) plaintiff engaged in a protected activity by opposing conduct prohibited thereunder; (2) defendants were aware of that activity; (3) plaintiff was subject to an adverse action; and (4) there was a causal connection between the protected activity

and the adverse action. McKinney's Executive Law § 296(7).

[7] Civil Rights 78 ⚿1085

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1074 Housing
78k1085 k. Interference, coercion, or intimidation; retaliation. Most Cited Cases

African–American cooperative resident stated a claim against cooperative corporation, alleging violations of state and city Human Rights Laws, by alleging that he opposed conduct that he perceived as discriminatory, corporation was aware of his protected activity because he directed his opposition to a corporate director, corporation refused to approve his purchase of an apartment adjacent to one he owned for the purpose of combining the two, and refusal of his application was in retaliation for his efforts to defend victims of corporation's discrimination. McKinney's Executive Law § 296(7).

[8] Civil Rights 78 ⚿1085

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1074 Housing
78k1085 k. Interference, coercion, or intimidation; retaliation. Most Cited Cases

African–American cooperative resident failed to allege that cooperative corporation's director was aware of his protected activity in opposing conduct that he perceived as discriminatory, as required to state claims against director for violations of state and city Human Rights Laws. McKinney's Executive Law § 296(7).

[9] Civil Rights 78 ⚿1085

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1074 Housing
78k1085 k. Interference, coercion, or intimidation; retaliation. Most Cited Cases

African–American cooperative resident's statement to cooperative corporation's board of directors that jokes about the number of times a certain shareholder would have to apply to fix her bathroom were inappropriate was insufficient basis for resident's retaliation claim against corporation under state and city Human Rights Laws, although the shareholder was African–American, where resident did not allege that he made any reference to her race. McKinney's Executive Law § 296(7).

[10] Common Interest Communities 83T ⚿70

83T Common Interest Communities
83TIV Unit Owners' Association
83Tk66 Powers, Duties, and Functions
83Tk70 k. Relationship with unit owners in general. Most Cited Cases

Cooperative corporation owed no fiduciary duty to its shareholders.

[11] Fraud 184 ⚿36

184 Fraud
184II Actions
184II(A) Rights of Action and De-

fenses
184k36 k. Defenses. Most Cited Cases

Libel and Slander 237 ⚿38(2)

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k35 Absolute Privilege
237k38 Judicial Proceedings
237k38(2) k. Complaints, affidavits, or motions. Most Cited Cases

Statements contained in affidavits submitted in opposition to plaintiff's preliminary injunction motion were protected by both the judicial proceedings and fair report privileges, precluding defamation and breach of fiduciary duty claims based on those statements.

[12] Torts 379 ⚿242

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k242 k. Contracts in general. Most Cited Cases

African–American cooperative resident stated a claim for tortious interference with contract against cooperative corporation, by alleging that corporation interfered with his contract to purchase an apartment adjacent to one he owned for the purpose of combining the two.

[13] Torts 379 ⚿242

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k242 k. Contracts in general. Most Cited Cases

African–American cooperative resident did not allege that cooperative corporation's director committed independent tortious conduct outside of his role as a board member, as required to state a claim against director for tortious interference with contract based on corporation's refusal to approve his purchase of an apartment adjacent to one he owned for the purpose of combining the two.

****265** Quinn Emanuel Urquhart & Sullivan, LLP, New York (Christine H. Chung, Jake M. Shields and Maaren A. Choksi of counsel), and Balber Pickard Maldonado & Van Der Tuin, PC, New York (John Van Der Tuin of counsel), for appellants.

Vladeck, Waldman, Elias & Engelhard, P.C., New York (Milton L. Williams, Jr. and Maia Goodell of counsel), and Kasowitz,****266** Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz, David E. Ross, Trevor J. Welch and Kanchana Wangkeo Leung of counsel), for respondents.

ANGELA M. MAZZARELLI, J.P., DAVID B. SAXE, JAMES M. CATTERSON, ROLANDO T. ACOSTA, NELSON S. ROMÁN, JJ.

ACOSTA, J.

***47** Plaintiff Alphonse Fletcher, Jr., an African–American resident of defendant co-op The Dakota, alleges that The Dakota and, as relevant to this appeal, two of its directors (defendants Barnes and Nitze) dis-

criminated against him, inter alia, on the basis of race in refusing to approve his purchase of an apartment adjacent to one he owns for the purpose of combining the two. According to Fletcher, the case is about retaliation against him for sticking up for the rights of others, including minority and Jewish shareholders and applicants at The Dakota, and then to further defame him when he brought the discriminatory conduct to light.

[1] Prior to discussing the relevant causes of action, we address individual board member liability in the context of discriminatory acts, and clear up an element of possible confusion in this area of law that may arise out of this Court's decision in *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 825 N.Y.S.2d 28 [2006]. In short, although participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability.

Turning to the contentions on appeal, defendants argue that all claims should be dismissed as against Nitze and Barnes because the complaint fails to allege that they engaged in any acts separate and distinct from actions they took as board members. The claims that remain as against Nitze that we must address are breach of fiduciary duty (first cause of action) insofar as it is based on allegations of defamation, and defamation (fifth cause of action). As to Barnes, the remaining causes of action are the first insofar as it is based on defamation, the sixth and eighth, which allege discrimination under the New York State and City human rights laws, the seventh and ninth, which allege retaliation in violation of the State and City human rights laws, respectively, the tenth, which alleges a violation of the Civil Rights Law, and the eleventh, which alleges tortious interference with contract. Since defendants are not challenging the motion court's ruling that the discrimination-based claims (the sixth, eighth and tenth) otherwise fail to state a cause of action, but only that they fail to allege independent conduct on Barnes's part, we begin with those claims.

The provisions of the State Human Rights Law (State HRL) that proscribe discrimination in housing apply not only to the ***48** "owner" of the housing, but also to a "lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation ... or any agent or employee thereof" (Executive Law § 296[5][a]). The City Human Rights Law (City HRL) similarly provides for individual liability (Administrative Code of the City of N.Y. § 8–107[5]). Although both statutes contain exceptions to their housing coverage (*compare* Executive Law § 296 [5] [a]) *with* Administrative Code of the City of N.Y. §§ 8–107[5][a][4], [g]-[m], [o]), there are no exemptions in either statute for directors or officers of a coop or any other corporation. The anti-retaliation sections of both statutes also provide for individual liability ****267** with no exemption for corporate directors or officers (*see* Executive Law § 296[7]; Administrative Code of the City of N.Y. § 8–107[7]).[FN1] Individual director and officer liability is also consistent with the limitations on the "business judgment" rule as enunciated by the Court of Appeals.

> FN1. The State HRL prohibits retaliation by "any person engaged in any activity to which this section applies" (Executive Law § 296[7]);

"[p]erson" includes "one or more individuals" (Executive Law § 292 [1]). The City HRL prohibits retaliation by "any person engaged in any activity to which this chapter applies" (Administrative Code § 8–107 [7]); "[p]erson" includes "one or more natural persons" (Administrative Code § 8–102[1]).

[2] In *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990], the Court of Appeals held that the "business judgment" rule was the correct standard of judicial review of the actions of the directors of a cooperative corporation. That rule prohibits judicial inquiry into the actions of corporate directors "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*id.* at 537–538, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [internal quotation marks omitted]). The Court, however, cautioned that "the broad powers of a cooperative board hold potential for abuse through arbitrary and malicious decision making, favoritism, discrimination and the like" (*id.* at 536, 554 N.Y.S.2d 807, 553 N.E.2d 1317). In *40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 157, 760 N.Y.S.2d 745, 790 N.E.2d 1174 [2003], the Court of Appeals "reaffirm[ed] [*Levandusky's*] admonition and stress[ed] that *those types of abuses are incompatible with good faith and the exercise of honest judgment.* While deferential, the *Levandusky* standard should not serve as a rubber stamp for cooperative board actions" (emphasis added). Thus, arbitrary or malicious decision making or decision making tainted by discriminatory considerations is not protected by the business judgment rule.

[3] ***49** Nothing in the holding or reasoning of either *Levandusky* or *Pullman* suggests that there is a safe harbor from judicial inquiry for directors who are alleged to have engaged in conduct not protected by the business judgment rule. Moreover, there is no principle of corporate law that director liability arises only where the director commits a tort independent of the tort committed by the corporation itself. On the contrary, it has long been held by this Court that "a corporate officer who participates in the commission of a tort may be held individually liable, ... regardless of whether the corporate veil is pierced" (*Peguero v. 601 Realty Corp.*, 58 A.D.3d 556, 873 N.Y.S.2d 17 [2009] [internal quotation marks omitted], quoting *Espinosa v. Rand*, 24 A.D.3d 102, 102, 806 N.Y.S.2d 186 [2005], quoting *American Exp. Travel Related Services Co., Inc. v. North Atlantic Resources, Inc.*, 261 A.D.2d 310, 311, 691 N.Y.S.2d 403 [1999]; *Savannah T & T Co., Inc. v. Force One Express Inc.*, 58 A.D.3d 409, 872 N.Y.S.2d 83 [2009]; *cf. Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 55, 735 N.Y.S.2d 479, 760 N.E.2d 1274 [2001] ["In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally"]; *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 44, 427 N.Y.S.2d 961, 405 N.E.2d 205 [1980], citing *Lippman Packing Corp. v. Rose*, 203 Misc. 1041, 1044, 120 N.Y.S.2d 461 [1953], which noted, even then, that "a long list of cases ... ha[d] ... held that the officers, directors and agents of a corporation are jointly and severally liable for torts committed on behalf of a corporation and the ****268** fact that they also acted on behalf of the corporation does not relieve them from personal liability"]).

[4] A leading treatise on corporations states that a director may be held individually liable to third parties for a corporate tort if he either participated in the tort or else directed, controlled, approved, or ratified the decision that led to the plaintiff's injury" (*see* 3A Fletcher Cyclopedia of the Law Corporations § 1135). This rule protects individual board members who did not participate or aid and abet the tortfeasors from being held vicariously liable for the tortfeasors' action.

[5] Nevertheless, defendants contend that this Court's decision in *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 825 N.Y.S.2d 28 [2006] requires that the discrimination claims be dismissed as against Barnes. In *Pelton*, the plaintiff brought a disability discrimination claim, under the City HRL, against his condominium and the individual members of the board of managers based on their alleged failure to properly accommodate his disability. This Court granted summary judgment dismissing the action against ***50** the individual board members, reasoning that (1) the *Levandusky* standard was not satisfied, and (2) the plaintiff failed to allege "independent tortious conduct" by the individual defendants "in order to overcome the public policy that supports the business judgment rule" (*id.* at 10, 825 N.Y.S.2d 28). However, there are two problems with this reasoning. First, as discussed above, the *Levandusky* rule will not protect a board member where he engages in discriminatory conduct. Second, *Pelton* takes a rule that applies where a cooperative or condominium board is alleged to have breached a contractual obligation, and incorrectly applies it where a board allegedly engaged in the intentional tort of discrimination. That is, *Pelton* failed to disentangle the principles of individual corporate director liability in the breach of contract context (understood to provide a shield against liability) from the principles applicable to tort cases (where there is no such shield). As authority for our holding in *Pelton*, we cited *Murtha v. Yonkers Child Care Assn.*, 45 N.Y.2d 913, 411 N.Y.S.2d 219, 383 N.E.2d 865 [1978]. We now find, however, that our reliance on *Murtha* was misplaced, and we therefore decline to follow, and expressly overrule, the pleading rule articulated in *Pelton*.

Murtha is a breach of contract case in which the Court of Appeals stated that a corporate officer will not be held liable for inducing the breach of a contract between the corporation and a third party if he committed no "independent torts or predatory acts" (45 N.Y.2d at 915, 411 N.Y.S.2d 219, 383 N.E.2d 865). The Court had no occasion to hold, or even suggest that a director would not be held liable for a tort committed by the corporation if he had not committed a tort independent of that tort. In *Brasseur v. Speranza*, 21 A.D.3d 297, 800 N.Y.S.2d 669 [2005], which the *Pelton* Court cited as an example of a *Murtha* pleading failure, we dismissed a breach of fiduciary duty claim against individual board members because "there is no allegation that they breached a duty *other than, and independent of, those contractually imposed upon the board*" (*id.* at 298, 800 N.Y.S.2d 669 [emphasis added]). Moreover, we find that the *Pelton* pleading rule conflicts with Court of Appeals' warning that discrimination, among other abusive practices, is not protected by the business judgment rule (*see Levandusky*, 75 N.Y.2d at 536, 554 N.Y.S.2d 807, 553 N.E.2d 1317; *Pullman*, 100 N.Y.2d at 157, 760 N.Y.S.2d 745, 790 N.E.2d 1174). It also is inconsistent

with the Court of Appeals' recent instruction that "we must construe Administrative Code § 8–107(7), ****269** like other provisions of the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v. City of New York*, 16 N.Y.3d 472, 477–78, 922 N.Y.S.2d 244, 947 N.E.2d 135 [2011]). Thus, we ***51** decline to dismiss the sixth, eighth and tenth causes of action as against defendant Barnes.

[6] Defendants contend that the retaliation claims (the seventh and ninth causes of action) should be dismissed as against The Dakota and Barnes for failure to state a cause of action. The State HRL provides in, pertinent part, that "[i]t shall be ... unlawful ... to retaliate ... against any person because he or she has opposed any practices forbidden under this article ..." (Executive Law § 296[7]). To make out a claim of retaliation under the State HRL, the complaint must allege that (1) Fletcher engaged in a protected activity by opposing conduct prohibited there under; (2) defendants were aware of that activity; (3) he was subject to an adverse action; and (4) there was a causal connection between the protected activity and the adverse action (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312–313, 819 N.E.2d 998 [2004]).

The City HRL provides in, pertinent part, that "[i]t shall be ... unlawful ... to retaliate ... in any manner against any person because such person has ... opposed any practice forbidden under this chapter" (Administrative Code § 8–107[7]). "The retaliation ... complained of under this subdivision need not result in an ultimate action ... or in a materially adverse change ... [but] must be reasonably likely to deter a person from engaging in protected activity" (*id.*).

In interpreting the City HRL, we start from the premise that the Local Civil Rights Restoration Act requires that "we ... construe Administrative Code § 8–107(7), like other provisions of the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v. City of New York*, 16 N.Y.3d 472, 477–78, 922 N.Y.S.2d 244, 947 N.E.2d 135 [2011]). "[I]t is important that the assessment [of a retaliation claim] be made with a keen sense of [the] realities [of the circumstances surrounding the plaintiff], of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities" (*Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 71, 872 N.Y.S.2d 27 [2009], *lv. denied* 13 N.Y.3d 702, 2009 WL 2622097 [2009] [in the context of a motion for summary judgment]).

Thus, to make out a retaliation claim under the City HRL, the complaint must allege that: (1) Fletcher participated in a protected activity known to defendants; (2) defendants took an ***52** action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action (*see Albunio v. City of New York*, 67 A.D.3d 407, 413, 889 N.Y.S.2d 4 [2009], *affd.* 16 N.Y.3d 472, 922 N.Y.S.2d 244, 947 N.E.2d 135 [2011]).[FN2]

FN2. While we rely upon *Forrest* in addressing plaintiff's State HRL claim (because that case continues to be binding upon us in the context of State HRL claims), we do not rely

upon *Forrest* with respect to plaintiff's City HRL claim since the City Council expressly rejected Forrest's application to claims brought under the City HRL when it enacted the Restoration Act (*see* *Bennett*, 92 A.D.3d at 35 n. 1, 936 N.Y.S.2d 112, *citing*, *Williams*, 61 A.D.3d at 67, 872 N.Y.S.2d 27).

[7] The complaint alleges that Fletcher began to oppose discrimination (or conduct that he perceived as discriminatory) after ****270** he was elected president of the coop board in May 2007. In or about September 2007, he complained to defendant Nitze that another board member's reference to certain applicants as "Jewish mafia" was "not appropriate." The applicants were initially rejected, although plaintiff and one other board member voted to approve. He further alleged that, "[a]lthough defendant Nitze tried to persuade Fletcher not to raise the issue again, Fletcher urged the Board to reconsider the couple's application 'on the record.' " The board granted the couple an interview, after which it approved the application.

Fletcher's protest that the "Jewish mafia" comment and the general tenor of the discussion about the Jewish couple's "ethnicity and religion" were inappropriate constitutes the kind of activity that is protected under the State HRL. Thus, the first element of a retaliation claim was alleged.

[8] The second element was alleged with respect to defendant The Dakota. Since defendant Nitze was a director, his knowledge of Fletcher's activity is imputed to The Dakota (*see* *Baker v. Latham Sparrowbush Associates*, 72 F.3d 246, 255 [2d Cir.1995], citing, inter alia, *Matter of Brown*, 252 N.Y. 366, 375–378, 169 N.E. 612 [1930]; *Keen v. Keen*, 113 A.D.2d 964, 966, 493 N.Y.S.2d 636 [1985], *lv. dismissed*, 67 N.Y.2d 602, 499 N.Y.S.2d 1027, 490 N.E.2d 556 [1986]; *Texaco, Inc. v. Weinberg*, 13 A.D.2d 1002, 216 N.Y.S.2d 588 [1961]; *Richmond Hill Realty Co. v. East Richmond Hill Land Co.*, 246 App.Div. 301, 305, 285 N.Y.S. 424 [1936]). However, Barnes did not become a member of the board until May 2009, and plaintiffs do not allege that he was aware of Fletcher's protected activity. Thus, the seventh and ninth causes of action should be dismissed as against Barnes and the Dakota. However, since discovery may reveal that he was aware of Fletcher's protected activity, the dismissal as against Barnes should be without prejudice.

Plaintiffs' allegations that defendants "denied Fletcher the benefit of having the Transfer Disclosure Policy govern his ***53** application to purchase Apartment 50; (b) denied Fletcher the impartial, fair, and unbiased review of his financial disclosures; [and] (c) recommended rejection of Fletcher's application" are sufficient to establish that Fletcher was subjected to an adverse action, and satisfy the third prong of a retaliation claim.

The fourth prong is satisfied by plaintiffs' allegation that defendants took the above mentioned adverse action in retaliation for his efforts to defend victims of discrimination by them (*Hicks v. Baines*, 593 F.3d 159, 170 [2d Cir.2010]). The fact that the alleged retaliation commenced a substantial period of time after the protected activity was engaged in does not defeat the claim: Fletcher's application for approval to purchase Apartment 50 in the early part of 2010 represented the first opportunity for retaliation (*see* *Bern-*

hardt v. Interbank of New York, 2009 WL 255992, at *6, 2009 U.S. Dist. LEXIS 8173, *20 [E.D.N.Y.2009]; *McKenzie v. Nicholson*, 2009 WL 179253, *5 n.5, 2009 U.S. Dist. LEXIS 5285 [E.D.N.Y.2009]; *Batyreva v. New York City Dep't of Education*, 2008 WL 4344583, *14; *Quinby v. WestLB AG*, 2007 WL 1153994,*13, 2008 U.S. Dist. LEXIS 28657, *35–39 [S.D.N.Y.2007]).

Thus, we decline to dismiss as against The Dakota Fletcher's retaliation claims under the State and City HRLs to the extent they are based on his conduct with respect to the Jewish couple.

[9] The complaint also alleges that Fletcher "made it clear" to the rest of the board that jokes about the number of times a certain shareholder would have to ****271** apply to fix her bathroom were inappropriate. Although the shareholder was African–American, the complaint does not allege that Fletcher made any reference to her race. Thus, it fails to state a cause of action under the State HRL for retaliation on the basis of Fletcher's conduct with respect to this shareholder (*see e.g. Forrest*, 3 N.Y.3d at 313, 786 N.Y.S.2d 382, 819 N.E.2d 998 [granting defendant summary judgment because "[a]lthough plaintiff filed numerous grievances claiming generalized 'harassment,' she never alleged that she was discriminated against because of race"]; *see Sullivan v. Chappius*, 711 F.Supp.2d 279, 287 [W.D.N.Y.2010] [dismissing complaint based on plaintiff's supervisor's extramarital affair]). Thus, the seventh and ninth causes of action should have been dismissed against the Dakota insofar as they are based on Fletcher's conduct with respect to the African–American shareholder. However, the dismissal is without prejudice, because following discovery, plaintiffs may be able to plead further details that would show that Fletcher was engaged in protected activity.

***54** We note that under the City HRL, a jury may infer from other evidence that a plaintiff's activity is in fact opposition to discrimination even where the plaintiff does "not say so in so many words" (*see Albunio*, 16 N.Y.3d at 479, 922 N.Y.S.2d 244, 947 N.E.2d 135). However, even under the City HRL, a complaint drafted by counsel that contains 269 numbered paragraphs without alleging even on information and belief that defendants knew or should have known that Fletcher was opposing discrimination when he spoke to them about the African–American shareholder who intended to renovate her bathroom fails to state a cause of action for retaliation.

[10] Because The Dakota is a corporation, it owes no fiduciary duty to its shareholders (*Peacock v. Herald Sq. Loft Corp.*, 67 A.D.3d 442, 443, 889 N.Y.S.2d 22 [2009]). Thus, although The Dakota sought to dismiss the first cause of action only to the extent it is based on defamation, we dismiss both the first and second causes of action in their entirety as against The Dakota, because the defectiveness of these claims is "apparent on the face of the record" (*see American Bldg. Contrs. Assoc., Inc. v. Mica & Wood Creations, LLC.*, 23 A.D.3d 322, 323, 804 N.Y.S.2d 109 [2005] [internal quotation marks omitted]). Moreover, the dismissal is with prejudice.

As to Barnes and Nitze, they correctly argue that the first cause of action should be dismissed as against them because it fails to adequately plead violations of the individual directors' fiduciary duty (*Brasseur v.*

Speranza, 21 A.D.3d 297, 298, 800 N.Y.S.2d 669 [2005]). However, since discovery may reveal such violations, the dismissal of the first cause of action as against them should be without prejudice.

[11] The fifth cause of action alleges defamation and the first cause of action, which alleges breach of fiduciary duty, is based, in part, on allegations of defamation. To the extent these causes of action rely on statements contained in affidavits submitted in opposition to plaintiffs' preliminary injunction motion, they should be dismissed, with prejudice, because the statements are protected by both the judicial proceedings and fair report privileges (*Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 171, 828 N.Y.S.2d 315 [2007]; *Fishof v. Abady*, 280 A.D.2d 417, 720 N.Y.S.2d 505 [2001]). However, the first cause of action alleges that defendants breached their fiduciary duty to Fletcher by "knowingly and maliciously spreading false statements and rumors to third parties, including the media, concerning**272 Fletcher's financial condition" and the fifth cause of action refers to statements made "[b]eginning in April 2010," i.e., long before this action was commenced. Thus, these *55 causes of action do not rely exclusively on statements contained in affidavits.

