

SDNY Finds No Coverage for Construction Defect Claims under CGL and EL Policies

By: Steven D. Cantarutti

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The U.S. District Court for the Southern District of New York (“SDNY”), applying New York law, issued two decisions declaring there is no coverage for construction defect claims under Comprehensive General Liability (“CGL”) and Employer’s Liability (“EL”) Policies issued by the Zurich companies.[1] Both decisions centered on whether the policy language “damages because of bodily injury” sufficiently triggers coverage within the insuring agreements where bodily injuries had occurred within the sequence of events leading up to the alleged construction damages. See *W. Waterproofing Co. v. Zurich Am. Ins. Co.*, 2022 U.S. Dist. LEXIS 20083 (SDNY Feb. 3, 2022) (“*Western I*”); *W. Waterproofing Co. v. Zurich Am. Ins. Co.*, 2023 U.S. Dist. LEXIS 133515 (SDNY Aug. 1, 2023) (“*Western II*”).

The underlying claim arose out of a project where the construction manager hired the insured, a subcontractor, to install the building’s façade. During the installation, a crane tipped over, causing bodily injuries to two of the insured’s employees. The accident also allegedly caused consequential damages to the project, such as repairs, delays, and cost overruns. The construction manager and project owner sued the insured for construction-related damages, and the insured, in turn, sought coverage through a declaratory judgment action against various insurers, including Zurich.

The insured’s initial claim against Zurich focused on the CGL Policy. The insured argued, among other things, that the underlying complaint triggered a duty to defend under Coverage A of the insuring agreement. The insured pointed to allegations that the cost overruns were caused, in part, by the “abrupt cataclysmic occurrences [of the crane accident], and the resulting [bodily] injury and property damage.” The insured also argued the CGL Policy did not contain exclusions to preclude coverage. In *Western I*, the district court (Hon. Alison J. Nathan) initially determined the underlying complaint suggested a reasonable possibility of coverage by alleging damages were incurred because of “bodily injury” and “property damage.” The district court went on to hold, however, that coverage was precluded based upon policy exclusions for “property damage” and “employer’s liability.” With respect to the latter exclusion, the district court made it clear that the insured “could not have it both ways,” arguing coverage was triggered within the insuring agreement for “bodily injury,” but it could evade the scope of the exclusion where bodily injuries occurred to its employees.

After the decision on the CGL Policy, the insured proceeded to sue Zurich under the EL Policy, again arguing coverage through the insuring agreement for “damages because of bodily injury.” The insured emphasized that the district court previously found coverage was sufficiently triggered within the insuring agreement and there were no exclusions to preclude coverage under the EL Policy.

In *Western II*, the district court (Hon. Colleen McMahon)[2] disagreed with the insured and declared there was no coverage afforded under the EL Policy. The district court found the EL Policy expressly limits coverage to a bodily injury suffered by an insured employee during the course of employment, which was not alleged in the underlying litigation. The district court emphasized that the construction manager and project owner were not seeking any damages that would compensate the injured workers. It also found

that the term “because of” does not afford coverage just because someone was injured “somewhere in the sequential chain of events leading up to” the claim. Rather, the term requires “a stronger casual link than . . . arising out of.”

The district court in *Western II* also concluded that the prior decision regarding the CGL Policy was not relevant for the determination of the EL Policy. Indeed, the district court declined to apply “law of the case” doctrine. It went to hold that even if the findings in *Western I* could be read as holding the underlying complaint seeks damages arguably covered under the EL Policy, the law of the case doctrine is purely discretionary and it “does not limit a district court’s power to reconsider its own decisions prior to the entry of a final judgment.”

Although the insured appealed both decisions in *Western I* and *II*, it recently withdrew its entire appeal, effectively ending more than five (5) years of protracted litigation between the insured and Zurich. In our opinion, the *Western II* decision is based upon sound principles of policy construction, wherein the district court properly refused to stretch the bounds of coverage beyond clear policy language. The idea that a bodily injury occurring anywhere within the chain of events could potentially trigger coverage for construction defect claims would turn both CGL and EL Policies on their heads. We also believe the district court in *Western I* should have examined the “gravamen” of the complaint. This is a doctrine used by New York courts to avoid triggering a duty to defend based upon an isolated allegation. Indeed, the gravamen of the underlying complaint in this case sought purely economic damages relating to project, and not one dime was going to be used to compensate the injured workers. As a result, the district court in *Western I* should never have reached the policy exclusions, when there was no coverage in the first place within the insuring agreement.

[1] Coughlin Midlige & Garland LLP represented the Zurich companies.

[2] Judge McMahon presided over the DJ Action after Judge Nathan was confirmed as justice to the Second Circuit Court of Appeals.