In the

Supreme Court of Virginia

At Richmond

Record No. 091496

AMTECH ELEVATOR SERVICES, n/k/a ABM AMTECH, INC., ABM INDUSTRIES, INC., and AIU INSURANCE COMPANY,

Appellants,

– v. –

UNIWEST CONSTRUCTION, INC., et al.,

Appellees.

Record No. 091521

FEDERAL INSURANCE COMPANY,

Appellant,

– v. –

AMTECH ELEVATOR SERVICES, n/k/a ABM AMTECH, INC., ABM INDUSTRIES, INC., and AIU INSURANCE COMPANY,

Appellees.

RESPONSE TO FEDERAL'S PETITION FOR REHEARING

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TABLE OF CONTENTS

Table of Authorities ii

Argument 1

I. PROVISION E-4 OF THE AIU POLICY REQUIRES FAULT ALLOCATION AND LIMITS ANY ADDITIONAL INSURANCE TO TWO MILLION DOLLARS 1

II. FAULT ALLOCATION IS NECESSARY TO DETERMINE THE AVAILABILITY AND EXTENT OF ANY ADDITIONAL INSURANCE UNDER PROVISION E-7 OF AIU'S POLICY 3

A. The Definition Of "Insured Contract" Establishes That Additional Insurance Under Provision E-7 Is Limited To Any Indemnity Amtech Owes Uniwest Under The Subcontract, Thus Requiring Fault Allocation.....3

B. The Requirement That Uniwest's Liability Arise Out Of Amtech's Operations Similarly Limits Coverage To The Amount Uniwest Paid To Settle Damages Caused By Amtech's Fault.....10

III. REMAND IS NECESSARY TO CONSIDER THE PRIORITY OF COVERAGE 12

Conclusion 13

Certificate

TABLE OF AUTHORITIES

Firemen's Fund Ins. Co. v. Discover Prop. & Cas. Ins. Co.,
No. C 08-0379, 2009 WL 2591394
(N.D. Cal. Aug. 21, 2009).....10, 11

Garamendi v. Golden Eagle Ins. Co.,
No. A106820, 2005 WL 1899409
(Cal. App., Aug. 10, 2005) 11, 12

KBS, Inc. v. Great Am. Ins. Co.,
No. 3:04 cv 730, 2006 WL 3538985 (E.D. Va. Dec. 7, 2006) 8

Premcor Refining Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.,
No. 07-C-01-095, 2008 WL 2232641
(Del. Super. Ct. May 7, 2008) 2

St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.,
101 Cal. App. 4th 1038, 124 Cal. Rptr. 2d 818 (2002)..... passim

St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co.,
111 Cal. App. 4th 1234, 4 Cal. Rptr. 3d 416 (2003)..... passim

Travelers Indemnity Co. v. Hanover Insurance Co.,
470 F. Supp. 630 (E.D. Va. 1979).....8

Uniwest Constr., Inc. v. Amtech Elevator Serv., Inc.,
2010 WL 3583997 (Va. Sept. 16, 2010) 9

ARGUMENT

This Court has granted rehearing to clarify the proper standard on retrial with respect to the scope of any additional insurance available to Uniwest under AIU's policy. This issue requires the trial court to allocate fault between Uniwest and Amtech since the additional insurance available to Uniwest under either provision E-4 or E-7 of AIU's policy is limited by Amtech's indemnity obligation under the subcontract.

I. PROVISION E-4 OF THE AIU POLICY REQUIRES FAULT ALLOCATION AND LIMITS ANY ADDITIONAL INSURANCE TO TWO MILLION DOLLARS.

Uniwest and Federal correctly concede that fault allocation is required to determine additional insured status under provision E-4 of AIU's policy. (Uniwest Pet. 3; 5-6; Federal Pet. 3) That provision provides additional insurance to any organization included as an additional insured in the underlying insurance but "not for broader coverage than is available" under the underlying policies:

> E. Insured means …:
>
> 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.

(JA 220)

The underlying policy extends additional insurance, but "only to the extent that is required to be indemnified," and limits the amount of additional insurance to "the limits of insurance required in the written agreement or contract, or the coverage of and limits of insurance of the policy, *whichever is less*." (JA 1790) (emphasis added) This last provision limits any obligation by AIU under this provision to the lesser amount of the policy limits ($25 million) or the contractual undertaking – here, two million dollars, as is required by Exhibit B to the subcontract, the Zipf Specifications.[1] *Premcor Refining Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, No. 07-C-01-095, 2008 WL 2232641, at *8 (Del. Super. Ct. May 7, 2008) (holding insurer owed the lower amount required by the insured contract since the additional insurance provision stated the policy would pay the lesser of the limits or the minimum limits the named insured agreed to procure in its insured contract).