Contrary to defendants' contention, the following allegedly defamatory statements are pleaded with sufficient particularity (CPLR 3016[a]):

> "[At an April 14, 2010 board meeting,] one or more of the Individual Defendants told the other members of the Board that Fletcher had not fulfilled binding charitable commitments and pledges, that Fletcher's assets were all illiquid and difficult to value, and that FAM's business loans left it over-extended and at risk of collapse ...
>
> "[On or before May 7, 2010, Nitze told Dakota shareholder Craig Hatkoff that Fletcher] "had not actually given the money he had promised to give [to charity] and 'he owes it'...
>
> "[At some point between June 24, 2010 and September 2010] one or more of the Individual Defendants falsely and maliciously stated to Hatkoff that Fletcher had 'checked out of his business' and was living on 'borrowed money' ...
>
> "On September 14, 2010, ... the Board sent a letter to certain Dakota shareholders ... [It stated, inter alia,] '[b]ased on the financial information submitted by Fletcher, the Board concluded that approving such a purchase would not be in the best interest of The Dakota' ... [The letter] also contained the false and misleading statement that Fletcher had declined the Board's request to provide additional financial information."

While some of these allegations do not specify exactly which of the defendants made a particular statement, that is not a fatal defect (*see Torres v. Prime Realty Servs.*, 7 A.D.3d 343, 344, 775 N.Y.S.2d 865 [2004]; *see also Herlihy v. Metropolitan Museum of Art*, 214 A.D.2d 250, 260, 633 N.Y.S.2d 106 [1995]).

Defendants further contend that the above-quoted statements are covered by a qualified privilege and that the complaint fails to allege malice sufficient to defeat the privilege (*see Liberman v. Gelstein*, 80 N.Y.2d 429, 437, 590 N.Y.S.2d 857, 605

N.E.2d 344 [1992]). Contrary to the latter contention, the complaint alleges malice. But, in any event, we would not "give conclusive effect to defendants' position of qualified privilege before any affirmative defense to that ***56** effect was raised in a responsive pleading" (*see Acosta v. Vataj*, 170 A.D.2d 348, 348, 566 N.Y.S.2d 49 [1991]). Thus, we decline to dismiss as against The Dakota the fifth cause of action and so much of the first cause of action as it is based on allegations of defamation to the extent they do not rely on statements contained in affidavits.

As to Barnes and Nitze, since we are dismissing the first cause of action in its entirety as against them, we need not address the defamation-based part of the claim. However, we decline to dismiss the fifth cause of action as against Nitze since he is alleged to have made defamatory statements about Fletcher to Hatkoff.

[12][13] Contrary to defendants' contention, the tortious interference with contract claim states a cause of action by alleging tortious interference with Fletcher's contract to purchase apartment 50 from Ruth Proskauer Smith's estate ****273**(*Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289 [1993]).[FN3] Thus, we decline to dismiss the eleventh cause of action as against The Dakota. However, it should be dismissed as against Barnes, because the complaint does not allege that Barnes committed independent tortious conduct outside of his role as a board member (*see American–European Art Assoc. v. Trend Galleries*, 227 A.D.2d 170, 171–172, 641 N.Y.S.2d 835 [1996]). The dismissal is without prejudice since discovery may reveal evidence that would support a claim against Barnes in his individual capacity.

FN3. We decline to consider defendants' argument that the cause of action fails because the Smith estate did not breached its contract with Fletcher, an element of the cause of action (the estate had the right to cancel the contract if the board refused to approve the sale), because it was raised for the first time in their reply brief.

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered July 27, 2011, which, insofar as appealed from, denied defendants The Dakota, Inc., Bruce Barnes, and Peter Nitze's motion to dismiss the first, second and fifth through eleventh causes of action as against The Dakota, the first and sixth through eleventh causes of action as against Barnes in his individual capacity, and the first and fifth causes of action as against Nitze in his individual capacity, should be modified, on the law, to dismiss the first cause of action as against The Dakota, with prejudice, and as against Barnes and Nitze, without prejudice; the second cause of action as against The Dakota, with prejudice; so much of the fifth cause of action as is based on statements made in defendants***57** ' affidavits, with prejudice; so much of the seventh and ninth causes of action as are based on plaintiffs' conduct with respect to the African–American shareholder who wanted to renovate her apartment as against The Dakota, without prejudice; and the seventh, ninth and eleventh causes of action as against Barnes, without prejudice, and otherwise affirmed, without costs.

Order, Supreme Court, New York

County (Eileen A. Rakower, J.), entered July 27, 2011, modified, on the law, to dismiss the first cause of action as against The Dakota, with prejudice, and as against Barnes and Nitze, without prejudice; the second cause of action as against The Dakota, with prejudice; so much of the fifth cause of action as is based on statements made in defendants' affidavits, with prejudice; so much of the seventh and ninth causes of action as are based on plaintiff Fletcher's conduct with respect to the African–American shareholder who wanted to renovate her apartment as against The Dakota, without prejudice; and the seventh, ninth and eleventh causes of action as against Barnes, without prejudice, and otherwise affirmed, without costs.

All concur.

N.Y.A.D. 1 Dept.,2012.
Fletcher v. Dakota, Inc.
99 A.D.3d 43, 948 N.Y.S.2d 263, 2012 N.Y. Slip Op. 05338

END OF DOCUMENT

98 N.Y.2d 289
(Cite as: 98 N.Y.2d 289, 774 N.E.2d 208)

Slayko v Security Mut. Ins. Co.
98 N.Y.2d 289, 746 N.Y.S.2d 444
N.Y. 2002.

98 N.Y.2d 289, 774 N.E.2d 208, 746 N.Y.S.2d 444, 2002 WL 1419127, 2002 N.Y. Slip Op. 05515

Ryan A. Slayko, Respondent,
v.
Security Mutual Insurance Company, Appellant, et al., Defendant.
Court of Appeals of New York

Argued May 30, 2002;
Decided July 2, 2002

CITE TITLE AS: Slayko v Security Mut. Ins. Co.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 19, 2001, which affirmed an order of the Supreme Court (David Demarest, J.; op 183 Misc 2d 688), entered in St. Lawrence County, granting a motion by plaintiff for summary judgment declaring that defendant insurer has a duty to defend and indemnify the individual defendant in an underlying personal injury action, and denying a cross motion by defendant insurer for summary judgment.

Slayko v Security Mut. Ins. Co., 285 AD2d 875, reversed.

HEADNOTES

Insurance--Homeowner's Insurance--Criminal Activity Exclusion--Felonious Assault

(1) A provision in a homeowner's general liability insurance policy that excludes coverage for liability arising directly or indirectly out of instances, occurrences or allegations of criminal activity by the insured does not offend public policy and is enforceable. Accordingly, where an insured was convicted of felony assault arising out of his shooting of the plaintiff, the criminal activity exclusion is enforceable in the related personal injury action against the insured. Inasmuch as homeowners face potential liability for many noncriminal acts of negligence, and the criminal activity exclusion leaves coverage for such liability intact, the exclusion is not too broad. Moreover, to the extent that the Legislature has expressed a public policy about coverage for persons who perform criminal acts, that policy is to facilitate rather than hinder insurers' efforts to remove such persons and their property from the general risk pool. While public policy does not prohibit criminal activity coverage, it does not require such coverage.

Insurance--Homeowner's Insurance--Intentional Act Exclusion--Shooting Person with Shotgun

(2) The intentional act exclusion in a homeowner's general liability insurance policy does not apply to an insured's shooting of a friend when he pointed what he thought to be an unloaded shotgun at the friend and pulled the trigger. Because the insured did not intend to injure his friend, the intentional

act exclusion could apply only if the injury were inherent in the nature of the wrongful act. While the insured undisputedly intended to point the gun and pull the trigger, insurable "accidental results" may flow from intentional causes. Inasmuch as the gun could have been empty, the insured's conduct, though reckless, was not inherently harmful for the purpose of the intentional act exclusion. More than a causal connection between the ***290** intentional act and the resultant harm is required to prove that the harm was intended.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Insurance §§ 708-710, 727.

NY Jur 2d, Insurance §§ 1540, 1541, 1557, 1566.

ANNOTATION REFERENCES

Assault as an accident, or injuries therefrom as accidentally sustained, within liability insurance coverage clause. 72 ALR3d 1090.

POINTS OF COUNSEL

Williamson, Clune & Stevens, Ithaca (*John H. Hanrahan* of counsel), for appellant.

I. The conduct which resulted in Slayko's injury is so outrageous, and so heinous, that "intent to harm" can be inferred. (*Pistolesi v Nationwide Mut. Fire Ins. Co.,* 223 AD2d 94;*Tomain v Allstate Ins. Co.,* 238 AD2d 774;*Allstate Ins. Co. v Mugavero,* 79 NY2d 153;*Muzzaferro v Albany Motel Enters.,* 127 AD2d 374;*Salimbene v Merchants Mut. Ins. Co.,* 217 AD2d 991.)II. The "criminal activity" exclusion clearly and unambiguously puts France's misconduct outside of coverage, and ought to be enforced. (*Demopoulous v New York Cent. Mut. Fire Ins. Co.,* 280 AD2d 855;*Caporino v Travelers Ins. Co.,* 62 NY2d 234;*DePaolo v Leatherstocking Coop. Ins. Co.,* 256 AD2d 879;*Allstate Ins. Co. v Zuk,* 78 NY2d 41.)

Sassone & Brown, Norwood (*Robert J. Sassone* of counsel), for respondent.

I. Plaintiff's injuries were unintended and accidental, and therefore do not fall within the "intentional acts" exclusion of Security Mutual's homeowner's policy. (*Miller v Continental Ins. Co.,* 40 NY2d 675;*Seaboard Sur. Co. v Gillette Co.,* 64 NY2d 304;*McGroarty v Great Am. Ins. Co.,* 36 NY2d 358;*Jubin v St. Paul Fire & Mar. Ins. Co.,* 236 AD2d 712;*Merrimack Mut. Fire Ins. Co. v Carpenter,* 224 AD2d 894;*Robbins v Michigan Millers Mut. Ins. Co.,* 236 AD2d 769;*General Acc. Ins. Co. v Zazynski,* 229 AD2d 920;*Messersmith v American Fid. Co.,* 232 NY 161;*Barry v Romanosky,* 147 AD2d 605;*Allegheny Co-op Ins. Co. v Kohorst,* 254 AD2d 744.)II. There is no evidence in the record upon which an "intent to harm" can be inferred. (*Barry v Romanosky,* 147 AD2d 605;*Allegheny****291** *Co-op Ins. Co. v Kohorst,* 254 AD2d 744;*Allstate Ins. Co. v Mugavero,* 79 NY2d 153;*Pistolesi v Nationwide Mut. Fire. Ins. Co.,* 223 AD2d 94;*Tomain v Allstate Ins. Co.,* 238 AD2d 774;*Salimbine v Merchants Mut. Ins. Co.,* 217 AD2d 991;*Mazzaferro v Albany Hotel Enters.,* 127 AD2d 374.)III. The "criminal activity" exclusion as written in Security Mutual's policy is overly broad and violates the public policy of the State of New York. (*Planet Ins. Co. v Bright Bay Classic Vehs.,* 75 NY2d 394;*Motor Veh. Acc. Indem. Corp. v Continental Natl. Am. Group Co.,* 35 NY2d 260;*McGroarty v Great Am. Ins. Co.,* 36 NY2d 358;*Allstate Ins. Co. v Zuk,* 78 NY2d 41;*Public Serv. Mut. Ins. Co. v Goldfarb,* 53 NY2d 392;*Messersmith v American Fid. Co.,* 232 NY 161;*Seaboard Sur. Co. v Gillette*

Co., 64 NY2d 304;*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863;*Neuwirth v Blue Cross & Blue Shield of Greater N.Y., Blue Cross Assn.*, 62 NY2d 718;*Royal Indem. Co. v Providence Washington Ins. Co.*, 92 NY2d 653.)IV. Security Mutual's "criminal activity" exclusion should not be rewritten under the guise of "narrow construction." (*Tower Ins. Co., Inc. v Judge*, 840 F Supp 679;*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863;*Laba v Carey*, 29 NY2d 302;*Slatt v Slatt*, 64 NY2d 966;*Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16;*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304;*DePaolo v Leatherstocking Coop. Ins. Co.*, 256 AD2d 879.)

Hugh W. Campbell, New York City, and *Hancock & Estabrook, LLP*, Syracuse (*Alan J. Pierce* of counsel), for New York State Trial Lawyers Association, amicus curiae.

Security Mutual's blanket "criminal activity" exclusion is void as contrary to New York's long-standing public policy of providing insurance coverage for unintended consequences of intentional acts. (*Allstate Ins. Co. v Zuk*, 78 NY2d 41;*Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392;*McGroarty v Great Am. Ins. Co.*, 36 NY2d 358;*Messersmith v American Fid. Co.*, 232 NY 61;*Jubin v St. Paul Fire & Mar. Ins. Co.*, 236 AD2d 712;*General Acc. Ins. Co. v Zazynski*, 229 AD2d 920;*Royal Indem. Co. v Providence Washington Ins. Co.*, 92 NY2d 653;*Matter of Liberty Mut. Ins. Co. [Hogan]*, 82 NY2d 57;*Planet Ins. Co. v Bright Bay Classic Vehs.*, 75 NY2d 394;*Randazzo v Cunningham*, 56 AD2d 702, 43 NY2d 937.)

OPINION OF THE COURT

Chief Judge Kaye.

(1) Is the criminal activity exclusion in the homeowner's general liability insurance policy before us unenforceable as a ***292** matter of public policy? Unlike the Appellate Division, we conclude that the exclusion is enforceable.

Ryan Slayko and Joseph France were drinking alcoholic beverages and smoking marijuana one night in the cabin where France dwelt, on premises owned by France's grandmother. France picked up a shotgun, pointed it at Slayko and pulled the trigger, believing the gun to be unloaded. The gun did not discharge, and Slayko exclaimed "What are you doing? Never point a gun around somebody and pull the trigger." By his own account, Slayko said this with a "smirky laugh ... because we were fooling around." France then pumped the gun and pulled the trigger again. This time the gun discharged, injuring Slayko. France took immediate measures to stanch Slayko's bleeding and summon help.

France subsequently pleaded guilty to the felony of assault, second degree, admitting that he recklessly caused serious physical injury by means of a deadly weapon (*see*Penal Law § 120.05 [4]). At about the same time, Slayko sued France for negligence. France tendered the defense to Security Mutual Insurance Company, which had issued a homeowner's policy that covered the premises. Security Mutual promptly disclaimed coverage, denying that it had a duty to defend or indemnify France. France made no appearance in the personal injury action, and Supreme Court entered a default judgment on liability.

Slayko commenced the instant action against Security Mutual and France, seeking a declaration that the insurer had the duty to defend and indemnify France. Security Mutual

denied that the policy covered France and relied on the policy's intentional act and criminal activity exclusions. The intentional act exclusion provides that the policy does not apply to liability "caused intentionally by or at the direction of any insured." The criminal activity exclusion provides that the policy does not apply to liability "arising directly or indirectly out of instances, occurrences or allegations of criminal activity by the insured."

Supreme Court granted Slayko's motion for summary judgment, and its threshold determination that France is an "insured" under the policy remains unchallenged. The Appellate Division affirmed, holding that the intentional act exclusion did not apply and the criminal activity exclusion, though applicable, was unenforceable as a matter of public policy ***293** because it "clearly defies the reasonable expectations of the insured" (285 AD2d 875, 878). We agree with the first holding but not the second. Accordingly, we reverse and grant Security Mutual's cross motion for summary judgment.

The Intentional Act Exclusion

Security Mutual first argues that the intentional act exclusion applies because France's misconduct is so "heinous" that it must be deemed intentional as a matter of law. In thus framing the argument, the insurer concedes that there is no evidence that France actually intended to injure Slayko. The evidence shows that the two young men were friends up until the shooting; that France was surprised when the gun discharged; and that he took prompt measures to mitigate the harm he had caused.

(2) Because France did not intend to injure Slayko, the intentional act exclusion could apply only if the injury were "inherent in the nature" of the wrongful act (*see Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 161 [1992]). Security Mutual maintains that France's act was inherently harmful because pointing any gun is dangerous and France undisputedly intended to point the gun and pull the trigger. We have long recognized, however, that insurable "accidental results" may flow from "intentional causes" (*see McGroarty v Great Am. Ins. Co.*, 36 NY2d 358, 364 [1975]). *Mugavero* identifies a narrow class of cases in which the intentional act exclusion applies regardless of the insured's subjective intent. There, faced with an implausible argument that the insured did not intend the injuries he caused, we found wisdom in "the public perception that molesting a child without causing harm is a virtual impossibility" (79 NY2d at 161). The same cannot be said here, as the gun could have been empty.

Thus, France's conduct, though reckless, was not inherently harmful for the purpose of the intentional act exclusion. The general rule remains that "more than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended" (*id.* at 160). Under this standard, as the Appellate Division correctly held, the exclusion does not apply.

The Criminal Activity Exclusion

(1) Unlike the intentional act exclusion, the criminal activity exclusion, on its face, does apply, as France's liability arose directly from an act for which he stands convicted. Slayko does ***294** not dispute that France's conduct falls within the broad sweep of the exclusionary language. He argues, rather, that the language is *too* broad. The courts

below accepted this argument, conjecturing that the exclusion, if enforced, would "reduce indemnity to a mere facade" (285 AD2d at 878).

In that homeowners face potential liability for many noncriminal acts of negligence, and the criminal activity exclusion leaves coverage for such liability intact, we cannot agree that indemnity would be so dramatically reduced. Further, New York courts have long known how to distinguish crimes from lesser statutory violations for the purpose of determining insurance coverage (*see Messersmith v American Fid. Co.*, 232 NY 161, 164 [1921]; *see also Insurance Co. of N. Am. v Chinoise Rest. & Trading Corp.*, 85 AD2d 712, 713 [1981]). A case may arise in which a broad criminal activity exclusion like Security Mutual's facially applies, yet works an injustice because the prohibited act involves little culpability or seems minor relative to the consequent forfeiture of coverage. This, however, is not such a case.

We are mindful, moreover, of the background of the broad language that Slayko seeks to nullify. The criminal activity exclusion is part of a "New York Amendatory Endorsement" to the policy form Security Mutual used, an endorsement dated November 1991. That date is five months after *Allstate Ins. Co. v Zuk* (78 NY2d 41 [1991]), which construed a different criminal activity exclusion. The policy in *Zuk* excluded coverage for "bodily injury ... which may *reasonably be expected to result from the intentional or criminal acts* of an insured person ..." (*id.* at 44 [emphasis in original]). In *Zuk*, the insured fatally shot a friend while cleaning a shotgun, and pleaded guilty to second degree manslaughter. We held that the conviction did not collaterally estop the insured from disputing that the injury was "reasonably expected" (*id.* at 46-47). The exclusion now under review omits reference to "reasonably expected" results in the drafter's evident attempt to find enforceable policy language that removes coverage from criminal conduct such as France's. Absent evidence of a strong public policy requiring such coverage we are reluctant--especially on the facts before us--to send the drafters of insurance policy forms back to the drawing board.

Both sides invoke public policy. For Security Mutual, the overriding policy concern is the interest law-abiding homeowners have in low premiums, an interest best served if such homeowners are not compelled to pool risk with convicted felons. ***295** Additionally, the insurer notes the settled principle that "no one shall be permitted to take advantage of his own wrong" (*see Messersmith*, 232 NY at 165). Slayko counters that accident victims should as a matter of public policy have recourse to financially responsible defendants. The cases from which he culls this proposition relate, however, specifically to automobile accidents and insurance (*see e.g. Planet Ins. Co. v Bright Bay Classic Vehs.*, 75 NY2d 394, 401 [1990]). Cases involving auto insurance coverage--an area in which the contractual relationship and many of its terms are prescribed by law--provide a weak basis for generalization about the constraints public policy places upon other insurance contracts.

The "public policy of this state when the legislature acts is what the legislature says that it shall be" (*Messersmith*, 232 NY at 163). Conversely, when statutes and Insurance Department regulations are silent, we are reluctant to inhibit freedom of contract by

finding insurance policy clauses violative of public policy (*see* Joseph R. Loring & Assoc. v Continental Cas. Co., 56 NY2d 848, 850 [1982];*Miller v Continental Ins. Co.*, 40 NY2d 675, 679 [1976]). When we recently found an exclusion unenforceable because it detracted from the statutorily-mandated minimum fire insurance coverage, we explicitly limited our decision to matters involving fire insurance (*see* Lane v Security Mut. Ins. Co., 96 NY2d 1, 6 [2001]).

There is no statutory requirement for the full panoply of coverages known as homeowner's insurance and hence "no prohibition against such insurers limiting their contractual liability" (*see* Suba v State Farm Fire & Cas. Co., 114 AD2d 280, 284 [1986]). To be sure, the policy France's grandmother bought includes coverage components, such as fire insurance, that are set by statute (*see*Insurance Law § 3404 [e]). Indeed, there are even statutory provisions applicable to the liability coverage under which Slayko specifically seeks to recover (*see*Insurance Law § 3420 [a]). Slayko does not base his claim on any purported failure of the Security Mutual policy to comply with these express statutory requirements. The policy's apparent compliance with the statute makes us all the more reluctant to fault it for failing to meet a further, implied requirement.

Furthermore, the Insurance Law explicitly permits carriers of personal lines insurance--a term that includes the policy at issue here--to cancel policies if the insured is convicted "of a crime arising out of acts increasing the hazard insured against" (*see*Insurance Law § 3425 [c] [2] [B]). This permission is set forth in a section that generally places restrictions on insurers' ***296** freedom to cancel coverage. Thus, to the extent that the Legislature has expressed a public policy about coverage for persons who perform criminal acts, that policy is to facilitate rather than hinder insurers' efforts to remove such persons and their property from the general risk pool.

In this context, the heavy reliance of Slayko and amici on *Royal Indem. Co. v Providence Washington Ins. Co.* (92 NY2d 653 [1998]) is misplaced. In *Royal Indemnity* we held that a clause that excluded liability coverage for trucks driven under certain circumstances was void as against public policy and that the policy must therefore "be read as if the exclusion did not exist" (*id.* at 656). Slayko argues that under *Royal Indemnity* if a policy exclusion potentially negates any coverage required by public policy, that exclusion must be stricken entirely. Assuming for the sake of argument that this is true, it still does not show that the criminal activity exclusion here negates any coverage that public policy requires. Put simply, no statute compels coverage here as Vehicle and Traffic Law § 388 did in *Royal Indemnity*.

