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Partner Stephen D. Straus and Senior Counsel Andrew N. Adler Obtain Summary Judgment for Insurer Client in First-Party Coverage Action

Traub Lieberman Straus & Shrewsberry LLP partner Stephen D. Straus and senior counsel Andrew N. Adler recently obtained summary judgment for their insurer client in a first-party coverage action. The litigation, *The Regency Condominium v. Dongbu Insurance Co., Ltd.*, Index No. 601050/2016, was filed in New York Supreme Court, Nassau County, to determine the respective rights and obligations of The Regency Condominium (“Insured” or “Regency”) and Dongbu Insurance Company, Ltd., under a policy of Commercial Property Insurance issued by Dongbu to Regency (“the Policy”).

Regency sought coverage for property damage caused by a water release at Regency’s premises, a condominium building. On the date of incident, a plumbing fixture referred to as a “clamp” or a “coupling” purportedly failed or separated and released water into numerous residential units and common areas inside the building.

After discovery ended, Dongbu filed a motion for summary judgment seeking dismissal of Regency’s complaint. Regency then cross-moved for summary judgment seeking a judicial declaration that Dongbu was required to cover the significant costs incurred to repair property damage caused by the subject water release.

The court granted Dongbu’s motion for summary judgment dismissing plaintiff Regency’s complaint in its entirety. The Order also denied Regency’s cross-motion.

In its Order, the court held as a matter of law that Regency’s failure to preserve the coupling impaired Dongbu’s subrogation rights and thereby breached express conditions precedent to coverage. In this regard, the witness for the plumbing company Regency called to fix the leak on the date of loss testified that nobody instructed plumbers to preserve anything from the job. The coupling was thus discarded the same day the repair was made.

Because the coupling was not preserved, it was not possible to determine whether it had failed, whether it had been negligently installed, or whether some combination of circumstances lead to water release. Dongbu’s subrogation counsel thus informed the insurer that a claim against parties potentially responsible for the loss had been impaired. The court held that Regency’s failure to preserve the coupling amounted to a breach of the clear and unambiguous policy conditions requiring the Insured to (i) preserve damaged property for Dongbu’s inspection, and (ii) not impair the carrier’s subrogation rights.

The court rejected Regency’s argument that it should be excused from failing to preserve the coupling because the Insured acted “reasonably” by taking quick steps to remedy the water release and thereby mitigate damage at the premises during an alleged “emergency.” The court held that no legal precedent exists supporting such a theory and that the court was not free to rewrite the parties’ insurance contract. The court cited appellate case law precedent holding that the same pertinent policy conditions in the Dongbu policy are clear and unambiguous and must be enforced as written. Moreover, the court believed that Regency’s excuse would “erode bargained-for rights and obligations” under insurance policies.

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Dongbu's purported failure to advise Regency to preserve the coupling did not excuse Regency's breach of the condition requiring the policyholder to preserve evidence. In any event, the facts revealed that the coupling was discarded the day before Dongbu was notified of the loss, and it was not until many months later that a representative of Regency asked the plumbing contractor if the coupling had been preserved.

The court also held that it would have been feasible for the Insured to advise the plumber to preserve the coupling for Dongbu's inspection. The Insured's failure to do so was not due to any legitimate inability or undue burden, but instead resulted from ignorance of the express policy condition. This does not excuse the breach. The court further held that since the obligation to preserve evidence was a condition precedent to coverage, Dongbu did not have to establish it was prejudiced by Regency's breach. Accordingly, the court dismissed the complaint in its entirety.