In the Supreme Court of Virginia

Record No. 091521

FEDERAL INSURANCE COMPANY,
Appellant

v.

AMTECH ELEVATOR SERVICES, INC. n/k/a ABM AMTECH, INC., *et al.*
Appellees

Record No. 091496

AMTECH ELEVATOR SERVICES, INC. n/k/a ABM AMTECH, INC., *et al.*
Appellants
v.

UNIWEST CONSTRUCTION, INC., *et al.*
Appellees

PETITION FOR REHEARING

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INTRODUCTION

Petitioner Federal Insurance Company, pursuant to Virginia Supreme Court Rule 5:37 and in the interest of judicial economy and fairness, respectfully requests that this Court clarify and/or rehear its Opinion of September 16, 2010 (the "Opinion"). This Petition is based upon the concern that a misinterpretation may result of what the methodology is that the Court instructed should be applied for determining Uniwest's entitlement to coverage as an additional insured under Subdivision E-7 of the AIU Insurance Company ("AIU") Policy issued to Amtech Elevator Services, Inc. ("Amtech").

Federal believes that, pursuant to the Court's finding that Uniwest is an additional insured under Subdivision E-7 of the AIU Policy, the trial court should be required to determine whether Uniwest's liability "[arose] out of operations conducted by [Amtech] or on [Amtech's] behalf," as compared with the need to determine the "relative liability" between Amtech and Uniwest as would be required under Subdivision E-4 of the Policy.

FACTUAL BACKGROUND

A. Subdivisions E-4 and E-7 of the AIU Policy

Section IV.E of the AIU Policy (the "Policy") provides, in pertinent part:

Insured means each of the following, to the extent set forth:

> 4. Any person or organization . . . included as an additional insured in the policies listed in the Schedule of Underlying Insurance **but not for broader coverage than is available to such person or organization under such underlying policies**.
>
> 7. Any . . . organization . . . to whom [Amtech is] obligated by a written Insured Contract to provide insurance such as is afforded by this policy, **but only with respect to . . . liability arising out of operations conducted by you or on your behalf** . . . .

J.A. at 1867, Section IV.E. (emphasis added).

The Continental Policy, which is the "underlying" primary policy beneath the AIU excess policy, provides:

> [If Amtech] is required to add a person or organization as an additional insured . . . under a written agreement or contract but . . . inadvertently fail[s] to issue such endorsement, that person or organization is included as an insured provided that
>
> 1. the additional insured is an insured **only to the extent that it is required to be indemnified by your written agreement or contract with the additional insured**;

J.A. at 1789-1790 (emphasis added).

B. The Opinion

This Court held "that the Subcontract incorporated [the indemnification provision contained in] Paragraph 3.18.1 [of the Prime Contract]." Opinion at 18. Moreover, this Court held that the incorporated indemnity clause ("Paragraph 3.18.1") "imposed on Match a duty to defend

and indemnify Uniwest." *Id.* The Court noted that "the Subcontract does not require Amtech to indemnify Uniwest for its own negligence." *Id. The* Court also held that "Uniwest was an insured under the CNA and AIU policies" and that "AIU had a duty to defend and indemnify Uniwest under **both** Subdivision E-4 and Subdivision E-7." *Id.* at 22 (emphasis added).

1. Subdivision E-4

Subdivision E-4 provides that an "insured" under the Policy means any organization "included as an additional insured in the policies listed in the Schedule of Underlying Insurance. . . . " Accordingly, this Court considered the terms of the "underlying" CNA policy, which provides that a person or organization is an additional insured if Amtech "is required to add a person or organization as an additional insured . . . . " The Court concluded that this requirement was satisfied. *Id.* at 19-22. However, this Court also recognized that the insurance coverage provided under E-4 is limited "**to the extent** that [Uniwest] is **required to be indemnified by [the] written agreement**." *Id.* at 19 (emphasis added).