The Appellate Division reasoned that the "mere fact that an act may have penal consequences does not necessarily mean that insurance coverage for civil liability arising from the same act is precluded by public policy" (285 AD2d at 878, quoting *Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 399 [1981]). But while public policy does not *prohibit* coverage for liability arising from criminal acts, it does not follow that public policy *requires* such coverage. We have never made that logical leap.

Finally, we decline to follow cases from other jurisdictions holding that the broad criminal activity exclusion "defies the rea-

sonable expectations of the insured" (285 AD2d at 878, citing *Tower Ins. Co., Inc. v Judge*, 840 F Supp 679, 692-693 [D Minn 1993]). Some states have developed the "reasonable expectations" doctrine to mitigate the rigors of policy exclusions when such exclusions operate in surprising and unfair ways (*see e.g. Atwater Creamery Co. v Western Natl. Mut. Ins. Co.*, 366 NW2d 271 [Minn 1985]). This doctrine has its own complex jurisprudence, and we will not lightly adopt it where, as here, the effect of the exclusion is neither surprising nor unfair. In any event, most of the courts in other jurisdictions that have considered public policy challenges to exclusions worded like the one under review have found the exclusions enforceable (*see e.g. Allstate Ins. Co. v Norris*, 795 F Supp 272, 275-276 [SD Ind 1992]; *Allstate Ins. Co. v Juniel*, 931 P2d 511, 516 [Colo Ct App 1996]; ***297***Horace Mann Ins. Co. v Drury*, 213 Ga App 321, 323, 445 SE2d 272, 274-275 [1994];*Princeton Ins. Co. v Chunmuang*, 151 NJ 80, 98, 698 A2d 9, 18 [1997];*New Mexico Physicians Mut. Liab. Co. v LaMure*, 116 NM 92, 98, 860 P2d 734, 740 [1993]).

Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiff's motion for summary judgment denied, defendant-appellant's cross motion for summary judgment granted and judgment granted declaring that defendant-appellant has no duty to defend and indemnify plaintiff in the underlying personal injury action.

Judges Smith, Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur.
Order reversed, etc.***298**

N.Y. 2002.
SLAYKO v SEC. MUT. INS. CO.
98 N.Y.2d 289, 774 N.E.2d 208578746 N.Y.S.2d 4446022002 WL 14191279992002 N.Y. Slip Op. 055154603, 774 N.E.2d 208578746 N.Y.S.2d 4446022002 WL 14191279992002 N.Y. Slip Op. 055154603, 774 N.E.2d 208578746 N.Y.S.2d 4446022002 WL 14191279992002 N.Y. Slip Op. 055154603, 774 N.E.2d 208578746 N.Y.S.2d 4446022002 WL 14191279992002 N.Y. Slip Op. 055154603

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75 N.Y.2d 196
(Cite as: 75 N.Y.2d 196, 550 N.E.2d 930)

Home Ins. Co. v American Home Prods. Corp.
75 N.Y.2d 196, 551 N.Y.S.2d 481
N.Y. 1990.

75 N.Y.2d 196, 550 N.E.2d 930, 551 N.Y.S.2d 481, 1990 WL 3333

Home Insurance Company, Plaintiff,
v.
American Home Products Corporation et al., Defendants.
Court of Appeals of New York

Argued November 15, 1989;
decided January 18, 1990

CITE TITLE AS: Home Ins. Co. v American Home Prods. Corp.

SUMMARY

Proceeding pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals § 500.17 (22 NYCRR 500.17) to review a question certified to the New York State Court of Appeals by order of the United States Court of Appeals for the Second Circuit. The following question was certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "Would New York require the insurer to reimburse the insured for punitive damages awarded against the insured on the out-of-state judgment in this case?"

HEADNOTES

Damages--Punitive Damages--Insurance Indemnification for Illinois Punitive Damages Award--Products Liability Action

(1) Plaintiff insurer is not required to indemnify defendant insured under its excess policy for punitive damages awarded against the insured in an Illinois products liability action based upon the insured's willful and wanton failure to warn of certain risks it knew to be inherent in one of its products, since to require such indemnification would be contrary to the public policy of New York, which precludes insurance indemnification for punitive damage awards, whether based on intentional actions or actions which, while not intentional, amount to gross negligence, recklessness or wantonness, or conscious disregard for the rights of others or for conduct so reckless as to amount to such disregard. New York policy should not be applied any differently solely because the punitive damages award happens to have been rendered in another State. No relevant difference can be discerned between the rules governing punitive damages in New York and the comparable rules in Illinois. Further, nothing in New York law or policy would preclude an award of punitive damages in a strict products case, where the theory of liability is failure to warn and where there is evidence that the failure was wanton or in conscious disregard of the rights of others.

Damages--Punitive Damages--Availability in Products Liability Action

(2) Nothing in New York law or public policy would preclude an award of punitive damages in a strict products liability case where the theory of liability is failure to warn and where there is evidence that the failure

was wanton or in conscious disregard of the rights of others. A products liability action founded on a failure to warn involves conduct of the defendant having attributes of negligence which the jury may find sufficiently wanton or reckless to sustain an award of punitive damages.

Conflict of Laws--Comity

(3) In determining whether it is contrary to the public policy of New York ***197** to require an insurer to indemnify its insured for punitive damages awarded against the insured in an Illinois products liability action, the Court of Appeals will not look beyond the law and make its own de novo analysis of the trial record to determine whether the insured's conduct was "morally culpable". There is no reason to question the regularity of the Illinois proceedings or the legitimacy of the Illinois judgment; indeed, to undertake such collateral factual review would be contrary to precedent and to the policy of respecting the judicial proceedings of sister States.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Insurance, §§ 260, 341; Products Liability, §§ 595, 972.

NY Jur 2d, Insurance, §§762, 769, 771, 1429, 1664, 1777; Products Liability, §§66, 82, 85, 86.

ANNOTATION REFERENCES

Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR4th 11.

Allowance of punitive damages in products liability case. 13 ALR4th 52.

POINTS OF COUNSEL

Sheila L. Birnbaum, Irene A. Sullivan, Timothy G. Reynolds and *Douglas W. Dunham* for plaintiff.

I. New York public policy precludes indemnification for the *Batteast* punitive damage award because such indemnification would undermine the punitive and deterrent purpose for which the award was imposed. *(Hartford Acc. & Indem. Co. v Village of Hempstead,* 48 NY2d 218;*Gertz v Robert Welch, Inc.,* 418 US 323;*Walker v Sheldon,* 10 NY2d 401;*Toomey v Farley,* 2 NY2d 71;*Hamilton v Third Ave. R. R. Co.,* 53 NY 25;*Sharapata v Town of Islip,* 56 NY2d 332;*Messersmith v American Fid. Co.,* 232 NY 161;*Public Serv. Mut. Ins. Co. v Goldfarb,* 53 NY2d 392;*Aetna Cas. & Sur. Co. v Shuler,* 72 AD2d 591;*Padavan v Clemente,* 43 AD2d 729.)II. New York public policy also bars coverage of the *Batteast* punitive verdict because the standard for the imposition of punitive damages is the same under New York and Illinois law.*(Walker v Sheldon,* 10 NY2d 401;*Sharapata v Town of Islip,* 56 NY2d 332;*Welch v Mr. Christmas,* 57 NY2d 143;*Giblin v Murphy,* 73 NY2d 769;*Loughry v Lincoln First Bank,* 67 NY2d 369;*West v Western Cas. & Sur. Co.,* 846 F2d 387.)III. The New York courts should not engage ***198** in a de novo review of a trial held in a sister State. *(Ehrlich-Bober & Co. v University of Houston,* 49 NY2d 574.)

Daniel J. Thomasch, Louis C. Lustenberger, Jr., and *Susan M. Hart* for American Home Products Corporation and another, defendants.

I. New York, not Illinois, has the paramount public policy interest in this action. *(Home Ins. Co. v American Home Prods. Corp.,* 873 F2d 520;*Schultz v Boy Scouts of Am.,* 65 NY2d 189.).

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II. Resolution of this action is not dictated by New York precedent regarding the insurability of punitive damages. *(Matter of Sprinzen [Nomberg],* 46 NY2d 623;*McCall v Frampton,* 99 Misc 2d 159;*Cheatham v Cheatham,* 93 Misc 2d 576;*Baltimore & Ohio Ry. v Voigt,* 176 US 498;*Hartford Acc. & Indem. Co. v Village of Hempstead,* 48 NY2d 218;*Public Serv. Mut. Ins. Co. v Goldfarb,* 53 NY2d 392.).

III. Insurance coverage of foreign punitive damage awards should not be denied as a matter of public policy absent a showing of morally culpable conduct.*(Fittipaldi v Legassie,* 18 AD2d 331;*Hamilton v Third Ave. R. Co.,* 53 NY 25;*Walker v Sheldon,* 10 NY2d 401;*Rand & Paseka Mfg. Co. v Holmes Protection,* 130 AD2d 429;*Gertz v Robert Welch, Inc.,* 418 US 323;*Kilberg v Northeast Airlines,* 9 NY2d 34;*Lugo v LJN Toys,* 146 AD2d 168;*Croton Falls Fire Dist. v Pierce Mfg. Co.,* 130 AD2d 456;*Hafner v Guerlain, Inc.,* 34 AD2d 162;*Roginsky v Richardson-Merrell, Inc.,* 378 F2d 832.)IV. New York has no public policy interest in denying AHP its contractual right to insurance coverage in this action. *(Hafner v Guerlain, Inc.,* 34 AD2d 162;*Cooley v Carter-Wallace, Inc.,* 102 AD2d 642;*Ventricelli v Kinney Sys. Rent A Car,* 45 NY2d 950;*Roginsky v Richardson-Merrell, Inc.,* 378 F2d 832.)

Eugene R. Anderson, Irene C. Warshauer, John H. Kazanjian, James Walker Smith and *Tracy E. Makow* for The Product Liability Advisory Council, Inc., *amicus curiae.*

I. The goal of deterrence does not prohibit insurance coverage for punitive damages. *(Walker v Sheldon,* 10 NY2d 401;*Aetna Life Ins. Co. v Lavoie,* 475 US 813.)

II. Insurance coverage for punitive damages is permitted in a significant number of jurisdictions.

III. Denying coverage to New York citizens who do business in other States is unfair given the widespread assertion and imposition of punitive damages nationwide.

IV. The insurance industry charges premiums intending to provide coverage for punitive damages. *(St. Paul Mercury Ins. Co. v Duke Univ.,* 849 F2d 133.)

V. The New York Legislature has ***199** never prohibited insurance coverage for punitive damages.

VI. The sanctity of private contracts should be respected.

OPINION OF THE COURT

Hancock, Jr., J.

A judgment for $9.2 million in compensatory damages and $13 million in punitive damages, based on a jury verdict, was recovered in an Illinois trial court against American Home Products Corp. (AHP). The damages were awarded for the grave and permanent injuries (including severe impairment of mental function) sustained by Marcus Batteast, a two-year-old boy, as a result of the administration of a drug, aminophylline, manufactured by AHP through its subsidiary, Wyeth Laboratories. On appeal to the appellate court of Illinois the judgment against AHP was unanimously affirmed *(Batteast v American Home Prods. Corp.,* No. 806-16808 [Cir Ct, Cook County, Ill], *affd sub nom. Batteast v Wyeth Labs.,* 172 Ill App 3d 114, 526 NE2d 428 [1st Dist 1988], *lv granted*123 Ill 2d 556, 535 NE2d 398 [1988]).

The question to be decided--certified to this court by the United States Circuit Court of Appeals for the Second Circuit--concerns the insurance coverage under the excess liability policy issued by The Home Insurance

Company (Home) to AHP and whether that policy covers the award for punitive damages in the *Batteast* case. Home commenced an action in New York State Supreme Court against AHP seeking a judgment declaring that it was not obligated to indemnify AHP for the amount of the punitive damages not covered by primary insurance. The action was removed to Federal court which declared that Home "is liable under its excess insurance policy for the punitive damages awarded in *Batteast*". (*Home Ins. Co. v American Home Prods. Corp.*, 665 F Supp 193, 197 [Duffy, J., SD NY 1987].) Home appealed to the Circuit Court of Appeals.

The Circuit Court of Appeals, noting that the question of coverage for punitive damages recovered in out-of-State judgments is one of first impression in this State and one which involves important New York public policy considerations, has certified to us the following question: "Would New York require the insurer to reimburse the insured for punitive damages awarded against the insured on the out-of-state judgment in this case?" (873 F2d 520, 522 [2d Cir 1989].)

(1) For reasons which follow, we hold that to require Home ***200** to indemnify AHP for such damages under its excess policy would be contrary to the public policy of this State. Accordingly, we answer the certified question in the negative.

I

The parties are in agreement that the answer to the question certified depends on an analysis of New York's public policy and an application of that policy to the circumstances here.[FN*]There is no question that the general rule, as articulated in two of our recent decisions, is that New York public policy precludes insurance indemnification for punitive damage awards, whether the punitive damages are based on intentional actions or actions which, while not intentional, amount to "gross negligence, recklessness, or wantonness" (*Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 400) or "conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard" (*Hartford Acc. & Indem. Co. v Village of Hempstead*, 48 NY2d 218, 227).

FN* Home (a New Hampshire corporation) and AHP (a Delaware corporation) both have their principal offices and places of business in New York. For purposes of this action, Home and AHP are considered New York residents.

The considerations underlying our public policy--thoroughly discussed in the court's opinion in *Hartford Acc.* (*id.*, at 225-229)--need not be detailed here. The main argument against coverage, we noted, is that to allow it would defeat "the purpose of punitive damages, which is to punish and to deter others from acting similarly, and that allowing coverage serves no useful purpose since such damages are a windfall for the plaintiff who, by hypothesis, has been made whole by the award of compensatory damages." (*Id.*, at 226.)

We underscored these policy considerations in *Public Serv. Mut. Ins. Co. v Goldfarb* (*supra*). There, we declared that the insured, a dentist, could not claim reimbursement for any punitive damages that might be awarded in the malpractice case which had been brought against him by a patient who claimed that he had committed sexual abuse. We

emphasized that if punitive damages were to be awarded "on any ground other than intentional causation of *injury* [emphasis in original]--*for example, gross negligence, recklessness or wantonness*--indemnity for compensatory damages would be allowable even though *indemnity for the punitive or exemplary component of the damage award would be barred as violative of* ***201** *public policy." (Public Serv. Mut. Ins. Co. v Goldfarb, supra,* at 400 [emphasis supplied].)

It can be argued that the claims for punitive damages in *Public Serv. Mut.* (based on alleged sexual abuse by the insured) and in *Hartford Acc.* (based on police officers' alleged violation of 42 USC § 1983 in using nightsticks) involved alleged wrongs which could be found to have been intentional or even criminal and which were, for that reason, more grievous in nature than the wrongful conduct in a case based on negligence or products liability. We hold, however, that the policy articulated in *Public Serv. Mut.* and *Hartford Acc.* should apply equally to cases involving conduct which, although *not intentional,* is found to be grossly negligent, or wanton or so reckless as to amount to a conscious disregard of the rights of others. Indeed, the very language of these opinions *(see, Public Serv. Mut. Ins. Co. v Goldfarb, supra,* at 400;*Hartford Acc. & Indem. Co. v Village of Hempstead, supra,* at 227) indicates that the same policy considerations would apply to conduct of this kind *(see, Aetna Cas. & Sur. Co. v Shuler,* 72 AD2d 591, 592;*Padavan v Clemente,* 43 AD2d 729;*Parker v Agricultural Ins. Co.,* 109 Misc 2d 678, 680-681).

Nor should New York policy be applied any differently solely because the punitive damages award happens to have been rendered in another State. It is the punitive nature of the award coupled with the fact that a New York insured seeks to enforce it in New York against a New York insurer which calls for the application of New York public policy. To determine whether there should be reimbursement in New York for an out-of-State punitive damages award, we must examine the nature of the claim, including the degree of wrongfulness for which the damages were awarded in the foreign State, as well as that State's law and policy relating to punitive damages in order to properly ascertain whether reimbursement would offend our public policy.

We accordingly turn to an analysis of the *Batteast* punitive damages award and of the Illinois law under which it was rendered.

II

The tort theory on which AHP's liability was predicated was its failure to warn of the risks it knew to be inherent in the administration of the drug, aminophylline, in suppository form to children. The appellate court of Illinois, on its review ***202** of the trial record, found "that there is ample evidence to support plaintiffs' contention that Wyeth's aminophylline was unreasonably dangerous due to the lack of adequate warnings accompanying the product. While the evidence demonstrates that Wyeth was aware of certain risks involved in administering aminophylline suppositories to children, Wyeth failed to warn the medical profession of the risks." *(Batteast v Wyeth Labs.,* 172 Ill App 3d 114, 127, 526 NE2d 428, 437,*supra.)*The appellate court listed nine separate risks for which no warning was given including, significantly, the fact that "severe intoxication and death have followed rectal administration

because of hypersensitivity or overdosage" *(id., at 127, at 437).*

Having decided the question of liability, the appellate court addressed the issue of punitive damages and rejected defendant's two contentions: (1) that the trial court should, as a matter of law, have dismissed the claim for punitive damages without submitting the issue to the jury and (2) that, in any event, the verdict on punitive damages was contrary to the weight of the evidence.

With respect to the legal challenge to the sufficiency of the proof to warrant submission of the punitive damages issue, the appellate court of Illinois stated: "if the jury believed that Wyeth was guilty of willful and wanton conduct which proximately caused plaintiff to be injured, and if the jury believed that justice and the public good require it, it was proper for the jury to award plaintiffs an amount which will serve to punish Wyeth and deter others from the commission of like offenses. Willful and wanton conduct is a course of action which shows deliberate intention to harm or shows an utter indifference or conscious disregard for the safety of others" *(id., at 141, at 446)*. The court, on its review of the record, decided that the evidence was "amply sufficient to support the trial court's decision to submit the issue of punitive damages to the jury" *(id.)*.

In rejecting defendant's argument that the punitive damages verdict was contrary to the weight of the evidence, the intermediate appellate court determined that, if accepted by the jury, the evidence of defendant's failure to warn and its failure to provide sufficient information for avoiding toxicity in the use of the drug, despite its awareness of the involved risks, showed "an utter indifference to or conscious disregard for the safety of others" *(id.)*. The court noted that the jury "believed the pertinent evidence [on the issue of punitive damages] which it had a right to do" *(id.)*.***203**

In deciding whether there should be indemnification for the *Batteast* punitive damages verdict as affirmed by the appellate court, we should assume that the judgment was made in conformity with prevailing Illinois law. Under Illinois law, punitive damages may only be awarded upon a showing that a tort has been " 'committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others' " *(Case Co. v McCartin-McAuliffe Plumbing & Heating, 118 Ill 2d 447, 453, 516 NE2d 260, 263 [1987]* [quoting *Kelsay v Motorola, Inc., 74 Ill 2d 172, 186, 384 NE2d 353, 359 (1978)]*). The purposes behind a punitive award are to punish the defendant and to serve as a "warning" and as an " 'example to deter the defendant and others from committing like offenses' " *(id.)*. Additionally, the Illinois Supreme Court has recently emphasized that "[b]ecause of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded" *(Deal v Byford, 127 Ill 2d 192, --, 537 NE2d 267, 272 [1989])* and will soon apply its own rule in the *Batteast* case, now pending before it.

We discern no relevant difference between the rules governing punitive damages in New York and the comparable rules in Illinois. In New York, as in Illinois, punitive damages are intended to act as a deterrent to the offender "and to serve as a warning to others.

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They are intended as punishment for gross misbehavior for the good of the public and have been referred to as 'a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine.' [Citations omitted.] Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit. The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another." *(Reynolds v Pegler,* 123 F Supp 36, 38 [SD NY 1954], *affd* 223 F2d 429 [2d Cir 1955], *cert denied* 350 US 846 [quoted in *Toomey v Farley,* 2 NY2d 71, 83].) The nature of the conduct which justifies an award of punitive damages has been variously described, but, essentially, it is conduct having a high degree of moral culpability *(see, Walker v Sheldon,* 10 NY2d 401, 405) which manifests a "conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." ***204** *(Welch v Mr. Christmas,* 57 NY2d 143, 150.)Such conduct need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness *(see, Giblin v Murphy,* 73 NY2d 769, 772;*Public Serv. Mut. Ins. Co. v Goldfarb, supra,* at 400;NY PJI 2:278).

(2) The concept of punitive damages has been sanctioned under New York law in actions based on negligence *(see, Wittman v Gilson,* 70 NY2d 970, 972;*Caldwell v New Jersey Steamboat Co.,* 47 NY 282, 296) and strict products liability *(see, Bikowicz v Nedco Pharmacy,* 130 AD2d 89, 94;*see also, Racich v Celotex Corp.,* 887 F2d 393 [2d Cir 1989]; *Roginsky v Richardson-Merrell, Inc.,* 378 F2d 832, 838-842 [2d Cir 1967]). While no case involving punitive damages in a strict products litigation has come before our court, nothing in New York law or public policy would preclude an award of punitive damages in a strict products case, where the theory of liability is failure to warn and where there is evidence that the failure was wanton or in conscious disregard of the rights of others. A products liability action founded on a failure to warn involves conduct of the defendant having attributes of negligence *(see, Sage v Fairchild-Swearingen Corp.,* 70 NY2d 579, 585;*Wolfgruber v Upjohn Co.,* 72 AD2d 59, 62,*affd for reasons stated in App Div opn* 52 NY2d 768) which the jury may find sufficiently wanton or reckless to sustain an award of punitive damages *(see, Racich v Celotex Corp.,* 887 F2d 393, 396-397,*supra* [sustaining an award of punitive damages in a products liability case based on failure to warn of the dangers of asbestos and expressly rejecting the argument that under New York law the recovery of punitive damages would be inappropriate]; *Fischer v Johns-Manville Corp.,* 103 NJ 643, 512 A2d 466 [1986]).

In concluding that punitive damages could be recovered in New York in a failure to warn case, we do not suggest that punitive damages are necessarily appropriate in all types of products liability litigation *(see generally,* discussion in *Fischer v Johns-Manville Corp., supra;* Comment, *Punitive Damages Awards in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses,* 42 Ohio St LJ 771; Comment, *Torts-Damages-Punitive Damages Recoverable in a Strict Liability Failure to Warn Action Based on Exposure to Asbestos: Fischer v Johns-Manville Corp., 103 NJ 643, 512 A2d 466 [1986],* 18 Rutgers LJ 979).

