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Traub Lieberman Attorneys Stephen D. Straus and Andrew N. Adler Obtain Appellate Reversal in Insurance Coverage Action

Traub Lieberman Straus & Shrewsberry LLP Partners **Stephen D. Straus** and **Andrew N. Adler** recently secured an appellate victory in a complex insurance coverage action entitled, *Old Republic Ins. Co. v. United Nat'l Ins. Co.*, Index No. 155995/2012, 2016 N.Y. slip op. 606 (1st Dep't Jan. 28, 2016), *rev'g* 977 N.Y.S.2d 668 (Sup. Ct. Commercial Div., N.Y. County).

Traub Lieberman filed a lawsuit on behalf of Old Republic Insurance Company ("Old Republic") and its subrogor, STS Steel, Inc. ("STS"), alleging that STS qualified as an additional insured ("AI") under a policy of umbrella insurance issued by United National Insurance Company ("United") to STS's subcontractor at a construction project. Old Republic seeks reimbursement of funds it contributed to the settlement of an underlying tort suit involving catastrophic injuries allegedly sustained on that job.

The appellate court focused on two principal issues; one factual and one legal. Firstly, STS and its subcontractor had crossed out certain printed language in their contract wherein the subcontractor was obligated to obtain umbrella coverage naming STS, and instead wrote non-standard phrasing by hand on the document. Secondly, STS did not independently provide United with notice of the underlying personal injury action for which STS sought defense and indemnification as an AI under the United policy.

Largely based upon these two factors, the trial court granted summary judgment to United and dismissed Old Republic's complaint. The United policy provides AI coverage to certain entities that are afforded coverage either in the subcontractor's primary policy or pursuant to a subcontract between United's insured and third party contractors. However, the United policy restricts such coverage to "the minimum limit of insurance that [the subcontractor] agreed to provide." The trial court held that an issue of fact existed as to whether STS qualified as an AI under the United policy. But, the court also concluded that, even if STS so qualified, the subcontractor promised no "minimum limit of insurance" in its agreement with STS. In other words, the lower court believed (as a matter of law) that the minimum limit was zero, effectively eliminating any coverage obligation on United's part to STS.

Moreover, the trial court relied upon a line of judicial decisions holding that, if an insured does not give notice of a claim directly to the insurer, the insurer has no duty to disclaim coverage in a timely fashion. Under the most common circumstance, the policyholder provides notice to the insurer. If such notice is timely, N.Y. Ins. Law §3420(d) requires that the insurer promptly disclaim. If the insurer fails to promptly disclaim, it forfeits coverage defenses it may otherwise hold.

In its appeal, Traub Lieberman argued on behalf of Old Republic that the subcontract did not manifest an intention to deliver zero umbrella coverage. Rather, based on other clauses in the subcontract, the applicable insurance policies, the doctrine of partial performance and the prohibition against illusory contracts, as well as various extrinsic evidence, there remains a question of fact as to the quantity of AI coverage afforded to STS.

Regarding STS's lack of notice to United, TLSS cited certain precedents requiring an insurer to timely disclaim, even when not given direct notice of a claim, when the insurer (1) is alerted of such claim by another source, (2) disclaims on the basis of late notice, and (3) expressly acknowledges that it is aware of the claim and impliedly anticipates that the non-notifying policyholder will imminently seek coverage.

A panel of the New York Appellate Division, First Department, unanimously agreed with Old Republic on these points. The appellate court held that "there is an issue of fact as to the amount of umbrella insurance the subcontractor was required to procure" and another "issue of fact surrounding the timeliness of United's disclaimer to STS." On this point, the court agreed that the duty to timely disclaim can be triggered where the insurer receives notice of the claim from sources other than the party seeking coverage as an AI under the policy.

As to other arguments raised by United, including standing, waiver, estoppel, applicability of a contractual liability exclusion and "other insurance" clauses, the Appellate Division held them all to be "unavailing." The appellate court thus reversed the trial court, reinstated the complaint and remanded the case for further proceedings.