2. Subdivision E-7

Under Subdivision E-7, this Court held that the trial court erred in ruling that the subcontract "did not impose on Amtech a duty to defend and indemnify Uniwest," *id.* at 19-20, and further ruled that "Paragraph 3.18.1 of

the General Conditions [of the Prime Contract] was incorporated into the Subcontract and created such a duty." Accordingly, this Court held that Uniwest is an additional insured under E-7. However, the Opinion may require clarification of the differing condition presented by Subdivision E-7, which provides that the additional insured status applies "with respect to . . . **liability *arising out of* operations conducted by [Amtech] or on [Amtech's] behalf**." (emphasis added).

3. Damages and Remand

In the "Damages" section of the Opinion, this Court concluded that:

> Amtech is not liable to contribute to Uniwest's settlement with the Employees to the extent, if any, the accident was caused by Uniwest's own negligence.
>
> Accordingly, we will remand for trial to determine the issue of relative liability for the accident and for entry of judgment against Amtech and AIU for compensatory damages based upon Amtech's relative liability.

Id. at 22-13.

ARGUMENT

Federal seeks a clarification or, if necessary, a rehearing, as there may be uncertainty on remand as to whether a trial on "relative liability" was intended to apply to not only Uniwest's entitlement to coverage under

Subdivision E-4, but also E-7.[1]

With respect to Subdivision E-4, Federal acknowledges that the Court determined that Uniwest's entitlement to indemnification under Paragraph 3.18.1 requires a finding of fact as to the "relative liability" of Amtech and Uniwest insofar as the Court ruled that the incorporated indemnity clause does not provide indemnification for Uniwest's own negligence.

However, since a finding of "relative liability" has no bearing on the insurance coverage provided under Subdivision E-7, Federal seeks a clarification, or rehearing, of the remand instructions that should apply for E-7.

Subdivision E-7 has a differing condition than E-4, and is comprised of two components. The first component of E-7 provides that an "insured means . . . any . . . organization . . . to whom [Amtech is] obligated by a written Insured Contract to provide insurance such as is afforded by this policy. . . . " The Court found that Paragraph 3.18.1 was an "Insured Contract" within the meaning of the Policy and, therefore, Uniwest is an additional insured pursuant to E-7. The second component of E-7 sets forth a condition to the coverage afforded thereunder. Specifically, the

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[1] Federal did not previously argue before this Court that E-7 does not require a finding of "relative liability" because AIU/Amtech never presented any argument before the trial court or on appeal as to such an issue.

condition provides that an "entity or organization" that satisfies the Insured Contract requirement is an insured under the Policy "but only with respect to . . . liability **arising out of operations** conducted by [Amtech] or on [Amtech's] behalf." (emphasis added).

Paragraph E-7 does not require a finding of the "relative liability" of Amtech and Uniwest. Accordingly, having satisfied the Insured Contract component of E-7, the only question left is whether the underlying claims gave rise to "liability arising out of operations conducted by [Amtech] or on [Amtech's] behalf." Federal respectfully requests that the Court clarify that a finding of "relative liability" is not required with respect to E-7; instead, the finding on remand with respect to E-7 should be limited to the issue of whether Uniwest's "liability [arose] out of operations conducted by [Amtech] or on [Amtech's] behalf."[2]

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[2] The trial record already evidences that Amtech was issued a total of nine (9) OSHA penalties, including for:

> (1) failure of the scaffolding to support its own weight and four times the maximum intended load applied or transmitted to it;
>
> (2) failure of a competent person to inspect the elevated wood platforms for visible defects before each work shift;
>
> (3) use of ladder on temporary elevated platforms to increase work level height;

Virginia's anti-indemnity statute, Code § 11-4.1, expressly provides that it "shall not affect the validity of any insurance contract, workers' compensation, or any agreement issued by an admitted insurer." Because AIU is an admitted insurer and the AIU Policy is an insurance contract, Uniwest may be indemnified under the Policy for its own negligence. Moreover, although this Court has not previously interpreted Subdivision E-7 or a similar provision, the plain wording of E-7 makes clear that the coverage provided is broad and extends to Uniwest's negligence, provided that the liability "aris[es] out of operations conducted by [Amtech]."[3]

Although the Court's Opinion, as it now stands, does not specifically call for the trial court to consider the parties' "relative liability" in determining the scope of Uniwest's coverage as an additional insured under E-7,

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(4) failure to train workers on elevated platforms to recognize hazards and procedures; and

(5) lack of personal fall arrest systems, *i.e.*, safety belts and lifelines.