From our conclusion that willful and wanton conduct like that found to have been committed by AHP in *Batteast* could ***205** support a punitive damages verdict under New York law, it follows that insurance indemnification for the *Batteast* punitive damages award would be contrary to our State's public policy *(see, Public Serv. Mut. Ins. Co. v Goldfarb, supra; Hartford Acc. & Indem. Co. v Village of Hempstead, supra).*

III

(3) AHP argues, however, that it is not enough for an application of our public policy that we be satisfied that the legal standard under which the punitive damages were awarded in *Batteast* is substantially the same as New York's standard. We should look beyond the law, it is argued, and make our own de novo analysis of the trial record to determine whether AHP's conduct was "morally culpable". In effect, AHP asks us to discredit the application of Illinois law by the Illinois courts in upholding the jury's award of punitive damages. We decline to do so. We have no reason to question the regularity of the Illinois proceedings or the legitimacy of the Illinois judgment. Indeed, it would be contrary to precedent and to our policy of respecting the judicial proceedings of sister States *(see,* Matter of Farmland Dairies v Barber, 65 NY2d 51, 55-56; *Greschler v Greschler,* 51 NY2d 368, 376; Restatement [Second] of Conflict of Laws § 98; *see also, Hinchey v Sellers,* 7 NY2d 287, 293-296; *cf., Matter of Halyalkar v Board of Regents,* 72 NY2d 261, 266-270) to undertake the collateral factual review which defendant requests.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this court pursuant to section 500.17 (22 NYCRR 500.17) of the Rules of Practice of the New York State Court of Appeals, and after hearing arguments by counsel for the parties and consideration of the briefs and record submitted, the certified question is answered in the negative.

Judges Simons, Kaye, Alexander, Titone and Bellacosa concur; Chief Judge Wachtler taking no part.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this court pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the negative. ***206**

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HOME INS CO v AM HOME PRODS
75 N.Y.2d 196, 550 N.E.2d 930578551 N.Y.S.2d 4816021990 WL 3333999, 550 N.E.2d 930578551 N.Y.S.2d 4816021990 WL 3333999, 550 N.E.2d 930578551 N.Y.S.2d 4816021990 WL 3333999

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Town of Massena v Healthcare Underwriters Mut. Ins. Co.
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98 N.Y.2d 435, 779 N.E.2d 167, 749 N.Y.S.2d 456, 2002 WL 31056039, 2002 N.Y. Slip Op. 06398

Town of Massena, Appellant,
v.
Healthcare Underwriters Mutual Insurance Company, Defendant and Third-Party Plaintiff-Respondent, and Federal Insurance Company et al., Respondents, et al., Defendants. Massena Memorial Hospital et al., Third-Party Defendants-Appellants, et al., Third-Party Defendants.
Court of Appeals of New York

Argued May 30, 2002;
Decided September 17, 2002

CITE TITLE AS: Town of Massena v Healthcare Underwriters Mut. Ins. Co.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 26, 2001, which modified, on the law, and, as modified, affirmed an order of the Supreme Court (David Demarest, J.), entered in St. Lawrence County, denying motions by Healthcare Underwriters Mutual Insurance Company, Physicians Reciprocal Insurers, Federal Insurance Company, and Medical Liability Mutual Insurance Company for summary judgment seeking a declaration that they are not obligated to defend and indemnify their insureds in an underlying federal action. The modification consisted of reversing so much of the order as denied the motions for summary judgment by defendants Healthcare Underwriters Mutual Insurance Company, Physicians Reciprocal Insurers and Federal Insurance Company, granting the motions for summary judgment, and declaring that the defendants owe no duty to defend or indemnify with regard to the underlying federal action.

Town of Massena v Healthcare Underwriters Mut. Ins. Co., 281 AD2d 107, modified.

HEADNOTES

Insurance--Duty to Defend and Indemnify--Defamation--Knowledge That Statements are False

(1) An insurer which issues a personal injury liability policy to a hospital is obligated to provide a defense to the hospital in an underlying action in which a physician is suing the hospital for defamation and other torts. The plain language of the policy, which specifically covers the "utterance of a libel or slander," obligates the insurer to provide a defense to plaintiff. The insurer may not rely on an exclusion for defamatory statements made within a business enterprise with knowledge of its falsity. The court in the underlying action held that the physician was a limited public figure who must prove actual malice, namely that the statements were false and were made with knowledge of the falsity or recklessness as to their falsity. Even if the

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allegedly ***436** defamatory statements concerned the "business enterprise" of the physician's practice of medicine, and even if the statements were intentionally and maliciously made, there was no allegation that the statements were made with knowledge of their falsity. Moreover, because the physician is a limited public figure, actual malice requires only recklessness as to the truth of the statement, and not knowledge of the falsity.

Insurance--Duty to Defend and Indemnify--Defamation--Intentional Wrongdoing
(2) An insurer which issues a personal injury liability policy to a hospital is obligated to provide a defense to the hospital in an underlying action in which a physician is suing the hospital for defamation and other torts. The plain language of the policy, which specifically covers the "utterance of a libel or slander," obligates the insurer to provide a defense to plaintiff. The insurer may not avoid its obligations on the ground that the allegations of malice in the underlying action were equivalent to allegations of intentional wrongdoing. Because of the physician's status as a limited public figure, he could recover on his defamation claim if he established that defendants' allegedly defamatory statements were made with reckless disregard of their truth. Such defamatory statements would be covered by the policy and would not be precluded by the public policy which prohibits the coverage of intentional acts by insurance. Because the insurer has a duty to defend the defamation claims, it consequently has a duty to defend the entire action.

Insurance--Exclusions--Burden of Proof--Failure to Refer Patients to Physician
(3) An insurer has no duty to defend a hospital in an underlying action brought by a physician alleging that the hospital engaged in a concerted campaign of defamation and tortious interference with contract and business relations designed to punish him for exercising his right to free speech. The insurance policy excludes any loss "arising out of" or otherwise related to "bodily injury ... libel, slander, defamation of character" or similar torts, and any loss resulting from the performance of "professional services," including services on "a formal medical accreditation or similar medical professional board or committee of an Insured." This broad exclusionary language negates coverage for all but the physician's tortious interference claims. The hospital has not, however, met its burden of showing that the tortious conduct is covered. Once the insurance company asserted the "professional services" exclusion, the hospital had the burden of showing that the conduct alleged was covered, and it has failed to make that showing.

Insurance--Exclusions--"Professional Services"
(4) An insurer has no duty to defend individual doctors affiliated with a hospital in an underlying action brought by a physician alleging that a hospital engaged in a concerted campaign of defamation and tortious interference with contract and business relations designed to punish him for exercising his right to free speech. Under the policy, the insurer is obligated to pay "all sums which you become legally obligated to pay for a claim," excluding punitive damages, and to defend every "claim" arising from the insured's performance of "professional services." However, the policy's exclusions are extensive, including "any willful, fraudulent or malicious civil act"; any claim resulting from "defamation, libel, slander" and similar torts; and any claim for interference with

contract or with prospective business advantage. Moreover, the exclusions apply even in light of an amendment to the definition of professional services to include accreditation review and standards review. ***437** Accordingly, the exclusions eliminate any duty the insurer could have to defend the hospital against the underlying claims.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Hospitals and Asylums § 17; Insurance §§ 703, 708, 717, 1405, 1408.

NY Jur 2d, Defamation and Privacy §§ 91, 96; Insurance §§ 1542, 1568, 1917.

ANNOTATION REFERENCES

See ALR Index under Hospitals; Insurance and Insurance Companies; Libel and Slander.

POINTS OF COUNSEL

David L. Welch, Massena, for appellant.

I. The Town's reasonable expectations were violated. (*Atlantic Cement Co. v Fidelity & Cas. Co. of N.Y.,* 91 AD2d 412, 63 NY2d 798;*Lavanant v General Acc. Ins. Co. of Am.,* 79 NY2d 623;*I Q Originals v Boston Old Colony Ins. Co.,* 85 AD2d 21, 58 NY2d 651;*Board of Educ., Yonkers City School Dist. v CNA Ins. Co.,* 647 F Supp 1495, 839 F2d 14;*Slayko v Security Mut. Ins. Co.,* 285 AD2d 875, 97 NY2d 605;*Matter of Mostow v State Farm Ins. Cos.,* 88 NY2d 321;*Moshiko, Inc. v Seiger & Smith,* 137 AD2d 170, 72 NY2d 945;*Rocon Mfg. v Ferraro,* 199 AD2d 999;*Uniroyal, Inc. v Home Ins. Co.,* 707 F Supp 1368;*Thomas J. Lipton, Inc. v Liberty Mut. Ins. Co.,* 34 NY2d 356.)II. The Appellate Division decision will have a chilling impact on municipalities.

O'Connor, Yoquinto & Ryan, LLP, Troy (*Thomas J. O'Connor* of counsel), for defendant and third-party plaintiff-respondent.

I. The intentional torts alleged in the underlying action are not within the Healthcare Underwriters Mutual Insurance Company coverages. (*Public Serv. Mut. Ins. Co. v Goldfarb,* 53 NY2d 392;*Technicon Elecs. Corp. v American Home Assur. Co.,* 74 NY2d 66;*Meyers & Sons Corp. v Zurich Am. Ins. Group,* 74 NY2d 298;*Allstate Ins. Co. v Mugavero,* 79 NY2d 153;*Allstate Ins. Co. v Zuk,* 78 NY2d 41;*Messersmith v American Fid. Co.,* 232 NY 161;*Brooklyn Law School v Aetna Cas. Ins. Co.,* 849 F2d 788;*Transportation Ins. Co. v Neu & Sons,* 233 AD2d 234;*Warrensburg Bd. & Paper Corp. v Unigard Mut. Ins. Co.,* 143 AD2d 602;*Hubert v Lumbermens Mut. Cas. Co.,* 117 AD2d 964.)II. The amended complaint in the underlying action alleges ***438** only intentional injury. (*Hampton v Hanrahan,* 600 F2d 600;*Pangburn v Culbertson,* 200 F3d 65.)III. The 42 USC § 1983 First Amendment retaliation claim is an intentional tort requiring specific intent to injure. (*Crawford-El v Britton,* 523 US 574;*Sheppard v Beerman,* 94 F3d 823;*Blue v Koren,* 72 F3d 1075.)IV. The defamation claim alleges intentional injury. (*Public Serv. Mut. Ins. Co. v Goldfarb,* 53 NY2d 392.)V. The tortious interference claims are intentional torts alleging intentional injury. (*Guard-Life Corp. v Parker Hardware Mfg. Corp.,* 50 NY2d 183;*NBT Bancorp v Fleet/Norstar Fin. Group,* 87 NY2d 614;*Foster v Churchill,* 87 NY2d 744.)VI. Common-law malice infuses each claim in the underlying action. (*Sweeney v Prisoners' Legal Servs. of N.Y.,* 84 NY2d 786;*Mahoney v Adirondack Publ. Co.,* 71 NY2d 31;*Present v Avon Prods.,* 253 AD2d 183, 93 NY2d 1032;*Harte-Hanks Communications v Connaughton,* 491 US 657;*Prozeralik v Capital*

Cities Communications, 82 NY2d 466;*Liberman v Gelstein,* 80 NY2d 429;*New York Times Co. v Sullivan,* 376 US 254;*Hartford Acc. & Indem. Co. v Village of Hempstead,* 48 NY2d 218.)VII. The penal consequences of an insured's conduct are not necessarily decisive of coverage issues. (*Public Serv. Mut. Ins. Co. v Goldfarb,* 53 NY2d 392;*Messersmith v American Fid. Co.,* 232 NY 161;*Miller v Continental Ins. Co.,* 40 NY2d 675;*D'Arata v New York Cent. Mut. Fire Ins. Co.,* 76 NY2d 659;*Matter of Nassau Ins. Co. [Bergen--Superintendent of Ins.],* 78 NY2d 888;*Allstate Ins. Co. v Zuk,* 78 NY2d 41;*Slayko v Security Mut. Ins. Co.,* 285 AD2d 875, 97 NY2d 605;*Pennsylvania Millers Mut. Ins. Co. v Rigo,* 256 AD2d 769.)VIII. The decision of the Appellate Division is consistent with this Court's holding in *Fitzpatrick v American Honda Motor Co.* (78 NY2d 61 [1991]). (*A.J. Sheepskin & Leather Co. v Colonia Ins. Co.,* 273 AD2d 107;*Transportation Ins. Co. v Neu & Sons,* 233 AD2d 234;*Pennsylvania Millers Mut. Ins. Co. v Rigo,* 256 AD2d 769;*Warrensburg Bd. & Paper Corp. v Unigard Mut. Ins. Co.,* 143 AD2d 602.)IX. Public policy prohibits indemnification or defense of any of the claims in the underlying action. (*Messersmith v American Fid. Co.,* 232 NY 161;*Public Serv. Mut. Ins. Co. v Goldfarb,* 53 NY2d 392;*City of Johnstown v Bankers Std. Ins. Co.,* 877 F2d 1146;*Barry v Romanosky,* 147 AD2d 605;*Miller v Continental Ins. Co.,* 40 NY2d 675;*McGroarty v Great Am. Ins. Co.,* 36 NY2d 358;*Munzer v St. Paul Fire & Mar. Ins. Co.,* 145 AD2d 193;*Allstate Ins. Co. v Zuk,* 78 NY2d 41;*Fitzpatrick v American Honda Motor Co.,* 78 NY2d 61.)X. Hospital peer review process does not merit special consideration. (***439***Allstate Ins. Co. v Mugavero,* 79 NY2d 153;*Gelbard v Genesee Hosp.,* 255 AD2d 882, 93 NY2d 916;*Patrick v Burget,* 486 US 94.)

Stroock & Stroock & Lavan LLP, New York City (*Curtis C. Mechling* and *Mary E. McEachern* of counsel), for Federal Insurance Company, respondent.

I. The defamation exclusion bars coverage for all claims of the Franzon action. (*High Voltage Eng'g Corp. v Federal Ins. Co.,* 981 F2d 596;*Sloman v First Fortis Life Ins. Co.,* 266 AD2d 370;*Scharf v Federal Ins. Co.,* 261 AD2d 257;*Board of Mgrs. of Yardarm Condominium II v Federal Ins. Co.,* 247 AD2d 499;*New Hampshire Ins. Co. v Jefferson Ins. Co.,* 213 AD2d 325;*Cone v Nationwide Mut. Fire Ins. Co.,* 75 NY2d 747;*McNichol Enters. v First Fin. Ins. Co.,* 284 AD2d 964;*Sphere Drake Ins. Co. v Block 7206 Corp.,* 265 AD2d 78;*Mount Vernon Fire Ins. Co. v Creative Hous.,* 88 NY2d 347;*Underwriters at Lloyd's of London v Cardova Airlines,* 283 F2d 659.)II. The accreditation exclusion bars coverage for all claims of the Franzon action. (*Mount Vernon Fire Ins. Co. v Creative Hous.,* 88 NY2d 347;*New Hampshire Ins. Co. v Jefferson Ins. Co. of N.Y.,* 213 AD2d 325.)III. The Federal policy's definition of "loss" bars coverage for the second and third claims of the Franzon action. (*Home Ins. Co. v American Home Prods. Corp.,* 75 NY2d 196;*Garcia v Allcity Ins. Co.,* 244 AD2d 219.)IV. The Federal policy does not cover the Franzon action's sixth claim for relief because the insureds are not sued for conduct in their insured capacities. (*Town of Somers v Titan Indem. Co.,* 289 AD2d 563.)

James W. Tuffin, Manhasset, and *Gabriel Mignella* for Physician's Reciprocal Insurers, respondent.

I. The endorsement and policy must be read together. (*Birnbaum v Jamestown Mut. Ins. Co.,* 298 NY 305;*Thompson-Starrett Co. v American Mut. Liab. Ins. Co.,* 276 NY

266;*County of Columbia v Continental Ins. Co.*, 83 NY2d 618;*Hubert v Lumbermens Mut. Cas. Co.*, 117 AD2d 964;*Matter of Knickerbocker Ins. Co. v Faison*, 22 NY2d 554.)II. The insurance contract must be enforced in accordance with its plain and unambiguous meaning. (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 940;*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514;*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863;*Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321;*Metzger v Aetna Ins. Co.*, 227 NY 411.)III. Franzon's claims for defamation and business torts do not come under the insuring agreements of Physicians' Reciprocal Insurers' policies. IV. The endorsement ***440** is not illusory. (*Rocon Mfg. v Ferraro*, 199 AD2d 999;*Bush v St. Clare's Hosp.*, 192 AD2d 772, 82 NY2d 738;*Byork v Carmer*, 109 AD2d 1087;*Thomas J. Lipton, Inc. v Liberty Mut. Ins. Co.*, 34 NY2d 356;*Shapiro v Glens Falls Ins. Co.*, 39 NY2d 204;*Allstate Ins. Co. v Mugavero*, 79 NY2d 153;*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 940;*Elletson v Bonded Insulation Co.*, 272 AD2d 825.)

Nixon Peabody LLP, Rochester (*William S. Brandt* of counsel), for Massena Memorial Hospital and others, third-party defendants-appellants.

I. The well-established rules governing the interpretation of insurance contracts were recognized and properly applied by the Trial Justice. (*Matter of Hanover Ins. Co. [Saint Louis]*, 119 AD2d 529, 68 NY2d 751;*Goldberg v Lumber Mut. Cas. Ins. Co.*, 297 NY 148;*Hartford Acc. & Indem. Co. v Village of Hempstead*, 48 NY2d 218;*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663;*Campanile v State Farm Gen. Ins. Co.*, 161 AD2d 1052, 78 NY2d 912;*Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66;*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419;*International Paper Co. v Continental Cas. Co.*, 35 NY2d 322;*Spoor-Lasher Co. v Aetna Cas. & Sur. Co.*, 39 NY2d 875;*Atlantic Cement Co. v Fidelity & Cas. Co. of N.Y.*, 91 AD2d 412, 63 NY2d 798.)II. Hospital defendants are entitled to a defense under each of the three insurance policies issued by Healthcare Underwriters Mutual Insurance Company.(*Federal Ins. Co. v Cablevision Sys. Dev. Co.*, 637 F Supp 1568, 836 F2d 54;*Lavanant v General Acc. Ins. Co. of Am.*, 79 NY2d 623;*Messersmith v American Fid. Co.*, 232 NY 161.)III. Federal Insurance Company is obligated to defend the hospital defendants. (*Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392.)IV. The Appellate Division misapplied and improperly expanded "public policy." (*Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392;*International Paper Co. v Continental Cas. Co.*, 35 NY2d 322;*Nortek, Inc. v Liberty Mut. Ins. Co.*, 858 F Supp 1231;*Federal Ins. Co. v Cablevision Sys. Dev. Co.*, 637 F Supp 1568;*Home Ins. Co. v Perlberger*, 900 F Supp 768.)V. The Appellate Division confused public policy with policy terms. (*Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392;*Federal Ins. Co. v Cablevision Sys. Dev. Co.*, 637 F Supp 1568;*Messersmith v American Fid. Co.*, 232 NY 161;*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640;*Valley Improvement Assn. v United States Fid. & Guar. Corp.*, 129 F3d 1108;*DiIorio v National Union Fire Ins. Co.*, 262 AD2d 347;*Royal Indem. Co. v Love*, 165 Misc 2d 890;***441***New Madrid County Reorganized School Dist. v Continental Cas. Co.*, 904 F2d 1236;*Allstate Ins. Co. v Mugavero*, 79 NY2d 1153;*Allstate Ins. Co. v Zuk*, 78 NY2d 41.)VI. Conclusory allegations of malice should not be treated as an allegation of intent to injure. (*Shapiro v*

Health Ins. Plan of Greater N.Y., 7 NY2d 56;*Foster v Churchill*, 87 NY2d 744;*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169;*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390;*Allstate Ins. Co. v Mugavero*, 79 NY2d 153;*Bassim v Howlett*, 191 AD2d 760;*Cosme v Town of Islip*, 63 NY2d 908;*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61;*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663;*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304.)VII. Physicians' Reciprocal Insurers is obligated to defend Dr. Schwam, Dr. Bakirtzian and Dr. Jhaveri. (*Johnson v Nyack Hosp.*, 964 F2d 116;*Bassim v Howlett*, 191 AD2d 760;*Giannelli v St. Vincent's Hosp.*, 160 AD2d 227;*Shapiro v Health Ins. Plan*, 7 NY2d 56;*Thomas J. Lipton, Inc. v Liberty Mut. Ins. Co.*, 34 NY2d 356;*Clarostat Mfg. Co. v Travelers Indem. Co.*, 115 AD2d 386;*Madawick Contr. Co. v Travelers Ins. Co.*, 307 NY 111;*Uniroyal, Inc. v Home Ins. Co.*, 707 F Supp 1368;*IBM Poughkeepsie Empls. Fed. Credit Union v Cumis Ins. Socy.*, 590 F Supp 769;*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169.)

Donohue, Sabo, Varley & Armstrong, P.C., Albany (*Fred J. Hutchison* of counsel), for Christine Rowe-Button, M.D., third-party defendant-appellant.

I. Healthcare Underwriters Mutual Insurance Company is obligated to provide a defense of Dr. Rowe-Button since the claims asserted fall within the coverage purchased. (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663;*International Paper Co. v Continental Cas. Co.*, 35 NY2d 322;*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304;*Altamore v Aetna Cas. & Sur. Co.*, 238 AD2d 455;*Muhlstock & Co. v American Home Assur. Co.*, 117 AD2d 117;*Pennsylvania Millers Mut. Ins. Co. v Rigo*, 256 AD2d 769;*Lavanant v General Acc. Ins. Co. of Am.*, 79 NY2d 623;*Messersmith v American Fid. Co.*, 232 NY 161;*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61;*Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66.)II. A denial of coverage to Dr. Rowe-Button and the other physicians in this action would have a chilling effect on peer review and quality assurance, to the detriment of public health.

Donald R. Moy, Lake Success, for Medical Society of the State of New York, amicus curiae.

I. Congress has adopted a ***442** policy to improve the quality of medical care by encouraging professional peer review. (*Mathews v Lancaster Gen. Hosp.*, 87 F3d 624.)II. New York State laws both mandate hospital peer review and quality assurance activities and protect individuals engaged in such activities. (*Shapiro v Central Gen. Hosp.*, 251 AD2d 317;*Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56.)III. The decision below will undermine federal and state policy to encourage good faith professional peer review and hospital quality assurance activities.

O'Connell and Aronowitz, Albany (*Jeffery J. Sherrin* and *Rafael A. Olazagasti III* of counsel), for Healthcare Association of New York State, amicus curiae.

