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# New York Federal Court Enforces Construction Exclusion, Rejects Reimbursement Claim

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In *Crescent Beach Club, LLC v. Indian Harbor Insurance Company*, 2020 WL 3414697 (E.D.N.Y. June 22, 2020), the district court considered application of a CGL policy issued to a property owner containing the following exclusion:

*"This policy does not apply to any 'bodily injury', 'property damage', 'personal and advertising injury', or any other loss, cost, defense fee, expense, injury, damage, claim, dispute or 'suit' either arising out of, or related to, any construction, renovation, rehabilitation, demolition, erection, excavation or remediation [sic] of any building and includes planning, site preparation, surveying or other other [sic] construction or development of real property. This exclusion, however, shall not apply to routine maintenance activities."*

Plaintiff in the underlying action alleged injury while engaged in construction work at the insured's premises. The information the insurer received was conflicting as to whether plaintiff was demolishing a pergola (excluded) or merely removing vines (not excluded). The insurer reserved its rights accordingly.

At his deposition in the underlying action, the plaintiff testified he was in a manlift performing demolition at the time he was injured. The insured's property manager also testified that the pergola was being demolished. Approximately one month after the depositions, the insurer denied coverage based on the exclusion.

The insured sued for a declaration of coverage, and the parties subsequently filed cross-motions for summary judgment. The insured first argued that the disclaimer was not issued "as soon as is reasonably possible," in violation of N.Y. Insurance Law § 3420(d). The court rejected this argument, reasoning that the insurer properly reserved its rights based on conflicting information, and disclaimed coverage promptly upon deposition testimony confirming it was demolition. Any delay in issuing the disclaimer was reasonably related to the insurer's diligent investigation.

The court further rejected the insured's argument that the exclusionary wording was ambiguous, finding that although undefined in the policy, "construction," "demolition," "erection," and "routine maintenance activities" have well-established legal definitions under relevant sections of the New York Labor Law. Moreover, the property manager's affidavit that plaintiff was performing routine maintenance was insufficient to create an ambiguity because it was inconsistent with the manager's prior deposition testimony that plaintiff was performing demolition.

Based on its application of the exclusion, the court ruled that the insurer's duty to defend "has now ended." The court, however, rejected the insurer's argument that it was entitled to recoup sums spent in defending the insured before the declaration of non-coverage. The underlying complaint allegations triggered the duty to defend, which is contractual in nature. As such, the insurer was not entitled to reimbursement on a quasi-contractual "unjust enrichment" theory.

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The decision is significant for its confirmation that the insurer's diligent investigation tolls the time to disclaim coverage pursuant to N.Y. Insurance Law § 3420(d) and the holding that the "construction" exclusion is unambiguous. The court's extensive discussion of the insurer's claim for reimbursement of defense costs may sound a death knell for such claims, at least in New York federal courts, although such right has been recognized in prior decisions.