J.A. at 2636.

[3] In *Mikula v. Miller Brewing Co.*, 701 N.W.2d 613, 622 (Wis. App. 2005), the court recognized that the "majority" rule concerning this type of additional insured provision, as reflected in the cases cited in the Court's Opinion, is that "there need not be negligence alleged against the named insured for the additional insured to be covered"). *See also Dayton Beach Park No. 1 Corp. v. Nat'l Un. Fire Ins. Co.*, 573 N.Y.S.2d 700, 702 (N.Y. App. 1991); *Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co.*, 501 N.E.2d 812, 815 (Ill. App. 1986).

Federal believes that the silence of the Opinion on this issue may give rise to misinterpretation of the remand instructions.

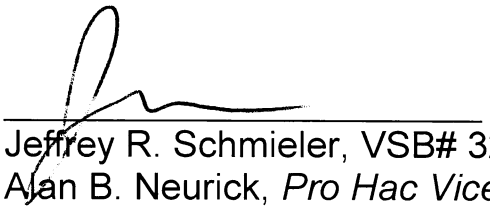
Lastly, footnote fourteen (14) of the Opinion notes that because it was determined that Uniwest was an additional insured under the AIU Policy, there was no need to reach the arguments by Uniwest and its insurers that AIU acquiesced in or is estopped from denying a duty to defend and indemnify Uniwest. Had the Court reached this issue and ruled in favor of Uniwest and its insurers, AIU would have been estopped to deny its obligation to **fully** indemnify Uniwest and its insurers. Federal's understanding of the Court's rationale for excluding these arguments is that Uniwest's status as an insured under the AIU policy pursuant to Subdivision E-7 would likewise afford full indemnity upon remand and a finding of "liability *arising out of* operations conducted by [Amtech] or on [Amtech's] behalf."

However, if this reading of the Opinion is incorrect, Federal respectfully requests that the Court now reach the estoppel/waiver arguments because the Court has before it all of the arguments that are necessary to determine this issue, one which will be completely dispositive of the duty to indemnity issue and the damages issue completely.

CONCLUSION

For the foregoing reasons, and in the interests of judicial economy and fairness, Federal seeks a clarification and/or rehearing as to the Court's remand instructions.

Respectfully submitted,



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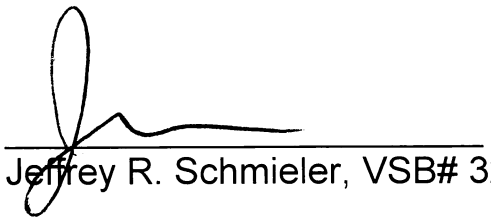
CERTIFICATE OF COMPLIANCE WITH RULE 5:37 WORD COUNT LIMITATION

I hereby certify that that this Petition complies with the word court limit set forth in Va. Sup. Ct. R. 5:37(d)(1).



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2010 a copy of the foregoing was sent via electronic mail to:

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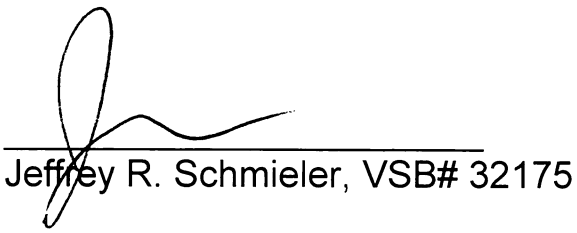

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