The Appellate Division decision undermines the strong public policy to enhance and protect the quality assurance and peer review processes. (*Matter of S-88-08-1940A*, 151 Misc 2d 769;*Feliciano v State of New York*, 175 Misc 2d 671;*Logue v Velez*, 92 NY2d 13;*Katherine F. v State of New York*, 94 NY2d 200;*Golub v St. Luke's-Roosevelt Hosp. Ctr.*, 226 AD2d 118;*Bryan v James E. Holmes Regional Med. Ctr.*, 33 F3d 1318.)

OPINION OF THE COURT

98 N.Y.2d 435
(Cite as: 98 N.Y.2d 435, 779 N.E.2d 167)

Smith, J.

The issue here is whether the defendant insurers have a duty to defend Massena Memorial Hospital and related litigants in an underlying federal lawsuit. We conclude that one insurer has a duty to defend, and we, therefore, modify the order of the Appellate Division.

Olof Franzon is a duly licensed physician and the sole shareholder in his practice, Women's Medical & Surgical Health Care, P.C. Franzon and Women's Medical brought the underlying federal action for damages against Massena Memorial Hospital, its Board of Managers, its Medical Executive Committee and a number of physicians and hospital executives, alleging a conspiracy to deprive Franzon of his civil rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution and 42 USC § 1983, and alleging that he is entitled to attorneys' fees pursuant to 42 USC § 1988. More specifically, Franzon alleged that he publically advocated that the hospital provide nurse-midwifery services and further alleged that the hospital had not previously provided such services for anticompetitive reasons. Franzon alleged that in response, the hospital engaged in a concerted campaign of harassment designed to punish him for exercising his right to free ***443** speech. The campaign consisted of defendants' (1) "overt and malicious acts" designed to "excommunicate him from, and ruin him in, the Massena medical community," (2) disparagement in internal reviews and to his patients and (3) refusing to renew his hospital privileges. Franzon alleged that this harassment caused him to suffer various injuries, including "extreme emotional distress." Franzon also alleged defamation, tortious interference with business relations and tortious inference with contract pursuant to the common law of New York State.

In the present action, the Town of Massena, the owner of Massena Memorial Hospital, and the hospital (collectively, the hospital) seek a declaration that three of their insurers--Healthcare Underwriters Mutual Insurance Company (HUM), Federal Insurance Company (Federal) and Physicians' Reciprocal Insurers (PRI)--owe them a defense in the federal action. Supreme Court held that "each insurer owes their insureds a defense in the underlying lawsuit" because each policy did not exclude coverage of all of the underlying claims as a matter of law. The Appellate Division modified by reversing the denial of summary judgment. It concluded that the alleged acts were either intentional, and therefore excluded as a matter of public policy, or specifically excluded under the applicable policies' provisions (281 AD2d 107 [2001]). We granted leave to appeal to the hospital and to third-party defendant Dr. Rowe-Button. We conclude that HUM is obligated to defend the federal action and we, therefore, modify the order of the Appellate Division.

"[T]he duty to defend is broader than the duty to indemnify" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]; *see also Goldberg v Lumber Mut. Cas. Ins. Co.*, 297 NY 148, 154 [1948]). "[A]n insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fitzpatrick*, 78 NY2d at 65). If the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend (*see*

Technicon Elecs. Corp. v American Home Assur. Co., 74 NY2d 66, 73 [1989];*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 669-670 [1981]). "If any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). Indeed, "[t]he duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the ***444** insurer ... [and, it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984] [citations omitted]). When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage (*see International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 325 [1974];*Technicon*, 74 NY2d at 73-74). The merits of the complaint are irrelevant and, "[a]n insured's right to be accorded legal representation is a contractual right and consideration upon which his premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured" (*International Paper*, 35 NY2d at 325).

(1) HUM contracted with the hospital for coverage under three policies--the Personal Injury Liability (PIL) policy, the Hospital Professional Liability (HPL) policy, and the Comprehensive General Liability (CGL) policy. The plain language of the PIL policy obligates HUM to provide a defense to plaintiff. Specifically, the PIL policy covers all personal injury damages arising out of various offenses including "the publication or utterance of a libel or slander" or of other defamatory or disparaging material. The complaint contains allegations that the hospital "intentionally and maliciously made false statements to Franzon's patients, potential patients, and the community at large in an effort to damage his reputation as a doctor." The complaint additionally alleges that the statements are untrue.[FN*]

> FN* The complaint also specifies that Dr. Jhaveri told another patient that Franzon "was going to be booted out of Massena"; that it was "bull" that a patient had an ultrasound in Franzon's office as the patient "should not have any ultrasounds done in Franzon's office"; and that Dr. Maresca told a resident during a repeat mammogram that "if you were Dr. Franzon's patient, I wouldn't even be talking to you."

HUM relies on its exclusion for defamatory statements made within a business enterprise with knowledge of their falsity. Defamation is defined as a false statement that exposes a person to public contempt, ridicule, aversion or disgrace (*see Foster v Churchill*, 87 NY2d 744, 751 [1996]). A party alleging defamation must allege that the statement is false (*see Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 245 [1991],*cert denied*500 US 954). In addition, where the party is a public figure, that party must allege that the statement was made with "actual malice," defined as either knowledge of the falsehood ***445** or recklessness as to the falsehood (*see New York Times Co. v Sullivan*, 376 US 254, 279-280 [1964]). Where the party alleging defamation is not a public figure, a showing of common-law malice, or ill will, is neces-

sary (*see* *Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). Even though a statement is defamatory, a qualified privilege exists where the communication is made to persons who have some common interest in the subject matter (*see id.* at 437-439).

The District Court in the underlying action held that Franzon was a limited public figure who must prove actual malice, namely that the statements were false and were made with knowledge of the falsity or recklessness as to their falsity (*see* *Franzon v Massena Mem. Hosp.*, 89 F Supp 2d 270, 278 [ND NY 2000]). Even if the allegedly defamatory statements concerned the "business enterprise" of Franzon's practice of medicine, and even if the statements were intentionally and maliciously made, there was no allegation that the statements were made with knowledge of their falsity. Moreover, because Franzon is a limited public figure, actual malice requires only recklessness as to the truth of the statement, and not knowledge of the falsity. Thus, defense coverage is proper based on the policy terms.

(2) HUM also argues, and the Appellate Division agreed, that it had no duty to indemnify because the allegations of malice were equivalent to allegations of intentional wrongdoing. This Court has stated that "an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]). As a matter of policy, conduct engaged in with the intent to cause injury is not covered by insurance (*see* *Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 399-400 [1981]; *Messersmith v American Fid. Co.*, 232 NY 161, 163-165 [1921]). As we have stated, because of Franzon's status as a limited public figure, he could recover on his defamation claim if he established that defendants' defamatory statements were made with *reckless* disregard of their truth. Such defamatory statements would be covered by HUM's policy and would not be precluded by public policy. Because HUM has a duty to defend the defamation claims under the HUM PIL policy, it consequently has a duty to defend the entire action brought under any of the HUM policies (*see* *Frontier Insulation Contrs. v Merchants Mut. Ins.*, 91 NY2d at 175 ["If any of the claims against the insured arguably ***446** arise from covered events, the insurer is required to defend the entire action"]). We therefore hold that HUM necessarily has a duty to defend all of the claims. Since HUM is obligated to defend the action under the PIL policy, it is unnecessary for us to discuss the HPL and the CGL policies.

(3) Federal Insurance Company has no duty to defend the hospital. Its Executive Liability and Indemnification Insurance Policy provides coverage for "all Loss" that the insured is "legally obligated to pay" for any "Wrongful Act." A wrongful act is "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed ... by any Insured Person, individually or otherwise, in his Insured Capacity, or any matter claimed against him solely by reason of his serving in such Insured Capacity." "Insured Capacity" means as a director or officer. The policy limits this coverage by excluding, among other things, any loss "arising out of" or otherwise related to "bodily injury ... libel, slander, defamation of character" or similar torts. The policy also excludes any loss resulting from performance of "professional services," including services

on "a formal medical accreditation or similar medical professional board or committee of an Insured." This broad exclusionary language negates coverage for all but the tortious interference claim in the Franzon complaint.

The hospital has not, however, met its burden of showing that the tortious conduct is covered. Franzon's tortious interference claims against the hospital are centered around three physicians' failure to refer patients to him. This conduct could only occur in the doctors' respective roles as members of an insurance network. Franzon's complaint, however, does not allege whether the doctors' conduct in question occurred while they were acting in their "insured capacity" as officers or directors or otherwise. Federal argues that the conduct surrounding the tortious interference claim occurred outside the doctors' insured capacity, or in the alternative, in the excluded performance of "professional services" category. Once the insurance company asserted the exclusion, the hospital defendants had the burden of showing that the conduct alleged was covered and they have failed to make that requisite showing. Federal therefore has no duty to defend under the policy.

(4) Physicians' Reciprocal Insurers is also under no duty to defend the individual doctors. Under the PRI policy, the insurer was obligated to pay "all sums which you become legally obligated to pay for a claim," excluding punitive damages, and to defend every "claim" arising from the insured's performance of ***447** "professional services." "Professional services" includes "services as a member of a formal accreditation board or any committee of a hospital where" the insured is "engaged in accreditation review and standards review." The policy's exclusions are extensive including "any willful, fraudulent or malicious civil act"; any claim resulting from "defamation, libel, slander" and similar torts; and any claim for interference with contract or with prospective business advantage. The policy stated that the exclusions applied even after the amendment of the definition of professional services to include accreditation review and standards review. These exclusions eliminate any duty PRI could have to defend the hospital against Franzon's claims.

Accordingly, the order of the Appellate Division should be modified, without costs, by reinstating so much of Supreme Court's order as declared a duty to defend by HUM and, as so modified, affirmed.

Judges Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur; Chief Judge Kaye taking no part.
Order modified, etc.*448

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MASSENA v HEALTHCARE INS CO.
98 N.Y.2d 435, 779 N.E.2d 167578749 N.Y.S.2d 4566022002 WL 310560399992002 N.Y. Slip Op. 063984603, 779 N.E.2d 167578749 N.Y.S.2d 4566022002 WL 310560399992002 N.Y. Slip Op. 063984603, 779 N.E.2d 167578749 N.Y.S.2d 4566022002 WL 310560399992002 N.Y. Slip Op. 063984603, 779 N.E.2d 167578749 N.Y.S.2d 4566022002 WL 310560399992002 N.Y. Slip Op. 063984603

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(Cite as: 98 N.Y.2d 435, 779 N.E.2d 167)

168 Misc.2d 971
(Cite as: 168 Misc.2d 971, 641 N.Y.S.2d 802)

American Mgt. Assn. v Atlantic Mut. Ins. Co.
168 Misc.2d 971, 641 N.Y.S.2d 802
N.Y.Sup. 1996.

168 Misc.2d 971, 641 N.Y.S.2d 802, 1996 WL 175097, 71 Fair Empl.Prac.Cas. (BNA) 19, 64 USLW 2660

American Management Association, Plaintiff,
v.
Atlantic Mutual Insurance Company, Defendant.
Supreme Court, New York County,

March 29, 1996

CITE TITLE AS: American Mgt. Assn. v Atlantic Mut. Ins. Co.

HEADNOTES

Insurance--Duty to Defend and Indemnify--Nonintentional "Disparate Impact" Age Discrimination Claim--Effect of Public Policy against Providing Insurance Coverage for Acts of Intentional Discrimination

(1) Defendant insurer was obligated to defend plaintiff in a Federal age discrimination action brought by plaintiff's former employees under the Age Discrimination in Employment Act (ADEA) (29 USC § 623 [a] [1]) and must reimburse plaintiff for any reasonable sum paid in settlement since the general liability policy and umbrella endorsement issued by defendant, although excluding coverage for intentional acts of discrimination "committed by or at the direction of the insured", affords coverage for the nonintentional "disparate impact" discrimination claim alleged in the underlying action. In order to state a claim for discrimination under the "disparate impact" theory, the complaint need only allege that the employer utilized a facially neutral criterion which resulted in selecting applicants for hire or promotion in a significantly discriminatory pattern and, although the law is unsettled as to whether "disparate impact" theory is applicable under the ADEA, there was at least a reasonable possibility that such claim would have been recognized as valid in the underlying action. Furthermore, the State's public policy against providing insurance coverage for intentional acts of discrimination does not bar coverage for "disparate impact" discrimination. Moreover, even if coverage were against public policy or plaintiff was found to have practiced "disparate impact" discrimination, defendant would still have a duty to defend.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Civil Rights, §§ 226-228; Insurance, §§ 704, 705, 708.

29 USCS § 623 (a) (1).

NY Jur 2d, Civil Rights, § 48; Insurance, §§ 1416, 1672, 1673.

ANNOTATION REFERENCES

See ALR Index under Age Discrimination; Civil Rights and Discrimination; Insurance and Insurance Companies.

APPEARANCES OF COUNSEL

168 Misc.2d 971
(Cite as: 168 Misc.2d 971, 641 N.Y.S.2d 802)

Anderson Kill Olick & Oshinsky, P. C., New York City *(Jean M. Farrell* of counsel), for plaintiff. *Smith Stratton Wise Heber* ****972*** *& Brennan,* Princeton, New Jersey *(Thomas E. Hastings* of counsel), and *Lilly & Bienstock,* Garden City *(Bradley L. Mitchell* of counsel), for defendant.

OPINION OF THE COURT

Herman Cahn, J.

Plaintiff, American Management Association (AMA), moves for a judgment, pursuant to CPLR 3212, declaring that defendant Atlantic Mutual Insurance Company (Atlantic Mutual) is obligated to defend and indemnify it in an underlying age discrimination action, *Clancey v American Mgt. Assn.* (US Dist Ct, SD NY, Nov. 21, 1990, 90 Civ 7570 [the *Clancey* action]). Defendant, Atlantic Mutual, cross-moves for a judgment declaring that it is not required to defend and indemnify plaintiff, and dismissing the action, with prejudice.

This is an action, for a declaration as to the rights of the parties under a general liability and umbrella insurance policy (policy No. 288-00-78 92), covering the period from January 24, 1989 to January 24, 1990, issued by Atlantic Mutual to AMA. AMA seeks reimbursement from Atlantic Mutual for the defense and settlement costs associated with the *Clancey* action, which was brought by former employees of AMA on November 21, 1990.

It is undisputed that AMA purchased a general liability and an umbrella insurance policy from Atlantic Mutual. Under the general liability endorsement, Atlantic Mutual agreed to provide AMA with insurance coverage for "personal injury" and "property damage" to which the policy applies, "caused by an occurrence." The endorsement also provided that Atlantic Mutual "shall have the right and duty to defend any suit against [AMA] seeking damages on account of such personal injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient".

"Personal injury" is defined in the general liability endorsement to include "bodily injury". "Bodily injury" is defined as follows: "Bodily injury, sickness or disease sustained by any person which occurs during the policy period". An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured."****973***

Under the umbrella endorsement, Atlantic Mutual agreed to indemnify AMA for the ultimate net loss in excess of the retained limit thereinafter defined, which AMA "shall become legally obligated to pay as damages by reason of the liability imposed upon [AMA] by law, or assumed by [AMA] under contract or on account of ... Personal Injury Liability ... Property Damage Liability, or ... Advertising Liability to which this insurance applies, caused by an occurrence anywhere in the world." The umbrella endorsement further provided, in part:

"With respect to any occurrence not covered by the insurance specified in the Umbrella Declarations or any other underlying insurance collectible by [AMA], but covered by the terms and conditions of this insurance

except for the amount of retained limit specified in Item (2) of Insuring Agreement D, the Company shall:

"1) defend any suit brought against [AMA] alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but [Atlantic Mutual] may make such investigation, negotiation and settlement of any claim or suit as it deems expedient".

"Personal injury" was defined in the umbrella endorsement to include "bodily injury, sickness, disease, disability, shock, mental anguish and mental injury ... resulting therefrom"; as well as *"racial, religious, sex or age discrimination (unless insurance thereof is prohibited by law)* not committed by or at the direction of [AMA], but only with respect to the liability other than fines and penalties imposed by law which occurs during the policy period." (Emphasis added.) An "occurrence" was defined to mean "an accident, or happening or event, or a continuous or repeated exposure to conditions, which unexpectedly or unintentionally results in personal injury, property damage."

The umbrella policy contained a "drop down" clause obligating Atlantic Mutual to defend AMA in any suit covered by the umbrella policy, even if excluded from coverage under the primary policy.

On November 21, 1990, several former regional sales representatives of AMA commenced the *Clancey* action against AMA in the United States District Court for the Southern District of New York, asserting, *inter alia,* claims of age discrimination under the Age Discrimination in Employment Act (29 USC § 623 [a] [1]; § 626 [b] [ADEA]), regarding adverse changes in the terms and conditions of their employment, as ***974** well as termination of some of the claimants; claims under the Employee Retirement Income Security Act () (ERISA) for lost benefits; and a variety of State claims.

Specifically, the complaint in the *Clancey* action alleged, *inter alia,* that beginning in 1987, AMA engaged in a "systematic effort" to eliminate the plaintiffs' jobs by engaging in "willful discrimination on the basis of age", including, among other things, by creating oppressive work conditions, reducing the size of their sales territories, hiring younger sales people and diverting sales leads to the younger sales people; and that, as a result of AMA's actions, said employees "have lost salary and benefits, including but not limited to, health care, pension benefits, profit sharing and regular increases in compensation," and "have suffered emotional distress as a result of AMA's harassment, the termination of their employment, and their inability to find comparable work."

AMA denied the allegations and asserts that it did not discriminate against any of its employees on the basis of age. Among other defenses to the *Clancey* action, AMA contended that some of the employees were replaced by older employees and that the plaintiffs were independent contractors and not protected by the ADEA. AMA also argued that even if its actions had a discriminatory result they were not intended to discriminate.

On November 30, 1990, AMA notified Atlantic Mutual of the *Clancey* action. By letter, dated March 5, 1991, Atlantic Mutual disclaimed coverage under the aforementioned general liability and umbrella en-

dorsements, asserting that the *Clancey* complaint alleges intentional acts, not covered under its policy, and that the public policy of New York bars an insurance company from insuring against age discrimination suits.

AMA retained its own counsel to defend the *Clancey* action, which was ultimately settled for $1.2 million in December 1992. In addition, AMA asserts that it incurred approximately $575,000 in defense costs in connection with the *Clancey* action.

By letters, dated April 27, 1993 and November 22, 1993, Atlantic Mutual reaffirmed its earlier disclaimer of coverage. By letters dated June 27, 1994 and October 25, 1994, AMA again sought to have Atlantic Mutual reimburse it for its defense and settlement expenses in connection with the *Clancey* action. In those letters AMA forwarded factual information seeking to show that it was not guilty of intentional age discrimination, but at worst might be liable for disparate ***975** impact discrimination. By letter, dated November 17, 1994, Atlantic Mutual again reaffirmed its position disclaiming coverage. Thereafter, AMA commenced this action.

AMA argues that it did not engage in intentional discrimination, and that the facts in the *Clancey* complaint, at best, establish a claim for "disparate impact" age discrimination, and unintentional acts for which the policy provided coverage. It so advised Atlantic Mutual in the letters and contacts between them.

It is well settled that "[W]here an insurance policy includes the insurer's promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify ... [t]he duty to defend arises whenever the allegations in a complaint against the insured fall with the scope of risks undertaken by the insurer, regardless of how false or groundless these allegations might be" *(see, Seaboard Sur. Co. v Gillette Co.,* 64 NY2d 304, 310 [1984] [citations omitted]).

Furthermore, "[t]he duty [to defend] is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" *(Seaboard Sur. Co. v Gillette Co., supra,* at 310). Rather, the duty of the insurer to defend the insured rests on whether the complaint liberally construed alleges any facts or grounds which arguably fall within a risk covered by the policy. *(Servidone Constr. Corp. v Security Ins. Co.,* 64 NY2d 419; *International Paper Co. v Continental Cas. Co.,* 35 NY2d 322.)Therefore, "[s]o long as the claims" asserted against the insured "may rationally be said to fall within policy coverage, whatever may later prove to be the limits of the insurer's responsibility to pay, there is no doubt that it is obligated to defend" *(Schwamb v Fireman's Ins. Co.,* 41 NY2d 947, 949). This is so even if the language of the complaint does not adequately state all the facts requisite to trigger coverage. "[A] policy protects against poorly or incompletely pleaded causes as well as those artfully drafted." *(Ruder & Finn v Seaboard Sur. Co.,* 52 NY2d 663, 670.)As long as there is potentially a claim within the policy's coverage an insurer is obligated to defend even though the complaint contains ambiguous or incomplete allegations that do not clearly bring the case within coverage, if the

insurer has knowledge of the facts which would bring the case within the policy's coverage. ***976***(Fitzpatrick v American Honda Motor Co., 78 NY2d 61;American Home Assur. Co. v Port Auth., 66 AD2d 269.)*Any doubt as to whether the allegations state a claim covered by the policy must be resolved in favor of the insured. *(Muhlstock & Co. v American Home Assur. Co., 117 AD2d 117.)*

An insurer will only be relieved of the duty to defend if it demonstrates that "the allegations of the complaint cast the pleading solely and entirely within the policy exclusions, and further, that the allegations, *in toto,* are subject to no other interpretation" *(International Paper Co. v Continental Ins. Co., 35 NY2d 322, 325 [1974],supra; see also, Villa Charlotte Bronte v Commercial Union Ins. Co., 64 NY2d 846).* Stated in another way, the insurer is obligated to defend an action brought against the insured whenever the complaint alleges a cause of action covered by the policy, regardless of the ultimate factual determination of the occurrence. *(Supra.)*

It is undisputed that Atlantic Mutual's policy does not provide insurance coverage for intentional acts of discrimination. As noted, the general liability endorsement excludes from coverage occurrences resulting in personal injury or property damage that was "expected ... or intended from the standpoint of the insured." The umbrella endorsement expressly excludes coverage for occurrences which result in age discrimination that was "committed by or at the direction of the insured."

However, AMA argues, in essence, that the allegations in the *Clancey* action include, "disparate impact" discrimination, which, it claims, is not excluded from coverage. In order to state a claim for discrimination under the disparate impact theory, the complaint must allege, at a minimum, that the employer utilized a facially neutral criterion which resulted in selecting applicants for hire or promotion in a significantly discriminatory pattern *(see, Geller v Markham, 635 F2d 1027* [2d Cir 1980], *cert denied*451 US 945 [1981];*Solo Cup Co. v Federal Ins. Co., 619 F2d 1178, 1186 [7th Cir 1980], cert denied*449 US 1033; Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 Minn L Rev 1038 [1984]).* "Disparate impact" discrimination need not be intentional.