When these provisions are read together, they require a fault allocation to determine what portion, if any, of Uniwest's settlement with

[1] The Zipf specifications required the elevator contractor to procure for Uniwest primary general liability insurance and a minimum of two million dollars in umbrella liability insurance by either naming Uniwest as an additional insured on its policy or by purchasing a separate policy. (JA 2016-17)

Bruce and Stinson was paid to discharge Amtech's fault for the accident, up to a maximum of two million dollars.

II. FAULT ALLOCATION IS NECESSARY TO DETERMINE THE AVAILABILITY AND EXTENT OF ANY ADDITIONAL INSURANCE UNDER PROVISION E-7 OF AIU'S POLICY.

A. The Definition Of "Insured Contract" Establishes That Additional Insurance Under Provision E-7 Is Limited To Any Indemnity Amtech Owes Uniwest Under The Subcontract, Thus Requiring Fault Allocation.

When additional insured provisions, by their own terms, depend upon the existence of a written contract between the named and additional insureds, that contract informs the scope of the additional insurance. *St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co*., 111 Cal. App. 4th 1234, 1245, 4 Cal. Rptr. 3d 416, 426 (2003).[2] This is true whether or not the insurer ever actually read the insured contract. *Id*. This is because the indemnity provision provides the context for the parties' expectations regarding the scope of the additional insurance.

In *St. Paul Mercury*, a subcontractor, Schuff, was hired by a general contractor, Bayley, to place steel beams. 111 Cal. App. 4th at 1238; 4 Cal.

[2] AIU issued its policy to ABM Industries, Inc. (Amtech) in California; the parties stipulated, and the district court applied, California law to these coverage issues. (JA 216; 473; 3042) Thus, Federal's and Uniwest's reliance upon non-California cases is erroneous. (Uniwest Pet. 8, n.3; Federal Pet. 7, n.3)

Rptr. 3d at 421. Schuff contracted with crane owner Bigge for use of a crane for the job. *Id.* Schuff agreed to indemnify Bigge for injury caused by Schuff occasioned by the use of the crane. 111 Cal. App. 4th at 1238-39; 4 Cal. Rptr. 3d at 421. Schuff also agreed to obtain additional insurance for Bigge. *Id*. Schuff was insured by St. Paul. *Id*. St. Paul issued two additional insured endorsements for the project, one providing additional insurance for Bigge "only with respect to liability arising out of [Schuff's] operations …" 111 Cal. App. 4th at 1239; 4 Cal. Rptr. 3d at 422.

After a Schuff employee was killed by a falling beam being hoisted with Bigge's crane, Bigge was sued for negligence; Schuff was protected by the workers compensation bar. 111 Cal. App. 4th at 1240; 4 Cal. Rptr. 3d at 422. After the underlying claim was settled, St. Paul sought an allocation of the settlement amount among it and Bigge's insurers. *Id.* The trial court initially intended to allocate fault between Bigge and Schuff, but then held 100% of the settlement was for Bigge's fault. 111 Cal. App. 4th at 1241; 4 Cal. Rptr. 3d at 423.

The appellate court held this was error and remanded for a fault allocation. 111 Cal. App. 4th at 1247; 4 Cal. Rptr. 3d at 428. First, the court found the indemnity provision limited indemnity to damages owed due to Bigge's vicarious liability for Schuff's fault:

> [T]he lease requires Schuff to indemnify Bigge for claims for injury or death in any way caused by [Schuff], in its use … of the crane. In *Hernandez*, this court held that substantively identical language required the lessee of a crane to indemnify the lessor only for the portion of the joint and several economic damage award to plaintiffs attributable to the lessee's negligence…. Accordingly, Schuff's fault is a prerequisite of contractual indemnity.

111 Cal. App. 4th at 1245-46; 4 Cal. Rptr. 3d at 426-27 (citation omitted).

Next, the court found that because the operative additional insured language limited coverage to "liability arising out of" Schuff's operations, there was no intent that the coverage be "more expansive than Schuff's promise of indemnity." 111 Cal. App. 4th at 1246; 4 Cal. Rptr. 3d at 427. Fault allocation was therefore necessary to determine how much each insurer owed for the settlement. The court explained that Bigge's insurers were responsible "for the settlement amount attributable to [Bigge's] own negligence or strict products liability." 111 Cal. App. 4th at 1247; 4 Cal. Rptr. 3d at 428.

Similarly, in *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co*., 101 Cal. App. 4th 1038, 1043, 124 Cal. Rptr. 2d 818, 821 (2002), subcontractor Sasco contracted with general contractor ARB for electrical work. Sasco agreed to indemnify ARB from any liability for bodily injury arising from an act or omission of Sasco and agreed to provide

additional insurance to ARB. *Id.* Sasco was insured by American Dynasty; the policy provided additional insurance to ARB for "liability arising out of" Sasco's operations. *Id*. ARB was insured by St. Paul. 101 Cal. App. 4th at at 1044; 124 Cal. Rptr. 2d at 822.

