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DISPATCHES FROM THE TRENCHES

On Matters of Insurance — Some Hard Lessons Learned

By Kenneth P. Weinberg

This issue of Dispatches From the Trenches discusses two cases highlighting certain risks that should be considered when a lessor relies on insurance coverage purportedly provided by its lessee. This first case relates to liability insurance and an insurance company's duty to defend. The second case relates to property insurance and the value (or potential lack thereof) of certificates of insurance.

Transport International Pool v. Continental Insurance Co., 2005 WL 1294392 (Tex. App. Ct., June 2, 2005)

In this case, a Texas Court of Appeals held that the insurance company providing liability insurance as required by an equipment lease did not have to defend, indemnify or otherwise cover a lessor with respect to a lawsuit which alleged lessor's negligence as the sole cause of the plaintiff's injury.

Transport International Pool, Inc. d/b/a GE Capital Modular Space (Lessor) leased a construction trailer to Vratsinas Construction Company (Lessee), which was to be anchored and used as an office on Lessee's construction site. It appears that Lessor was responsible for anchoring the trailer. One of Lessee's employees (the Plaintiff) was working in the trailer-office when straight line winds blew it over, causing it to roll several times and seriously injuring the Plaintiff. The Plaintiff sued Lessor alleging that Lessor negligently anchored the trailer and was therefore

liable for Plaintiff's injuries. Plaintiff did not name Lessee or any other party as a defendant in the suit.

The equipment lease contained standard language requiring Lessee to procure and keep in full force and effect commercial general liability Insurance naming Lessor as an additional insured. Relying on this provision, Lessor filed third-party petition against Lessee and Lessee's insurance company, Continental Insurance Company.

The Trial Court agreed with Continental's argument that it had no duty to defend, indemnify or otherwise cover Lessor with respect to Plaintiff's claim since the sole cause of action was based on Lessor's negligence.

On appeal, the Appellate Court stated that an insurer's duty to defend and indemnify another party is determined in accordance with the "eight corners" rule, which requires that the Court compare the allegations within the petition and the insurance policy. The insurance policy contained a fairly common exclusion stating that the insurance does not apply to "bodily injury or property damage arising out of the sole negligence of [the party who otherwise qualifies as an insured]."

The Court held that, since the Plaintiff's petition only alleged that Lessor was negligent in the anchoring of the trailer, the exclusion clearly applied and Continental had no obligation to defend or indemnify Lessor.

Lessor argued that a variety of other factors may have caused the accident and the exclusion should not negate coverage stating, for example that: 1.) Lessee had sole responsibility for preparing the site on which the trailer would be used; 2.) Lessee had the responsibility of providing firm and level ground for a safe and unobstructed installation; 3.) the site selection for the trailer was the responsibility of Lessee; and 4.) Lessee assumed all maintenance duties.

The Court rejected these arguments, stating, "a determination of whether an insurer has a duty to defend does not consider matters outside the [insurance] policy or [Plaintiff's] pleadings." Since the Plaintiff's pleadings alleged that Lessor "furnished and set up" the trailer and that Plaintiff's damages resulted solely from Lessor's negligence, the Court of Appeals upheld the Trial Court's ruling that Lessor could not require Continental to defend it.

In re Comdisco Ventures, Inc. v. Federal Ins. Co., 2005 WL 1377856 (N.D. Ill., June 8, 2005)

This case, which involves several defendants, relates to insurance policies provided in connection with multiple leases between Comdisco Ventures, Inc. (Lessor) and several venture capital-backed ".com" companies (Lessees) of computer equipment, office furniture, and other office equipment. All transactions were documented on standard Master Lease Agreements, which required each of the Lessees to obtain liability, and property insurance, which covered the leased equipment and named Lessor as an additional insured and loss payee under the policies. Lessor claimed that Lessees instructed and authorized various insurance brokers (referred to in the case and in this summary as the "Broker Defendants") to procure the required insurance policies and to have Lessor named as an additional insured and loss payee under them. The Broker Defendants allegedly procured such insurance with various insurance companies (referred to in the case and in this summary as the "Chubb Defendants") and then provided Lessor with a certificate evidencing that such insurance was in place and that Lessor was named as additional insured and loss payee.

All of the Lessees at issue in this case went out of business and all of the leased equipment "disappeared." Lessor alleged that it sustained over \$12 million dollars in equipment-related losses during the effective dates of the insurance policies. Lessor notified the Chubb Defendants of the losses and the Chubb Defendants denied coverage on the grounds that Lessor is not named as an additional insured or loss payee under the policies.

Lessor sued the Chubb Defendants and the Broker Defendants for damages. A key cause of action against the Broker Defendants was that they had misrepresented to Lessor that proper insurance was in place naming Lessor as additional insured and loss payee. The Broker Defendants countered that Lessor could not have reasonably relied on the alleged misrepresentations of the Broker Defendants and that Lessor therefore had no such cause of action. The Court explained the basis of the defense raised by the Broker Defendants, explaining that "[t]o state a claim for either negligent misrepresentation or intentional misrepresentation, [Lessor] must show that its reliance on the alleged misrepresentations of the Broker Defendants was reasonable." In the case at bar, the Court held that:

[T]he Evidence of Property Insurance issued by [Broker Defendant] to [Lessor] states, "This is evidence that insurance as identified below has been issued, is in force, and conveys all the rights and privileges under the policy." The document does not contain a disclaimer of the type commonly found in certificates of insurance. See, e.g., *American Country Ins. Co. v. Kraemer Bros., Inc.*, 699 N.E.2d 1056, 1059 (Ill. App. 1st Dist. 1998) ("This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below."). If a certificate of insurance does not include a disclaimer, the insured may rely on representations made in the certificate. *Id.* at 1060. Thus, [Lessor's] reliance on the Evidence of Property Insurance was reasonable. 2005 WL 1377856, *8.

Although the Court does not analyze the matter further, this portion of the decision emphasizes a key issue that should be considered by leasing companies relying on insurance certificates for proof that the required insurance is in place. More than 90% of the insurance certificates that are issued are promulgated by the Association of Cooperative Operations Research and Development (ACORD). The types of insurance certificates that lessors take as evidence that property insurance is in place generally take one of two forms. One form is labeled "Evidence of Property Insurance" and is the ACORD 28 Form. It contains the language blessed by this Court as the type upon which a lessor can rely. The other type of insurance certificate is labeled as "Certificate of Insurance" and is the ACORD 24 form. It contains the disclaimer referred to by the Court in this case and it is very questionable whether a lessor may rely on such a certificate. Indeed, many courts have held the ACORD 24 disclaimer to be effective. See e.g., *Pekin Insurance Company v. American Country Insurance*, 572 N.E.2d 1112, 1114 (Ill. App. Ct. 1991) (addressing reliance on a Certificate of Liability Insurance (ACORD 25-S) that contained the same type of problematic disclaimer and holding that since the disclaimer on the certificate clearly advised the recipient that "the certificate afforded no rights to the certificate holder," the recipient knew that it "had to look to the policy to determine the extent of the coverage as well as any existing exclusions" and could not reasonably assert that it relied on the certificate).

Although there is some variation, the weight of authority has generally rejected estoppel arguments and agreed that the coverage delineated in detailed insurance policies should not be expanded when lessors or other parties rely on insurance certificates to the extent those

certificates contain explicit disclaimers which clearly notify the holder that the certificate neither affords any rights to the holder nor amends the terms of the underlying policy (like those disclaimers in the ACORD 24 form).

The lesson is clear: Lessors should require the better Evidence of Property Insurance and be wary of disclaimers contained within certificates purportedly providing proof of insurance.

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