The law is unsettled as to whether disparate impact theory is applicable under the ADEA. The Supreme Court in *Hazen Paper Co. v Biggins* (507 US 604 [1993]) specifically declined to address the issue. The circuit courts have come to differing conclusions. The Second Circuit has applied disparate impact theory to ADEA. *(See, Moresco v Evans, 964 F2d 106* [2d Cir ***977** 1992]; *Lowe v Commack Union Free School Dist., 886 F2d 1364* [2d Cir 1989], *cert denied*494 US 1026 [1990];*see also, Shutt v Sandoz Crop Protection Corp., 934 F2d 186 [9th Cir 1991]; Wooden v Board of Educ., 931 F2d 376 [6th Cir 1991].)* A cause of action alleging intentional age discriminations implies within it an alternative cause of action based on disparate impact age discrimination *(see, Solo Cup Co. v Federal Ins. Co., supra,* at 1187). Other circuit courts have held that disparate impact theory should not apply to age discrimination claims. *(See, Equal Empl. Opportunity Commn. v Parker School, 41 F3d 1073 [7 th Cir 1994]; DiBiase v Smith Kline Beecham Corp., 48 F3d 719* [3d Cir 1995].) Commentators have also clashed

over the issue. *(See,* Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?,* 1995 Wis L Rev 507 [1995]; Pontz, *What a Difference ADEA Makes: Why Disparate Impact Theory Should not Apply to the Age Discrimination in Employment Act,* 74 NC L Rev 267 [1995].)

This court need not decide this issue of Federal law in order to make a determination in this action. It is clear that the *Clancey* claim alleged enough facts to make a prima facie claim for disparate impact discrimination. Therefore, there was a reasonable possibility that such claim would be recognized as valid, particularly since the *Clancey* action was pending within the Second Circuit. Additionally, the insurance policy provided for a defense against actions that are fraudulent, groundless or false. At most, Atlantic Mutual could argue that a disparate impact claim was groundless. Therefore, Atlantic Mutual had a duty to defend against the action which AMA claimed was groundless. Furthermore, Atlantic Mutual could have argued that, at most, the complaint alleged acts which amount to disparate impact treatment and that it is not protected by ADEA. In other words, the arguments being made here should have been made by Atlantic Mutual in the defense of the *Clancey* action. Accordingly, Atlantic Mutual had a duty to defend AMA in the *Clancey* action.

Atlantic Mutual argues that even if the allegation in the *Clancey* complaint are covered by the policy, it does not have a duty to defend or indemnify AMA as a matter of public policy. By opinion dated September 26, 1963, the State Superintendent of Insurance stated that acts of discrimination on the basis of race, creed, color or national origin "may not lawfully be written under the New York Insurance Law; is not authorized by Section 46 of the Insurance Law in any of its specific ***978** provisions; and, since the writing of such coverage would be against the public policy of the State of New York as expressed in its Laws Against Discrimination, may not be written under 'catch-all' provision of Section 46, subdivision 23." It is well settled that the opinions of the State Superintendent of Insurance with respect to the Insurance Law are to be accorded great weight by the courts unless contrary to the clear wording of a particular statute *(see, Matter of Liquidation of Consol. Mut. Ins. Co.,* 60 NY2d 1, 8 [1983]). The 1963 opinion did not include age discrimination and did not address unintentional or disparate impact discrimination. The language of the opinion also clearly indicates that it only addressed intentional discrimination.

Atlantic Mutual has submitted a copy of a letter dated December 3, 1990 from an attorney at the State of New York Insurance Department addressed to Atlantic Mutual. The letter states in relevant part: "The Department's position regarding insurance against legal liability arising out of discrimination because of race, creed, color or national origin was first annunciated in September, 1963 by then Deputy Superintendent Alford, in an opinion after a public hearing. A copy of that opinion is enclosed. The Department has revisited this issue several times since then, most recently in 1989, and each time has reaffirmed the position that it is against public policy in this state to provide insurance coverage against legal liability arising out of acts of discrimination, even where the act was unintentional or vicariously imposed, which may be the case for an employer. *While the Alford opinion only*

addresses, race, creed, color or national origin, it is our opinion that any act of prohibited discrimination under either federal or state law can not be insured."(Emphasis added.) Atlantic Mutual has not provided the court with a copy of its inquiry to the Insurance Department. The court also notes that this letter was apparently not publicly disseminated and does not have the same authority as an official opinion of the Insurance Department.

In any event, a subsequent circular letter from the Insurance Department dated May 31, 1994 to all "Licensed Property/Casualty Insurers and Insurance Producer Organizations" (circular letter No. 6 [1994]) concludes that insurance coverage for acts of discrimination, when based solely on either disparate impact or vicarious liability is not against public policy. The letter states in relevant part:

"The Property and Casualty Insurance Bureau, in conjunction with the Office of General Counsel, has conducted a ***979** comprehensive analysis concerning the permissibility of coverage for acts of discrimination under liability insurance policies. Based on this analysis, the Department has concluded that liability coverage for acts of discrimination, when based solely on either disparate impact (as Opposed to disparate treatment) or vicarious liability, would not be against public policy and therefore should be permitted ...

"In recent years, however, actions and recoveries under the various and evolving civil rights laws have increasingly been rooted in discrimination claims based upon disparate impact, rather than disparate treatment. In such cases, the discriminatory result does not directly proceed from specific discriminatory acts against individuals; in fact, such acts are not an element of the wrong and need play no part in the facts alleged. Rather, such results are normally grounded upon statistical or other numerical profiles that reflect disparities between or among groups sufficient to support a finding of discrimination ...

"Moreover, the Insurance Department concludes that the strong public policy against discrimination of any kind is, in fact, furthered by permitting coverage of the kinds described. By bringing to employers' attention practices that can potentially result in unlawful discrimination, insurers' loss prevention programs and underwriting standards should discourage such practices. Any employer who does not diligently attempt to modify employment procedures accordingly may well be denied insurance coverage. When unlawful acts of discrimination occur nonetheless, coverage will help ensure just compensation for victims."

Accordingly, New York's public policy does not bar coverage for disparate impact age discrimination.

The court further notes that even if coverage were against public policy or AMA was found to have practiced disparate treatment age discrimination, Atlantic Mutual would still have a duty to defend. *(See, Colon v Aetna Life & Cas. Ins. Co.*, 66 NY2d 6;*Andover Newton Theol. School v Continental Cas. Co.*, 930 F2d 89 [1st Cir 1991]; *Continental Ins. Co. v Wilcox Elec.*, slip opn No. 84-2145-s [D Kan 1986].)

Where an insurer wrongfully refuses to provide a defense to its insured, the insurer must reimburse the insured for any reasonable

sums paid in settlement. *(Rosen & Sons v Security Mut. Ins. Co., 31 NY2d 343;Feuer v Menkes Feuer Inc., 8 AD2d 294.)*The reasonableness of the settlement is generally an issue of fact that must be decided at trial. ***980***(Horn Constr. Co. v MT Sec. Serv. Corp., 97 AD2d 786;Atlantic Cement Co. v Fidelity & Cas. Co., 91 AD2d 412* [Alexander, J.], *affd*63 NY2d 798.)

Accordingly, plaintiff's motion for summary judgment is granted to the extent that defendant Atlantic Mutual is declared to have been obligated to defend AMA in the *Clancey* action and must reimburse AMA for any reasonable sum paid in settlement. Defendant's cross motion to dismiss is denied.***981**

N.Y.Sup. 1996.
AM MGT ASSN v ATL MUT INS CO
168 Misc.2d 971, 641 N.Y.S.2d 8026021996 WL 17509799971 Fair Empl.Prac.Cas. (BNA) 192664 USLW 2660864, 641 N.Y.S.2d 8026021996 WL 17509799971 Fair Empl.Prac.Cas. (BNA) 192664 USLW 2660864, 641 N.Y.S.2d 8026021996 WL 17509799971 Fair Empl.Prac.Cas. (BNA) 192664 USLW 2660864, 641 N.Y.S.2d 8026021996 WL 17509799971 Fair Empl.Prac.Cas. (BNA) 192664 USLW 2660864

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Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.
16 N.Y.3d 257, 920 N.Y.S.2d 763
NY,2011.

16 N.Y.3d 257, 945 N.E.2d 1013, 920 N.Y.S.2d 763, 2011 WL 649812, 2011 N.Y. Slip Op. 01361

Fieldston Property Owners Association, Inc., Plaintiff
v
Hermitage Insurance Company, Inc., Respondent, and Federal Insurance Company, Sued Herein as Chubb Group of Insurance Companies, Appellant. (Action No. 1.)
Hermitage Insurance Company, Inc., Respondent
v
Fieldston Property Owners Association, Inc., et al., Defendants, and Federal Insurance Company, Appellant. (Action No. 2.)
Court of Appeals of New York

Argued January 11, 2011
Decided February 24, 2011

CITE TITLE AS: Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered February 26, 2009. The Appellate Division, in the first above-entitled action, (1) reversed, on the law, an order of the Supreme Court, New York County (Herman Cahn, J.; op 2006 NY Slip Op 30541[U]), which had (a) granted a motion of defendant Federal Insurance Company (Federal) for summary judgment dismissing the amended cross claims against it, and (b) denied the cross motion of defendant Hermitage Insurance Company, Inc. (Hermitage) for summary judgment, (2) denied the motion, (3) granted the cross motion, and (4) declared that Federal is required to reimburse Hermitage for Federal's equitable share of the reasonable costs incurred by Hermitage in defending the Chapel Farm Estates, Inc. action, except for the costs Hermitage incurred in defending against the injurious falsehood claims if those claims are covered by both policies or are covered solely by the Commercial General Liability policy. The Appellate Division, in the second above-entitled action, modified, on the law, an order of that court (op 2007 NY Slip Op 34405[U]), which had denied defendant Federal's motion for summary judgment, and denied plaintiff Hermitage's cross motion for summary judgment. The modification consisted of granting the cross motion, and declaring that Federal is obligated to reimburse Hermitage for Federal's equitable share of the reasonable costs incurred by Hermitage in defending the Chapel Farm action, except for the costs Hermitage incurred in defending against the injurious falsehood claims if those claims are covered by both policies or are covered solely by the Commercial General Liability policy. The Appellate Division affirmed the order as modified. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of Supreme Court entered August 10, 2006, and modified the order of said

Court entered January 25, 2007, properly made?"

Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc., 61 AD3d 185, reversed.

HEADNOTE

Insurance
Duty to Defend and Indemnify
Allocation of Defense Costs—Effect of "Other Insurance" Clause

In declaratory judgment actions relating to a dispute between the Commercial General Liability (CGL) policy insurer and the Association Directors and Officers Liability (D&O) policy insurer over their respective responsibility for the cost of defending their mutual insured against two underlying actions, the CGL policy insurer had the primary duty to defend the insured to the exclusion of any duty owed by the D&O policy insurer based on the language of the "other insurance" clauses in the policies and notwithstanding that the D&O policy insurer appeared to have an obligation to indemnify the insured for a greater proportion of the causes of action in the underlying actions. An insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy regardless of whether the complaint asserts additional claims that fall outside the policy's coverage. In the context of primary and excess insurance, a primary insurer has the primary duty to defend and generally is not entitled to contribution from an excess insurer. Here, where the possibility that the CGL policy covered at least one cause of action in each of the two underlying complaints was conceded, the plain language of the "other insurance" clauses of the policies was determinative. The CGL policy provided that it was primary insurance, except in regard to types of insurance not relevant here. The D&O policy provided that its coverage was excess where any loss, including defense costs, arising from any claim against the insured was insured under any other valid policy. Thus, under the terms of the D&O policy, the CGL policy constituted "other insurance" which would cover the loss arising from the defense of the two underlying actions.

RESEARCH REFERENCES

Am Jur 2d, Insurance §§ 1396, 1747, 1755, 1765–1767.

Couch on Insurance (3d ed) §§ 200:38, 200:41, 219:33.

NY Jur 2d, Insurance §§ 2080, 2335–2337, 2339, 2343–2346.

ANNOTATION REFERENCE

See ALR Index under Excess Insurance; Insurance and Insurance Companies; Other Insurance.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

***259** Query: "other insurance clause" & duty /3 defend /s primary /2 insurer

POINTS OF COUNSEL

Hogan & Hartson LLP (*Jonathan A. Constine*, of the District of Columbia bar, admitted pro hac vice, of counsel), and *Hogan & Hartson LLP*, New York City (*Katherine M. Bolger* and *Rachel F. Strom* of counsel), for appellant.

The Appellate Division's decision is contrary

to this Court's precedent concerning the scope of the duty to defend and the application of policy language. (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208; *Caporino v Travelers Ins. Co.*, 62 NY2d 234; *Government Empls. Ins. Co. v Kligler*, 42 NY2d 863; *Nationwide Mut. Ins. Co. v Travelers Ins. Co.*, 8 AD3d 861; *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169; *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 281 AD2d 107, 98 NY2d 435; *Hirschhorn v Town of Harrison*, 210 AD2d 587; *Marshall v Tower Ins. Co. of N.Y.*, 44 AD3d 1014; *B&W Heat Treating Co., Inc. v Hartford Fire Ins. Co.*, 23 AD3d 1102.)

Gold, Stewart, Kravatz, Benes & Stone, LLP, Westbury (*Jeffrey B. Gold*, *James F. Stewart* and *Max W. Gershweir* of counsel), for respondent.

I. The "same risk" rule dictates that the policies' "other insurance" clauses do not apply to the claims against Fieldston Property Owners Association, Inc., with one possible exception, and thus to that extent, Federal Insurance Company must reimburse Hermitage Insurance Company, Inc., for its equitable share of Fieldston's defense costs. (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 14 NY3d 796; *Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682; *NL Indus., Inc. v Commercial Union Ins. Co.*, 935 F Supp 513; *Pennsylvania Manufacturers' Assn. Ins. Co. v Liberty Mut. Ins. Co.*, 39 AD3d 1161; *HRH Constr. Corp. v Commercial Underwriters Ins. Co.*, 11 AD3d 321; *State of New York v Blank*, 27 F3d 783; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208; *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369; *Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265; *Soho Plaza Corp. v Nationwide Mut. Ins. Co.*, 244 AD2d 184.) II. This Court should reject Federal Insurance Company's improper attempt to argue for the first time that the Hermitage Insurance Company, Inc. policy covers the injurious falsehood claims. (*Snyder v Wetzler*, 84 NY2d 941; *Bingham v New York City Tr. Auth.*, 99 NY2d 355.)**2

***260** OPINION OF THE COURT

Ciparick, J.

This appeal involves two declaratory judgment actions relating to a dispute between two insurers—Hermitage Insurance Company, Inc. (Hermitage) and Federal Insurance Company (Federal)[FN*]—over their respective responsibility for the cost of defending Fieldston Property Owners Association, Inc. (Fieldston), the insurers' mutual insured, against two underlying actions. Specifically, we are asked to determine whether the "other insurance" clauses in the two applicable insurance policies require Hermitage to bear the entire defense costs in the two underlying actions against Fieldston. Based on the language of the policies, we conclude that Hermitage had the primary duty to defend Fieldston, to the exclusion of any duty owed by Federal.

I.

Hermitage issued a Commercial General Liability (CGL) policy to Fieldston for the period July 5, 2000 to July 5, 2001. The "per occurrence" CGL policy provides coverage for "bodily injury," "property damage," and "personal and advertising injury" as defined in the policy, among other things. The "other insurance" clause of Hermitage's CGL policy provides, as relevant here:

"If other valid and collectible insurance is available to the insured for a loss we cover . . . our obligations are limited as follows:
"a. Primary Insurance.
"This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described [herein].
"b. Excess Insurance.
"This insurance is excess over [certain types of insurance not relevant here]."

Federal issued an "Association Directors and Officers Liability" (D&O) policy covering the policy period from February 13, 1999 to February 13, 2002. The D&O policy is a "claims ***261** made" policy providing coverage for "wrongful acts," as that term is broadly defined in the policy, committed by the directors and officers of Fieldston. The D&O policy also covers ****3** certain enumerated "offenses" committed before or during the policy period. The "other insurance" clause of Federal's D&O policy provides:
"If any Loss arising from any claim made against the Insured(s) is insured under any other valid policy(ies) prior or current, then this policy shall cover such Loss, subject to its limitations, conditions, provisions, and other terms, only to the extent that the amount of such Loss is in excess of the amount of such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the limits provided in this policy."

"Loss" is defined in Federal's D&O policy to mean "the total amount which the Insured(s) becomes legally obligated to pay on account of all claims made against it for Wrongful Acts with respect to which coverage hereunder applies, including . . . Defense Costs."

By letter dated April 20, 2001, nonparty Chapel Farm Estates (Chapel Farm) informed Fieldston that Fieldston's officers had been making "false statements and fraudulent claims" with respect to Chapel Farm's "right to access its property from" adjacent public streets. Specifically, Chapel Farm claimed that, in statements "given broad publication to a number of . . . community groups and elected officials," including statements made at a meeting of the Community Board's Land Use Committee, Fieldston made false claims as to Chapel Farm's ability to access certain property over "private streets" purportedly owned by Fieldston for the purpose of a construction project. Chapel Farm thereafter commenced an action against Fieldston and its officers in federal district court asserting several causes of action, including "injurious falsehood," and seeking damages, among other remedies. Some of the facts and events described in the complaint apparently related to events that occurred during the D&O policy period, but not during the CGL policy period.

By letter dated October 30, 2001, Hermitage demanded that Federal acknowledge its coverage obligations to Fieldston for defense of the Chapel Farm's federal action. Specifically, Hermitage stated:
***262** "The complaint makes reference to a variety of alleged wrongful acts which are not covered under [the CGL] policy. Seven out of the eight causes of action in the complaint involve allegations that are clearly related to D&O issues and we feel that [Federal] has a primary defense obligation

under [its] policy."

The letter also stated that "it appears that only the cause [of action] for injurious falsehood might trigger a defense obligation under" the CGL policy. Relying on its "other insurance" clause, Federal refused to provide coverage for defense costs. Thereafter, Hermitage agreed to defend Fieldston in the Chapel Farm federal action under a full reservation of its rights.

Shortly after the federal action was dismissed in August 2003, Chapel Farm—by **4 then known as Villanova Estates, Inc. (Villanova)—filed an action in Supreme Court. Although the state action included more causes of action, the operative facts stated therein were nearly identical to the federal action, except that the new complaint included additional, later-occurring events. The eighteenth cause of action set forth an injurious falsehood claim; the remaining causes of action sought declaratory and injunctive relief and damages related to Fieldston's purported interference with Villanova's (formerly known as Chapel Farm) property rights, among other things. As with the federal complaint, some of the operative events allegedly occurred when the D&O policy, but not the CGL policy, was in effect.

By letter dated October 24, 2003, Hermitage reserved its right to deny coverage for the Villanova action, specifically advising Fieldston that only the injurious falsehood cause of action was potentially covered. However, Hermitage, once again, agreed to defend Fieldston, subject to a full reservation of its rights, including the right to seek reimbursement from Federal for the cost of the defense. Again relying on its "other insurance" clause, Federal disclaimed coverage, asserting that its coverage for the defense costs of the Villanova action was excess to Hermitage's policy.

In the state action, Fieldston successfully moved to dismiss certain causes of action, including the injurious falsehood claim. After the partial dismissal of the state action was affirmed on appeal (23 AD3d 160 [1st Dept 2005]), Hermitage demanded that Federal provide a defense as to the remaining causes of action. Federal conceded and assumed the defense of the state action.

***263** These two declaratory judgment actions ensued, seeking to establish the respective defense cost responsibilities of Hermitage and Federal. Fieldston commenced the first action against both insurers to establish their obligation to cover the defense costs of the underlying Chapel Farm federal action. Supreme Court granted Federal's motion for summary judgment dismissing Hermitage's cross claims against it and denied Hermitage's cross motion for summary judgment (2006 NY Slip Op 30541[U]). Supreme Court concluded, in relevant part, that the "other insurance" clauses in the respective policies rendered Hermitage the primary and Federal the excess insurer as to the defense costs of the federal action. Hermitage appealed.

The second declaratory judgment action was brought by Hermitage against Federal seeking reimbursement—in full or on an equitable basis—for the costs incurred in defending the underlying Villanova action. In a separate order, Supreme Court denied Federal's motion and Hermitage's cross motion for summary judgment (2007 NY Slip Op 34405[U]). In relevant part, Supreme Court concluded that neither Hermitage nor Federal

had demonstrated their respective positions as a matter of law. Hermitage appealed, and Federal cross-appealed, from the second Supreme Court order.

The Appellate Division in the first action reversed, on the law, denied Federal's **5 motion for summary judgment, granted Hermitage's cross motion for summary judgment, and declared that Federal is required to reimburse Hermitage for its equitable share of defending the federal Chapel Farm action. In the second action, it modified, on the law, to the extent of granting Hermitage's cross motion for summary judgment and declaring that Hermitage is entitled to recover from Federal its equitable share of defending the Villanova state action, except to the extent that those costs related to the injurious falsehood claims (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 61 AD3d 185 [1st Dept 2009]). The Appellate Division rejected Federal's argument, reasoning:

"With the possible exception of the injurious falsehood claims, all the other losses (including defense costs) that could result from the other causes of action are not insured under the CGL policy but at least some of them are insured under the D&O policy. Accordingly, the 'other insurance' clause [in the D&O policy] is inapplicable to the risks of all *264 other such losses, and the D&O policy thus provides primary coverage with respect to some of those risks. In other words, putting aside that possible exception, the CGL and D&O policies do not provide concurrent coverage as they do not insure against the same risks" (*id.* at 191).

The Appellate Division granted Federal leave to appeal to this Court, certifying the following question: "Was the order of this Court . . . properly made?" We now reverse and answer the certified question in the negative.

II.

In resolving insurance disputes, we first look to the language of the applicable policies (*see Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]). If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language (*see id.*). Here, the parties have conceded at least the possibility that both Hermitage's CGL and Federal's D&O policies cover the injurious falsehood claims in the two underlying actions. Thus, based on the "other insurance" clauses, Hermitage's CGL policy is primary to Federal's D&O policy as they relate to defense costs. The question presented distills to whether the Hermitage policy's primacy on the injurious falsehood claim triggers a primary duty to defend against the remaining causes of action in the two complaints, thus preempting any obligation by Federal. We say it does.

An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, "in order to ensure [an] adequate . . . defense of [the] insured," without regard to the insured's ultimate likelihood of prevailing on the merits of a claim (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]; *see also Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). As we have explained on multiple occasions, the insurer's **6 duty to defend its insured "arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65

[1991]; *see also* *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Moreover, if " '*any* of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action' " (***265***Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002], quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997] [emphasis added and brackets omitted]). It is "immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage" (*id.* at 444 [citation, internal quotation marks and brackets omitted]).