After a Sasco employee was injured by an exploding pipe while another contractor conducted pressure testing, he sued ARB for his injuries. 101 Cal. App. 4th at 1045; 124 Cal. Rptr. 2d at 822. ARB's insurer, St. Paul, defended and settled the case. *Id.* ARB and St. Paul then sought indemnity from Sasco and coverage from American Dynasty. 101 Cal. App. 4th at 1045-46; 124 Cal. Rptr. 2d at 823. The parties stipulated that Sasco did not cause the accident. 101 Cal. App. 4th at 1059-60; 124 Cal. Rptr. 2d at 834. The trial court nevertheless found Sasco owed indemnity and American Dynasty owed coverage. 101 Cal. App. 4th at 1060; 124 Cal. Rptr. 2d at 834.

The appellate court reversed, holding there could be no indemnity obligation if the liability arose out of ARB's (or its agent's) negligence:

> [T]here must be some evidence of such an act or omission, and there can be no indemnification obligation if the liability arose solely from the negligence of the promissee or its agents.

101 Cal. App. 4th at 1054; 124 Cal. Rptr. 2d at 829.

The court then held that the extent of the additional insurance was unclear, making it necessary to read the additional insurance provision in American Dynasty's policy "together with, and in the context of, the subcontract," particularly since the additional insured provision referred expressly to the subcontract. 101 Cal. App. 4th at 1056; 124 Cal. Rptr. 2d at 831. The fact that the provision referred to the indemnity contract established that the additional insurance was issued "in express contemplation of the obligations undertaken by Sasco under the subcontract." 101 Cal. App. 4th at 1057; 124 Cal. Rptr. 2d at 831. Thus, the court concluded the liability coverage provided by the additional insurance provision "could not reasonably be expected to be more expansive than Sasco's individual promise of indemnity." 101 Cal. App. 4th at 1059; 124 Cal. Rptr. 2d at 834. The court found this in keeping with the "well established meaning" of additional insurance provisions to provide parties who are not named insureds protection from exposure to vicarious liability for the acts of the named insured. 101 Cal. App. 4th at 1059-60; 124 Cal. Rptr. 2d at 834. Since the parties stipulated the named insured had not caused the accident, no fault allocation was necessary. 101 Cal. App. 4th at 1054, 1060; 124 Cal. Rptr. 2d at 829, 834. The court accordingly entered judgment for Sasco and its insurers. *Id*.

Decisions applying Virginia law are in accord. For instance, in *Travelers Indemnity Co. v. Hanover Insurance Co*., 470 F. Supp. 630 (E.D. Va. 1979), the named insured agreed to indemnify the city for claims occasioned by the negligence of the named insured. *Id*. at 631. Hanover issued a policy to the named insured and provided additional insurance to the city "as respects the activities" of the named insured. *Id*. at 632. The court found these documents, taken together, made clear that the coverage afforded to the city as an additional insured was limited to coverage for liability incurred because of the named insured's negligence:

> The court finds from the language of both of these instruments [the indemnity provision and additional insurance provision] that Hanover was only to insure the city … insofar as the city's liability was derived from an act of [the named insured].

Id. at 633. Because the complaint did not allege that the city was vicariously liable for the conduct of the named insured, the court awarded Hanover summary judgment. *Id*. *Accord KBS, Inc. v. Great Am. Ins. Co*., No. 3:04 cv 730, 2006 WL 3538985, at *12 (E.D. Va. Dec. 7, 2006) (holding that under Virginia law, additional insurance is determined by scope of indemnity provision and the fault allocated among the named and additional insureds).

Here, the subcontract between Uniwest and Amtech contains an indemnity provision wherein Amtech agrees to indemnify Uniwest, but only to the extent caused in whole or in part by negligent acts or omissions of Amtech. *Uniwest Constr., Inc. v. Amtech Elevator Serv., Inc*., 2010 WL 3583997, at *1 (Va. Sept. 16, 2010). Like in *St. Paul Mercury* and *St. Paul Fire & Marine,* AIU's additional insured provision, by its own terms, depends upon the existence of this indemnity agreement to meet the definition of an insured contract:[3]

> E. Insured means …:
>
> 7. Any … organization … to whom you [Amtech] are ***obligated by a written Insured Contract*** to provide insurance such as is afforded by this policy but only with respect to:
>
> a. liability arising out of operations by you [Amtech] or on [Amtech's] behalf …

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[3] The policy defines "insured contract" as a contract pertaining to Amtech's business whereby Amtech agrees to assume another party's tort liability for bodily injury:

> Insured Contract means any … written contract … entered into by [Amtech] and pertaining to [Amtech's] business under which [Amtech] assume[s] the tort liability of another party to pay for Bodily Injury … to a third person …. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(JA 1867)

(JA 220) (emphasis added) Just like in *St. Paul Mercury* and *St. Paul Fire & Marine,* AIU's additional insured provision should be read together with, and in the context of, the subcontract. This is particularly true since the additional insured provision expressly refers to the subcontract and thus the additional insurance was issued in contemplation of the obligations undertaken in that subcontract.