In the context of primary and excess insurance, we have explained that a ""primary insurer 'has the primary duty to defend on behalf of its insureds' " (*General Motors*, 4 NY3d at 455, quoting *General Acc. Fire & Life Assur. Corp. v Piazza*, 4 NY2d 659, 669 [1958] [brackets omitted]), and it generally has no " 'entitlement to contribution from an excess insurer' " (*id.* at 456, quoting *Firemen's Ins. Co. of Washington, D.C. v Federal Ins. Co.*, 233 AD2d 193 [1st Dept 1996], *lv denied* 90 NY2d 803 [1997]). Although an excess insurance carrier may elect to participate in an insured's defense to protect its interest, it has "no obligation to do so" (*id.*).

As relevant here, Federal's D&O policy provides that its coverage is excess where "any Loss arising from any claim made against the Insured(s) is insured under any other valid policy(ies)." "Loss" as defined in the D&O policy includes "Defense Costs." Based on the broad duty to defend, and upon the conceded possibility that Hermitage's CGL policy covers at least one cause of action in each of the two underlying complaints, Hermitage has a duty to provide a defense to the entirety of both complaints (*see e.g.* *Town of Massena*, 98 NY2d at 443-444). Thus, under the terms of Federal's D&O policy, there does exist "other insurance" which would cover the "loss" arising from the defense of the two underlying actions. Accordingly, Hermitage had an obligation to defend both of the underlying actions without contribution from Federal (*see Firemen's Ins. Co.*, 233 AD2d at 193; *Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 21 [1st Dept 2009], citing *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373 [1985]), notwithstanding the fact that Federal would appear to have an obligation to indemnify Fieldston for a greater proportion of the causes of action, if successfully prosecuted.

We acknowledge that the result reached by the Appellate Division has much equitable appeal. If the policies were drafted using different language, we might hold differently, but we may not judicially rewrite the language of the policies at issue here to reach a more equitable result (*see e.g.* *Raymond Corp.*, 5 NY3d at 162).

***266** Accordingly, the order of the Appellate Division should be reversed, with costs; in action No. 1, the judgment of Supreme Court should be reinstated, in action No. 2, defendant **7 Federal Insurance Company's motion for summary judgment should be granted, and the certified question should be answered in the negative.

Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Order reversed, etc.

FOOTNOTES

16 N.Y.3d 257
(Cite as: 16 N.Y.3d 257, 945 N.E.2d 1013)

FN* Federal was apparently improperly originally named as "Chubb Group of Insurance Companies" in the first declaratory judgment action.

NY,2011.
FIELDSTON INC v HERMITAGE CO
16 N.Y.3d 257, 945 N.E.2d 1013578920 N.Y.S.2d 7636022011 WL 6498129992011 N.Y. Slip Op. 013614603, 945 N.E.2d 1013578920 N.Y.S.2d 7636022011 WL 6498129992011 N.Y. Slip Op. 013614603, 945 N.E.2d 1013578920 N.Y.S.2d 7636022011 WL 6498129992011 N.Y. Slip Op. 013614603, 945 N.E.2d 1013578920 N.Y.S.2d 7636022011 WL 6498129992011 N.Y. Slip Op. 013614603

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33 A.D.3d 447
(Cite as: 33 A.D.3d 447, 823 N.Y.S.2d 360)

C

Bravo Realty Corp. v Mt. Hawley Ins. Co.
33 A.D.3d 447, 823 N.Y.S.2d 360
NY,2006.

33 A.D.3d 447, 823 N.Y.S.2d 360, 2006 WL 2947641, 2006 N.Y. Slip Op. 07421

Bravo Realty Corp. et al., Respondents
v
Mt. Hawley Insurance Company, Appellant.
Supreme Court, Appellate Division, First Department, New York

October 17, 2006

CITE TITLE AS: Bravo Realty Corp. v Mt. Hawley Ins. Co.

HEADNOTE

Insurance
Duty to Defend and Indemnify

Defendant insurer was required to defend plaintiffs in underlying negligence action since alleged conduct on plaintiffs' behalf fell within policy's coverage; fact that underlying complaint also sought recovery on theories arguably not within coverage did not avail defendant.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 11, 2005, which, inter alia, granted plaintiffs' motion for partial summary judgment declaring that defendant insurer is obligated to defend plaintiffs, its insureds, in the underlying action, unanimously affirmed, with costs.

The duty to defend is "exceedingly broad" and an insurer will be required to defend its insured whenever the allegations of the complaint suggest a reasonable possibility of coverage (*see* *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). Here, the complaint in the underlying action seeks recovery, at least in part, on the theory that negligence on the part of plaintiff insureds proximately caused the alleged damages and, as such, alleges conduct falling within the subject policy's coverage. The allegations of negligence are not necessarily based on violations of lease obligations, as defendant argues (*see* *Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189 [2006]). That the underlying complaint also seeks recovery on theories alleging intentional conduct and breach of contract arguably not within the coverage, does not, given the allegations that do fall within the coverage, avail defendant insurer insofar as it seeks to avoid providing its insureds a defense (***448***Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73-74 [1989]). Nor has defendant insurer shown that the allegations of the complaint cast the pleading " 'solely and entirely within the policy exclusions' " it invokes (*see* *Automobile Ins. Co. of Hartford*, 7 NY3d 131, 137 [2006], quoting *Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 159 [1992]). The record does not permit us to conclude, as a matter of law, that the damages claimed in the underlying action are barred by the policy's exclusions for known loss, expected or intended property damage, or discrimination, and we find defendant's interpretation of the policy's breach of contract exclusion untenably broad (*see* *Hotel des Artistes, Inc. v General Acc.*

33 A.D.3d 447
(Cite as: 33 A.D.3d 447, 823 N.Y.S.2d 360)

Ins. Co. of Am., 9 AD3d 181, 189-193 [2004], *lv dismissed* 4 NY3d 739 [2004]).**2

We have considered defendant's remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., Andrias, Sullivan, McGuire and Malone, JJ.

NY,2006.
Bravo Realty Corp. v Mt. Hawley Ins. Co.
33 A.D.3d 447, 823 N.Y.S.2d 3606022006 WL 29476419992006 N.Y. Slip Op. 074214603, 823 N.Y.S.2d 3606022006 WL 29476419992006 N.Y. Slip Op. 074214603, 823 N.Y.S.2d 3606022006 WL 29476419992006 N.Y. Slip Op. 074214603

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--- N.E.2d ----, 19 N.Y.3d 730, 2012 WL 5833969 (N.Y.), 2012 N.Y. Slip Op. 07849
(Cite as:)

H

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.
AMERICAN BUILDING SUPPLY CORP., Appellant,
v.
PETROCELLI GROUP, INC., Respondent, Pollak Associates, Defendant.

Nov. 19, 2012.

Background: Insured brought action against insurance broker, alleging that broker was negligent and in breach of contract by failing to procure adequate general liability insurance coverage for building it subleased. The Supreme Court, New York County, Eileen A. Rakower, J., 2010 WL 1219508, denied broker's motion for summary judgment, and broker appealed. The Supreme Court, Appellate Division, First Department, 81 A.D.3d 531, 918 N.Y.S.2d 28, reversed. Leave to appeal was granted.

Holdings: The Court of Appeals, Ciparick, J., held that:
(1) issues of fact as to whether insured requested specific general liability coverage for its employees precluded summary judgment, and
(2) insured's failure to read and understand policy's coverage exclusion for its employees was not absolute bar to recovery against broker.

Reversed.

Pigott, J., filed dissenting opinion in which Graffeo, J., concurred.

West Headnotes

[1] Insurance 217 ⚿1669

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1669 k. In General. Most Cited Cases

Insurance 217 ⚿1671

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1671 k. Failure to Procure Coverage. Most Cited Cases

Insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage.

[2] Insurance 217 ⚿1671

217 Insurance
217XI Agents and Agency

217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1671 k. Failure to Procure Coverage. Most Cited Cases

To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy.

[3] Insurance 217 ⚿1671

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1671 k. Failure to Procure Coverage. Most Cited Cases

A general request for coverage will not satisfy the requirement for negligence or breach of contract claims against an insurance broker of a specific request for a certain type of coverage.

[4] Federal Civil Procedure 170A ⚿2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases

Genuine issues of material fact as to whether insured requested specific general liability coverage for its employees in case of accidental injury at building that insured subleased and to which the public did not enter and as to whether insurance broker, being aware of such request, failed to procure the requested coverage precluded summary judgment on insured's breach of contract and negligence claims against broker.

[5] Insurance 217 ⚿1671

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1671 k. Failure to Procure Coverage. Most Cited Cases

Insured's failure to read and understand the general liability policy obtained by its broker for building in which no one but insured's employees ever entered was not an absolute bar to recovery on its negligence and breach of contract claims against broker arising from fact that policy contained cross liability exclusion clause excluding coverage to insured's employees despite insured's alleged request for specific general liability coverage for its employees in case of accidental injury.

[6] Insurance 217 ⚿1669

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1669 k. In General. Most Cited Cases

While it is certainly the better practice for

an insured to read its policy, an insured should have a right to look to the expertise of its insurance broker with respect to insurance matters.

[7] Insurance 217 ⚿1670

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1670 k. Negligence in General. Most Cited Cases

The insured's failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against an insurance broker.

Stuart S. Zisholtz, for appellant.

Stephen C. Cunningham, for respondent.

Defense Association of New York, Inc., amicus curiae.

CIPARICK, J.:

In this appeal, we are asked to determine if an action for negligence and breach of contract lies against an insurance broker for failure to procure adequate insurance coverage where the insured received the policy without complaint. We hold, where issues of fact exist as to a request for specific coverage, that the insured can maintain such an action and defendant's motion for summary judgment should be denied.

I.

Plaintiff American Building Supply Corp. (ABS) is a business which sells and furnishes building materials to general contractors. Plaintiff is located both in Manhattan and the Bronx. This action only concerns the premises located in the Bronx, where plaintiff is the sole tenant of a building it subleased from DRK, LLC (DRK), which had procured the property by entering into a lease agreement with the New York City Industrial Development Agency (N.Y.CIDA). Pursuant to the lease agreement between DRK and NYCIDA, DRK was, among other things, required to procure general liability insurance from a carrier licensed to do business in the State of New York in the minimum amount of $5,000,000 for bodily injury and property damage. The sublease agreement between ABS and DRK, both owned and managed by the same person, noted that the sublessee consented to all the terms of the lease agreement.

Prior to October 2004, Pollack Associates, not a party to this appeal, was plaintiff's insurance broker and procured a policy with the Burlington Insurance Company (Burlington), an excess line carrier not licensed in the State of New York. DRK was named an additional insured under the policy. The policy did not comply with the requirements set forth by the lease agreements and was subsequently cancelled due to nonpayment of premiums. In October 2004, plaintiff hired defendant Petrocelli Group, Inc. to replace Pollack as its insurance broker. Defendant arranged to reinstate the Burlington policy. Plaintiff claims that in its discussions with defendant regarding a new policy, it specifically requested general liability coverage for its employees in case of injury, as required by the lease agreements. Plaintiff also alleged that it informed defendant that only employees entered the premises, never customers, as no retail business was conducted at the

Bronx location. Finally, plaintiff avers that defendant visited the premises and had assured NYCIDA that the insurance deficiencies would be corrected when the policy was up for renewal.

Defendant then renewed the Burlington policy for the period of June 14, 2005 through June 14, 2006. The policy was essentially the same as plaintiff had previously received through Pollack. The policy contained a cross liability exclusion clause that provided: "This insurance does not apply to any actual or alleged 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to ... A present, former, future or prospective partner, officer, director, stockholder or employee of any insured." Plaintiff did not read the insurance policy upon receipt, nor did the broker.

In October 2005, one of plaintiff's employees was injured at the Bronx facility in the course of performing his duties. Burlington disclaimed coverage based upon the cross-liability exclusion. DRK sought a declaratory judgment against Burlington seeking a determination that Burlington was obligated to defend and indemnify plaintiff. Burlington moved for summary judgment. Supreme Court denied the motion and ordered Burlington to defend and indemnify plaintiff. The Appellate Division reversed, holding that Burlington had no duty to defend or indemnify based on the cross liability exclusion clause (*see* *DRK, LLC v. Burlington Ins. Co.*, 74 A.D.3d 693, 905 N.Y.S.2d 58 [1st Dept 2010] *lv denied* 16 N.Y.3d 702 [2011]).

Plaintiff next commenced this action against its broker for negligence and breach of contract in connection with defendant's procurement of insufficient insurance. Following discovery, defendant moved for summary judgment dismissing the complaint. Supreme Court denied the motion, holding that "an issue of fact exists which precludes summary judgment." Specifically, the court found that plaintiff testified that it informed defendant it required coverage if any employee injured himself or herself and that a jury could rationally conclude that plaintiff made a specific request for such coverage to defendant. The Appellate Division reversed, holding that although issues of fact may exist as to plaintiff's request for specific coverage, plaintiff's failure to "read and under[stand] [the] policy ... precludes recovery in this action (*American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 81 A.D.3d 531, 531–532, 918 N.Y.S.2d 28 [1st Dept 2011]). We granted leave to appeal (17 N.Y.3d 711 [2011]) and now reverse.

II.

[1][2][3] "[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Murphy v. Kuhn*, 90 N.Y.2d 266, 270 [1997]). To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy (*see* *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 155 [2006]). "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage" (*id.* at 158, 818 N.Y.S.2d 798, 851 N.E.2d 1149).

[4] Here, plaintiff testified, at its deposi-

tion, that it specifically requested "general liability for the employees ... if anybody was to trip and fall and get injured in any way." Plaintiff also testified that defendant was aware of ABS's operations, i.e., that there were no retail sales to the public at the premises and that the only persons at the premises were plaintiff's employees. Defendant, of course, maintains that the procured coverage satisfied plaintiff's request. Like the courts below, we conclude that issues of fact exist as to whether plaintiff specifically requested coverage for its employees in case of accidental injury and defendant, being aware of such request, failed to procure the requested coverage.

This would be a more difficult case if it rested on plaintiff's uncorroborated word alone. Here, however, the evidence arguably supports plaintiff's claim. Since no one but employees ever entered the premises, the coverage defendant obtained, which excluded coverage for injuries to employees, hardly made sense.

III.

[5] Defendant maintains, however, that plaintiff's claim is barred by its receipt of the insurance policy without complaint. In *Hoffend* we left open the question of whether a plaintiff who has received an insurance policy and had an opportunity to read it and had not requested any changes is barred from recovery (*see* 7 N.Y.3d at 157, 818 N.Y.S.2d 798, 851 N.E.2d 1149). Various appellate courts have held that once an insured has received his or her policy, he or she is presumed to have read and understood it and cannot rely on the broker's word that the policy covers what is requested (*see Busker on Roof Ltd. Partnership Co. v. Warrington*, 283 A.D.2d 376, 376–377, 725 N.Y.S.2d 45 [1st Dept 2001]; *Rotanelli v. Madden*, 172 A.D.2d 815, 817, 569 N.Y.S.2d 187 [2d Dept 1991] *lv denied* 79 N.Y.2d 754 [1992]; *Madhvani v. Sheehan*, 234 A.D.2d 652, 654–655, 650 N.Y.S.2d 490 [3d Dept 1996]; *Chase's Cigar Store v. Stam Agency*, 281 A.D.2d 911, 912, 722 N.Y.S.2d 320 [4th Dept 2001]). However, other appellate courts have been more forgiving and have held that receipt and presumed reading of the policy does not bar an action for negligence against the broker (*see Kyes v. Northbrook Prop. & Cas. Ins. Co.*, 278 A.D.2d 736, 737–738, 717 N.Y.S.2d 757 [3d Dept 2000]; *Reilly v. Progressive Ins. Co.*, 288 A.D.2d 365, 366, 733 N.Y.S.2d 220 [2d Dept 2001]). This may be such a case.

[6][7] The facts as alleged here, that plaintiff requested specific coverage and upon receipt of the policy did not read it and lodged no complaint, should not bar plaintiff from pursuing this action. While it is certainly the better practice for an insured to read its policy, an insured should have a right to "look to the expertise of its broker with respect to insurance matters" (*Baseball Off. of Commr. v. Marsh & McLennan*, 295 A.D.2d 73, 82, 742 N.Y.S.2d 40 [1st Dept 2002]; *see also Bell v. O'Leary*, 744 F.2d 1370, 1373 [8th Cir1984]). The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker (*see Baseball Off. of Commr.* , 295 A.D.2d at 82, 742 N.Y.S.2d 40).

Because there are issues of fact as to whether plaintiff requested specific coverage for its employees and whether defendant failed to secure a policy as requested, we conclude that summary judgment is inappropriate in this matter. We further conclude

that plaintiff's failure to read and understand the policy should not be an absolute bar to recovery under the circumstances of this case.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the motion by defendant Petrocelli Group, Inc. for summary judgment denied.

PIGOTT, J. (dissenting):

It seems to me elementary that before you can complain about the contents of any contract, you should at least have read it. Nearly 100 years ago we held that when an insured receives an insurance contract, he or she has a duty to read and examine its contents (*see Metzger v. Aetna Ins. Co.*, 227 N.Y. 411, 416 [1920]). There, we held that the insured is "conclusively presumed" to know the contents of the insurance contract and assent to it, when he or she signs or accepts the contract (*id.*). While it is true that, until now, this Court had yet to decide whether the presumption applies to protect an insurance broker that has allegedly failed to obtain requested coverage, several appellate courts have considered the issue and appropriately applied the presumption (*see McGarr v. The Guardian Life Ins. Co. of Am.*, 19 A.D.3d 254, 256, 799 N.Y.S.2d 19 [1st Dept 2005]; *Laconte v. Bashwinger Ins. Agency*, 305 A.D.2d 845, 758 N.Y.S.2d 562 [3d Dept 2003]; *Busker on the Roof Ltd. Partnership Co. v. Warrington*, 283 A.D.2d 376, 725 N.Y.S.2d 45 [1st Dept 2001]).

The majority offers no compelling reason why this basic requirement, i.e. that you read the thing, should not obtain in cases involving an insurance broker. Although an insured may claim to have relied upon the broker's experience and knowledge in certain circumstances, we have made clear that insureds are in a better position to know both their own assets and ability to protect themselves than agents or brokers (*Murphy v. Kuhn*, 90 N.Y.2d 266, 273 [1997]). Agents and brokers are not "personal financial counselors and risk managers, approaching guarantor status" (*id.*). The relationship between a broker and an insured is not one in which continuing obligations to advise might exist but, rather, is an ordinary commercial relationship that does not give rise to a duty to provide such ongoing guidance (*see id.* at 270–271, 660 N.Y.S.2d 371, 682 N.E.2d 972; *see also Kimmell v. Schaefer*, 89 N.Y.2d 257, 263–264 [1996]).

There are, of course, limitations on the presumption rule. For example, the presumption is overcome when a broker fails to correct a clear misimpression created by a binder (*see Arthur Glick Truck Sales v. Spadaccia–Ryan–Haas, Inc.*, 290 A.D.2d 780 [2002]), or when a broker makes an affirmative misrepresentation regarding coverage in response to questioning by the client after reviewing the policy (*Kves v. Northbrook Prop. & Cas. Ins. Co.*, 278 A.D.2d 736 [2000]). Those limitations are not alleged here.

By permitting ABS to evade the conclusive presumption rule, the majority in essence allows an insured, months and possibly years after a policy is procured, to complain, following a loss, that it made a request of its broker for the relevant coverage but it was not forthcoming. This will almost always result in a "he said-she said" battle of what occurred during coverage discussions between the insured and broker.

In short, I agree with the Appellate Divi-

sion that Petrocelli demonstrated its prima facie entitlement to judgment as a matter of law. It submitted the renewal policy to ABS and ABS concedes that it received it. Thus, ABS was conclusively presumed to know the contents, including the exclusions, of the policy. In opposition, ABS failed to raise a triable issue of fact. Had ABS read the policy, and claimed not to have understood the cross-liability exclusion and that Petrocelli misled it with respect to the meaning thereof, a clear question of fact would have been presented. However, ABS does not dispute receipt of the policy and admitted that it did not review it; and, as the Appellate Division noted, the record failed to demonstrate any exception to the presumption that ABS assented to the policy terms.

Order reversed, with costs, and motion by defendant Petrocelli Group, Inc. for summary judgment denied.

Chief Judge LIPPMAN and Judges READ and SMITH concur. Judge PIGOTT dissents and votes to affirm in an opinion in which Judge GRAFFEO concurs.

N.Y.,2012.
American Bldg. Supply Corp. v. Petrocelli Group, Inc.
--- N.E.2d ----, 19 N.Y.3d 730, 2012 WL 5833969 (N.Y.), 2012 N.Y. Slip Op. 07849

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Court of Appeals of New York.
METZGER
v.
AETNA INS. CO.

Jan. 6, 1920.

Action by Emanuel Metzger, as receiver of the Kingston Chemical Manufacturing Company, against the AEtna Insurance Company. From judgment of the Appellate Division (186 App. Div. 627, 175 N. Y. Supp. 428) reversing a judgment dismissing the complaint rendered upon the direction of the court and granting a new trial, defendant appeals.

Judgment of the Appellate Division reversed, and that of the Trial Term affirmed.

West Headnotes

[1] Insurance 217 ⚿2128

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2128 k. Duration of Coverage. Most Cited Cases
(Formerly 217k177)

Where "builder's risk clause", stipulating that policy was to cover property only while building was in process of erection, was attached, as a rider, to fire policy insuring building for term of one year, the building was covered by such policy only while being constructed.

[2] Insurance 217 ⚿2128

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2128 k. Duration of Coverage. Most Cited Cases
(Formerly 217k177)

A builder's risk clause, attached, as a rider, to a fire policy, and providing that the building was to be covered by such policy only during process of construction, held a valid condition under Insurance Law, § 121.

Contracts 95 ⚿93(2)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k93 Mistake
95k93(2) k. Signing in Ignorance of Contents in General. Most Cited Cases

Ignorance through negligence or inexcusable trustfulness will not relieve party of his contract obligations.

Contracts 95 ⚿93(2)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k93 Mistake
95k93(2) k. Signing in Ignorance of Contents in General. Most Cited Cases

One who signs or accepts a written contract in the absence of fraud or other wrongful act on the part of another contracting party is conclusively presumed to know its contents, and to assent to them, and there can be no evidence for the jury as to his understanding of its terms.

Insurance 217 ⚿1887(3)

217 Insurance
217XIII Contracts and Policies
217XIII(K) Reformation
217k1884 Grounds
217k1887 Mistake
217k1887(3) k. Terms or Durations of Policies. Most Cited Cases
(Formerly 217k143(6))

Where builder's risk clause, providing that the policy was to cover the building only while it was being constructed, was attached, as a rider, to policy insuring building against fire for a term of one year, and insured accepted policy when delivered with rider so attached without reading policy, though a lawyer and experienced in matters of insurance, insured was not entitled to have policy reformed so as to cover building for a term of one year upon ground of mistake.

Reformation of Instruments 328 ⚿16

328 Reformation of Instruments
328I Right of Action and Defenses
328k15 Grounds for Reformation
328k16 k. In General. Most Cited Cases

While in equity a rescission of a contract may be adjudged on the ground of a unilateral mistake in its contents, there must be mutual mistake, or inadvertence, or the excusable mistake of one party and fraud of the other as to agreement on which the minds of the parties have met, in order that a reformation may be adjudged.

****815 *412** Appeal from Supreme Court, Appellate Division, Third Department. John N. Carlisle, of Albany, for appellant.

Joseph M. Fowler, of Kingston, for respondent.

***413** COLLIN, J.

The action is to reform a policy of fire insurance, issued by the defendant to the Kingston Chemical Manufacturing Company, and to recover upon the policy as reformed. The trial justice, at the close of the evidence in behalf of the plaintiff, ordered the dismissal of the complaint. The Appellate Division reversed the consequent judgment and granted a new trial.

The direct evidence, and the reasonable inferences from it, most favorable to the plaintiff, would have permitted the jury to find as the facts: The policy, issued June 9, 1916, insured for the term of one year from that date, against fire, in the sum of $2,500, a factory building in process of erection. Attached to and a part of the policy when delivered was this slip or rider:

'*Builder's Risk Clause.*—It is understood and agreed that this policy covers the property described herein only while the building is in process of erection and completion and not as an occupied building and that all liability under this policy shall cease when the building shall become occupied in whole or in part; except that if the building is to be a manufacturing plant machinery may be set up and tested.'

The policy was delivered by the agent of the defendant to the president of the insured, who, at about its date, had told the agent that the building was inclosed and to write a policy for $2,500 at present. Prior to the delivery there were no other negotiations and no agreement between the parties. Upon the outside of the folded policy, as delivered, appeared the words, 'Expires June 9, 1917,' and the insured's president, at the delivery, said to the defendant's agent, 'This policy is written for a year,' and received the reply, ***414** 'Yes,' and the statement:

'He (the agent) had to write it at $1.25, which is a builder's risk rate, as the building was not identified by the Underwriters', but he would try to get the Underwriters' to put a rate on it and he would let me know.'

He paid the premium of $31.25, and without opening the policy put it in the safe. The building was completed in July, 1916. In October, 1916, it had become equipped with the machinery, and the company applied for and received a second policy in the sum of $1,500 from a company other than the defendant, represented, however, by the same persons as agents. In October or November, 1916, the agents of defendant told the insured's president that upon the policy of June 9th a premium rate, to take the place of the builder's risk rate, less than $5 on each $100, could not be procured, and wrote him under date of December 16, 1916, as follows:

'Inclosed please find indorsements which will be necessary to attach to policies of insurance which we have written for you. You will see that the rate is increased a very large amount, however we assume you will continue the policies until you are able to put in the sprinkler system in your building as it would not pay you to be without insurance. We are protecting your interest and await your further pleasure.'

The inclosed indorsement pertinent to the policy of June 9th fixed the amount, term, and expiration identically with those in the plicy and rate in the additional sum of $93.75, which the insured refused to pay. The agents said they would have to cancel the policy. There ended the transactions between the parties. The insured building was destroyed by fire February 5, 1917. The insured duly served notice and proofs of loss. The defendant denied liability upon the ground it was not an insurer of the building. The insured's president was and had been for many years a lawyer and had had an insurance agency of his ***415** own after his admission to the bar. He knew the Underwriters' Association made the premium rates.

****816** [1][2] Those facts do not constitute or disclose a liability on the part of the defendant. The policy, in and through the indorsement slip or rider, in form stipulated that it was in force and effect only while the building was in process of erection and completion and the machinery placed and tested, and that all liability under it should cease when the building shall become occupied in whole or in part for operating. The stipulation was in purpose and intendment a potential qualification or limitation of the expressed existence of the insurance through the term of one year. The two stipulations were, obviously, to be read together, and said the insurance shall exist for one year unless at a time within the year the erection of the building should be completed and its operation entered upon, at which time it shall cease to exist and all the liability under the policy

shall cease. Expressed conditions within a policy terminating or forfeiting the insurance within the term prescribed in the policy are neither novel nor unusual. The legality of that involved in the instant case is not and cannot be questioned. Insurance Law (Cons. Laws, c. 28) § 121. Its language and meaning are unambiguous, unequivocal, and not susceptible of interpretation. There cannot be applied to it the rule that courts are averse to forfeitures and are cautious in enforcing them. If the insured obtained or held a mistaken view or belief concerning the agreements of the policy, the fault or negligence of its president and representative was the cause. A mere reading of the policy would have made him and the plaintiff know the agreements the plaintiff was accepting and entering into. To hold that a contracting party, who, through no deceit or overbearing inducement of the other party, fails to read the contract, may establish and enforce the contract supposed by him, would introduce into the law a dangerous doctrine. Of course, ***416** the doctrine does not exist.

It has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them, and there can be no evidence for the jury as to his understanding of its terms. Breese v. United States Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526; Hill v. Syracuse, Binghamton & N. Y. R. R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Watkins v. Rymill, 10 Q. B. D. 178; Moran v. McLarty, 75 N. Y. 25; Boylan v. Hot Springs Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; Standard Manufacturing Co. v. Slot, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016; Germania Fire Insurance Co. v. Memphis & Charlestown R. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Rice v. Dwight Mfg. Co., 2 Cush. (Mass.) 80. This rule is as applicable to insurance contracts as to contracts of any other kind. Commonwealth Mutual Fire Ins. Co. v. Knabe & Company Manfg. Co., 171 Mass. 265, 50 N. E. 516; Bostwick v. Mutual Life Ins. Co. of New York, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; Fidelity & Casualty Co. of N. Y. v. Fresno F. & Ir. Co., 161 Cal. 119 Pac. 646, 37 L. R. A. (N. S.) 322; Matter of Millers' & Manufacturers' Ins. Co., 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144; Monitor Mutual Fire Ins. Co. v. Buffum, 115 Mass. 343. The fact that the acceptor does not sign the contract is, of course, immaterial. Quimby v. Boston & Maine R. R., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491. There are exceptions to the general rule (Watkins v. Rymill, 10 Q. B. D. 178; McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64; Hay v. Star Fire Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607; Flickinger v. Farmers' Mutual Fire & L. Ins. Ass'n of Story County, Iowa, 136 Iowa, 258, 113 N. W. 824; Salmon v. Farm Property Mutual Ins. Ass'n of Iowa, 168 Iowa, 521, 150 N. W. 680) which do not enter into the instant case. It is manifest that the responsive statement of the defendant's agent at the delivery of the policy that it ***417** was written for a year could not constitute a fraud or wrongful act or relieve the company from the acceptance of it. Indeed, the plaintiff has not made and does not make a claim

of contrary effect. He asserts a mutual mistake in attaching the slip or rider. Conditions forfeiting the insurance are, as we have said, neither novel nor unusual. Illustrations in judicial decisions are many. We refer to Nelson v. Traders' Ins. Co., 181 N. Y. 472, 74 N. E. 421; Rosenstein v. Traders' Ins. Co., 79 App. Div. 481, 79 N. Y. Supp. 736; and Wilcox v. Continental Ins. Co. of N. Y., 85 Wis. 193, 55 N. W. 188.

It is common knowledge and experience that they do not, in ordinary understanding or expression, destroy the prescribed term as that for which the policy is written. With those in the policy, the insured and insurer still say it is written for one year or three years or as the case may be. While in equity a rescission of a contract may be adjudged on the ground of a unilateral mistake in its contents, in order that a reformation may be adjudged, there must be mutual mistake or inadvertence or the excusable mistake of one party and fraud of the other. There must have been a meeting of the minds of the contracting parties ****817** concerning the agreement, or agreements, which the court is asked to declare existent. Albany City Savings Institution v. Burdick, 87 N. Y. 40; Bidwell & Banta v. Astor Mutual Ins. Co., 16 N. Y. 263; Bryce v. Lorillard Fire Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249; 21 Halsbury, Laws of England, pp. 16–20. It is manifest, in virtue of what we have written, there was not a mistake on the part of the insured concerning the terms and conditions of the policy. It is manifest from the evidence there was not a mistake on the part of the insurer. It, by its agent, wrote and delivered the policy. It expressed in it, in language which it could not have misunderstood, the contract it intended and made. The policy as written and delivered must, then, be deemed and taken as the contract of the parties.

***418** The judgment of the Appellate Division should be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and this court.

HISCOCK, C. J., and CHASE, HOGAN, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment reversed, etc.

N.Y. 1920
Metzger v. Aetna Ins. Co.
227 N.Y. 411, 125 N.E. 814

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21 A.D.3d 138
(Cite as: 21 A.D.3d 138, 798 N.Y.S.2d 30)

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Segal Co. v Certain Underwriters at Lloyd's, London
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21 A.D.3d 138, 798 N.Y.S.2d 30, 2005 WL 1530233, 2005 N.Y. Slip Op. 05540, 9 A.L.R.6th 787

The Segal Company, Respondent-Appellant
v
Certain Underwriters at Lloyd's, London, Appellants-Respondents
Supreme Court, Appellate Division, First Department, New York

June 30, 2005

CITE TITLE AS: Segal Co. v Certain Underwriters at Lloyd's, London

SUMMARY

Cross Appeals from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered January 7, 2004. The order granted plaintiff's motion for summary judgment on public policy grounds and directed defendants to sell to plaintiff extended reporting period coverage for its primary and excess insurance policies.

HEADNOTE

Insurance
Excess Coverage
Claims-Made Liability Policies—Extended Reporting Period Coverage

Public policy does not require that an insured under a claims-made liability insurance policy, which provides coverage only when a claim is made during the policy period (*see* 11 NYCRR 73.0 [a]), be offered a right to purchase extended reporting period (ERP) coverage upon the termination of coverage under the policy. Insurance Department Regulation 121, which establishes minimum standards for claims-made liability policies and requires the issuing insurer to make ERP coverage available to the insured upon termination of coverage (11 NYCRR 73.3 [c] [1]), does not express a public policy to give every insured an automatic right to purchase ERP coverage. Consequently, Supreme Court erred in directing defendants, foreign underwriters, to sell plaintiff ERP coverage as a matter of public policy for plaintiff's expiring primary and excess professional liability insurance policies after plaintiff declined defendants' offer to renew the policies and thus had no contractual right to purchase ERP coverage. Defendants' policies were not subject to the regulatory minimum standards, since the policies were procured from unauthorized insurers by a licensed excess line broker (*see* 11 NYCRR 27.10; Insurance Law § 2105 [a]; § 2117 [h]). Moreover, since plaintiff was a "large commercial insured" as measured by its total estimated revenues, total gross assets and the amount of coverage provided, ERP coverage was not required to be offered for plaintiff's policies upon termination of coverage.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Insurance §§ 689, 1755.

Couch on Insurance (3d ed) § 102:24.

McKinney's, Insurance Law §§ 2105, 2117 (h).

11 NYCRR 27.10, 73.0 (a); 73.3 (c) (1).

NY Jur 2d, Insurance §§ 402, 407; NY Jur 2d, Malpractice § 367.

ANNOTATION REFERENCE

***139**Event as occurring within period of coverage of occurrence and discovery or claims made liability policies. 37 ALR4th 382.

FIND SIMILAR CASES ON WESTLAW
Database: NY-ORCS

Query: claims-made /4 insurance & extended /2 reporting

APPEARANCES OF COUNSEL

Mendes & Mount, LLP, New York City (*George L. Maniatis*, *Mary Ann D'Amato* and *Alex K. Ross* of counsel), for appellants-respondents.
Dickstein Shapiro Morin & Oshinsky LLP, New York City (*Randy Paar* and *John P. Winsbro* of counsel), for respondent-appellant.

OPINION OF THE COURT

Ellerin, J.
The issue before us is whether public policy requires that an insured under a claims-made liability insurance policy be offered a right to purchase extended reporting period coverage upon the termination of coverage under the policy.

Plaintiff is an employee benefits consulting firm that has been insured by defendants since 1997. Defendants are individuals or corporations who are members of syndicates that conduct business at Lloyd's in London, which syndicates "subscribe" in proportionate shares to insurance policies.

Defendants sold plaintiff a primary professional liability insurance policy and an excess professional liability insurance policy for the period April 15, 2000 to April 15, 2003. Both were "claims-made" policies, as to which the primary policy contains the following notice:
"This is a Claims made form. Except to such extent as may otherwise be provided herein, the coverage afforded under this insurance policy is limited to liability for only those Claims that are first made against the Insured and reported to the Underwriters while the insurance is in force. The limit of liability available to pay Damages shall be reduced and may be completely exhausted by payment of Claims Expenses. Damages and Claims Expenses shall be applied against the deductible. Please review the coverage afforded under this insurance ***140** policy carefully and discuss the coverage hereunder with your insurance agent or broker." The excess policy contains a similar notice.

Pursuant to these policies, defendants agreed "To pay on behalf of the Insured Damages and Claim Expenses which the Insured shall become legally obligated to pay because of any Claim or Claims, first made against the Insured, . . . and reported to the Underwriters during the Period of Insurance or Extended Reporting Period, arising out of any act, error or omission of the Insured in rendering or failing to render Professional Services."

The extended reporting period referred to in

the paragraph quoted above is defined in the policies as
"the selected period of time purchased in accordance with Clause X after the end of the Period of Insurance for reporting Claims, suits or proceedings arising out of acts, errors or omissions which take place prior to the end of the Period of Insurance and otherwise covered by this insurance."

Clause X provides that"[i]n the event of cancellation or non-renewal of this insurance by **2 Underwriters, the Named Insured shall then have the right, in consideration of the appropriate additional premium, to an extension of the cover granted by this policy to apply . . . in respect of any Claim made against any Insured during the period selected below after the expiration date of this policy but only when such Claim arises out of acts, errors or omissions committed prior to the expiration date of this policy."

Clause X further provides that "[t]he quotation by Underwriters of a different premium or deductible or limits of liability or changes in policy language for the purpose of renewal shall not constitute a refusal to renew by the Underwriters."

By letter dated March 25, 2003, defendants transmitted "2003 Renewal Terms" for plaintiff's insurance. Because of plaintiff's adverse loss history, which included paid claims of more than $21 million between 1999 and 2001, as compared to $1.52 million in premiums paid by plaintiff for the same period, the renewal terms included higher deductibles and higher premiums. *141 The expiring primary policy provided $5,000,000 in coverage, subject to an annual aggregate of $5,000,000 and a $250,000 deductible for each claim; the renewed policy would provide $5,000,000 in coverage, subject to an annual aggregate of $5,000,000 and a $7,500,000 deductible (or "retention") per claim. Plaintiff paid three annual premiums of $218,500 for the expiring policy and would pay a premium of $3,250,000 for the renewed policy. The expiring excess policy provided an additional $5,000,000 in coverage, for which plaintiff paid three annual premiums of $80,000; the renewed policy would provide the same additional coverage, for which plaintiff would pay a premium of $2,000,000.

Plaintiff regarded the above terms as a refusal on defendants' part to renew the policies, and advised defendants that it intended to purchase extended reporting period (ERP) coverage for the policies. Defendants declined to sell plaintiff ERP coverage, on the ground, as provided in clause X of the policy cited above, that such coverage is only available in the event of defendants' cancellation or nonrenewal of the insurance, and that the quotation of different limits, deduction, premium and alternative terms and conditions does not constitute a nonrenewal.

Plaintiff then brought this action, seeking a declaration that the 2003 renewal terms do not constitute a renewal of the policies and that plaintiff is entitled to purchase ERP coverage in accordance with the terms of those policies, and asserting that defendants breached the terms of the policies by refusing to sell plaintiff such coverage. Plaintiff then moved for summary judgment declaring that defendants refused to renew the policies and ordering them to sell plaintiff ERP coverage in accordance with the policies' terms.

The motion court denied plaintiff's request for a declaration that the 2003 renewal terms

**3 were not an offer to renew the policies, but, as a matter of public policy, ordered defendants to sell plaintiff ERP coverage. In light of clause X, we conclude that the court correctly determined that there was no contractual triggering of plaintiff's right to purchase ERP coverage under its policies. However, the court erred in holding categorically that public policy favors the automatic triggering of a right to purchase ERP coverage upon the termination of policies.

New York State's general disapproval of claims-made policies, such as plaintiff's, is expressly set forth in Insurance Department Regulation 121 (11 NYCRR part 73; *see* *142*Curiale v Ardra Ins. Co.*, 88 NY2d 268, 276 [1996] ["The regulation of the insurance industry is closely related to the public interest and a legitimate exercise of a State's police powers"]). In contrast to the traditional "occurrence" policy, which generally provides liability coverage for injury or damage that occurs within the policy period, without regard to when the claim is made or suit is filed, the "claims-made" policy generally provides coverage only when a claim is made during the policy period (11 NYCRR 73.0 [a]). The Insurance Department promulgated Regulation 121 as a consequence of its finding that "claims-made coverage tends to provide less protection than occurrence coverage, [and] that claims-made coverage compared to occurrence coverage is a more complicated and confusing method of coverage that can create potential coverage gaps" (§ 73.0 [c]).

To counter this consequence, Regulation 121, with certain exceptions, prohibits the provision of claims-made coverage in any policy issued or renewed in this state (11 NYCRR 73.2), and imposes certain minimum standards on those claims-made policies that are permitted and on the issuing insurers (11 NYCRR 73.3). Among the minimum standards with which a claims-made liability insurance policy and the issuing insurer must comply is that ERP coverage must be available upon termination of coverage under the policy (§ 73.3 [c] [1]).

However, because the policies issued by defendants in the instant case fall within an exception to Regulation 121, they are not subject to these minimum standards. Policies procured from unauthorized insurers by licensed excess line brokers are exempt from the provisions of Regulation 121 (11 NYCRR 27.10 [a]; *see* *Matter of John Paterno, Inc. v Curiale*, 88 NY2d 328, 332 n [1996]). Defendants are foreign Lloyd's underwriters and as such are not "licensed to do an insurance business in this state" (Insurance Law § 6116 [c]). While as a general rule New York State Insurance Law prohibits the sale in New York of insurance underwritten by insurers not authorized to conduct business in New York (Insurance Law § 2117 [a]; 11 NYCRR 27.0 [a]), it permits excess line brokers to procure insurance from unauthorized insurers (*see*Insurance Law § 2105 [a]; § 2117 [h]), if they have been unable "after diligent effort" to procure the full amount of required insurance from authorized insurers (Insurance Law § 2118 [b] [3] [A]).

The instant policies were written in the excess and surplus lines market through Aon Risk Services, Inc. of New York, plaintiff's surplus lines broker. Accordingly, they are not subject *143 to the provisions of Regulation 121 (11 NYCRR 27.10 [a]). We therefore hold that the motion court erred in finding that New York public policy as expressed in Regulation 121, a regulation that is

not applicable to defendants, requires them to sell ERP coverage to plaintiff.

The instant policies also fall within another exception to the requirement of 11 NYCRR 73.3 (c) (1) that extended reporting period coverage be available upon termination of coverage. **4Section 73.3 (c) (3) provides that "[f]or policies issued or renewed pursuant to section 73.2 (d) (1) of this Part, extended reported period coverage *need not be offered* upon termination of coverage pursuant to section 73.1 (n) (2) of this Part" (emphasis added). Section 73.1 (n) (2) defines termination of coverage as "decrease in limits, reduction of coverage, increased deductible or self-insured retention, new exclusion, or any other change in coverage less favorable to the insured."

Policies issued pursuant to section 73.2 (d) (1) are policies that meet any of the following criteria: (i) they insure a large commercial insured (as defined in section 73.1 [g]); (ii) they provide primary coverage of at least $5,000,000 per occurrence; (iii) they provide excess coverage of at least $1,000,000 per occurrence; or (iv) they are written with a deductible of at least $100,000 per occurrence. "Large commercial insured" is defined as an insured that meets any of five standards of net worth, assets and revenue, one of which is that it is a for-profit business entity that has gross assets exceeding $25,000,000 and generates annual gross revenues exceeding $25,000,000 (§ 73.1 [g] [4]).

Plaintiff's policies meet all four criteria of section 73.2 (d) (1). Plaintiff is a "large commercial insured" as measured by its total estimated revenues of $181,921,000 and total gross assets of $100,000,000 in 2002 (cl [i]), and the policies provide for primary coverage of $5,000,000 for each claim (cl [ii]) and for excess coverage of $5,000,000 (cl [iii]), and are written with a $250,000 deductible for each claim (cl [iv]). Accordingly, pursuant to section 73.3 (c) (3), ERP coverage was not required to be offered for plaintiff's policies upon termination of coverage.

Thus, even if defendants were subject to the provisions of Regulation 121, they would not be required to offer ERP coverage to plaintiff upon the termination of its policies because section 73.3 (c) (3) excepts policies such as plaintiff's from that requirement. Indeed, Regulation 121 makes clear that it is not New York State policy to give every insured the protection of ***144** the automatic right to purchase ERP coverage upon the termination of its policies.

The cross appeal by plaintiff should be dismissed as taken by a party not aggrieved (CPLR 5511; *see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544 [1983]).

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered January 7, 2004, which granted plaintiff's motion for summary judgment on public policy grounds and directed defendants to sell to plaintiff extended reporting period coverage for its primary and excess insurance policies, should be reversed, on the law, without costs, and the **5 motion denied. The cross appeal by plaintiff should be dismissed, without costs.

Andrias, J.P., Saxe, Sullivan and Sweeny, JJ., concur.

Order, Supreme Court, New York County, entered January 7, 2004, reversed, on the

law, plaintiff's motion for summary judgment denied and the cross appeal dismissed, without costs.

NY,2005.
SEGAL CO. v UNDERWRITERS
21 A.D.3d 138, 798 N.Y.S.2d 306022005 WL 15302339992005 N.Y. Slip Op. 0554046039 A.L.R.6th 7877185, 798 N.Y.S.2d 306022005 WL 15302339992005 N.Y. Slip Op. 0554046039 A.L.R.6th 7877185, 798 N.Y.S.2d 306022005 WL 15302339992005 N.Y. Slip Op. 0554046039 A.L.R.6th 7877185, 798 N.Y.S.2d 306022005 WL 15302339992005 N.Y. Slip Op. 0554046039 A.L.R.6th 7877185

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