When read together, the liability coverage provided by the additional insurance provision should not exceed Amtech's individual promise of indemnity. Put another way, since Uniwest can obtain indemnity from Amtech only to the extent Uniwest establishes it faced liability for injury caused by Amtech's negligence, the additional insurance under this provision of AIU's policy requires the same analysis. Fault allocation is necessary to determine the availability and extent of any additional insurance under this provision.

B. The Requirement That Uniwest's Liability Arise Out Of Amtech's Operations Similarly Limits Coverage To The Amount Uniwest Paid To Settle Damages Caused By Amtech's Fault.

Provision E-7 also limits additional insurance to "liability arising out of" Amtech's operations. (JA 220) Liability arises out of the named insured's operations where the named insured is at fault for causing the accident giving rise to the liability. *Firemen's Fund Ins. Co. v. Discover Prop. & Cas.*

Ins. Co., No. C 08-0379, 2009 WL 2591394, at *3 (N.D. Cal. Aug. 21, 2009) (finding no additional insurance since the liability did not arise out of named insured's operations, applying an "intermediate level of causation between 'but for' and proximate causation"). Additionally, as shown in *St. Paul Mercury*, use of the "arising out of operations" language in the additional insurance context involving an indemnity contract establishes the intent that coverage not be more expansive than the named insured's promise of indemnity to the additional insured. 111 Cal. App. 4th at 1246; 4 Cal. Rptr. 3d at 427.

Here, additional insurance is provided only to the extent Uniwest's liability to Bruce and Stinson is causally connected to Amtech's operations. Proving causation between the liability of the additional insured (for the accident and injuries) and the risk (the named insured's operations) is the same thing as proving the extent to which the named insured is at fault for the accident. Uniwest can obtain insurance only for that portion of its settlement that discharged Uniwest for liability to Bruce and Stinson resulting from Amtech's fault for the accident. Uniwest cannot, however, obtain insurance for any portion of the settlement discharging its own negligence or its vicarious liability for any of the other defendants Bruce and Stinson sued. *See Garamendi v. Golden Eagle Ins. Co*., No. A106820,

2005 WL 1899409, at *7 (Cal. App., Aug. 10, 2005) (holding additional insured endorsements do not intend to cover the general contractor's direct or vicarious liability arising out of the work performed by other subcontractors unrelated to the scope of the work performed by the named insured).

Thus, Uniwest must allocate fault for the accident to determine if there is additional insurance and the extent of any such insurance. If the evidence shows that a portion of the settlement discharged Uniwest's liability for its own conduct – like requiring workers to forego fall protection to accelerate operations to compensate for construction delays – then that liability arises out of its own operations, not Amtech's, and is not covered under the AIU policy. Similarly, if Uniwest paid to discharge its vicarious liability, like the scaffolding contractor's negligence in supplying defective wood, that would not be covered under AIU's additional insured endorsement.

In The Alternative Only

III. REMAND IS NECESSARY TO CONSIDER THE PRIORITY OF COVERAGE

The trial court did not reach the insurance issues because it found the indemnity provision between Amtech and Uniwest invalid and thus the necessary predicate for additional insurance – a written insured contract –

was lacking here. Accordingly, the court never considered the impact of other policy provisions, including the "other insurance" provisions of the policies issued to Uniwest. (JA 1301-02) Remand is therefore necessary to consider the impact these additional provisions have on allocating the settlement amount.

CONCLUSION

For the foregoing reasons, plaintiffs-appellees, Amtech Elevator Services, n/k/a ABM Amtech, Inc., ABM Industries, Inc., and AIU Insurance Company, request the Court confirm that the fault it allocated is necessary to determine the extent of an additional insurance owed Uniwest under AIU's policy and grant such further relief as this court deems just.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for the appellees, hereby certifies that the foregoing Response to Federal's Petition for Rehearing complies with Rule 5:37 (f) and is 13 pages in length.

/s/John D. McGavin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of February, 2011, a copy of the foregoing Response to Federal's Petition for Rehearing was served via third party commercial carrier and via e-mail on the following counsel of record:

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This same date, a copy was filed in the Clerk's Office via email at scvpfr@courts.state.va.us.

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