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NEWSLETTER

# Obligation To Seek Consent To Settlement Determined By Whether Insurer "Denied" or "Disclaimed" Coverage

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Applying New York law, the United States District Court for the Southern District of New York has held that whether an insured is excused from its contractual obligation to obtain consent to a settlement depends on whether the insurer has "denied" or "disclaimed" coverage and, where there was an open question of fact on this issue, dismissal of the insured's claims for breach of contract was not appropriate. P*B Americas Inc. v. Cont. Cas. Co.*, 2010 WL 532306 (S.D.N.Y. Feb. 9, 2010). The court did conclude, however, that the insured's claim against the insurer for damages under New York's deceptive practices act could not be sustained.

The policy at issue provided specified professional liability coverage for the joint venture responsible for managing the design and construction of the "Big Dig" project in Boston, Massachusetts. By its terms, coverage under the policy was not triggered unless and until the $50 million in underlying insurance was paid out. The policy also provided that the insured was required to obtain the insurer's approval before making any payment, admitting liability or assuming any obligation with respect to a claim for which coverage was sought.

In late 2003, the state threatened to bring suit against the insured for alleged mismanagement of the project. The insured tendered this information to the insurer as a potential claim and sought the insurer's assistance in preparing a defense. The insurer responded with a request for information as to the underlying insurance and stated that its coverage was only applicable upon the exhaustion of that underlying insurance. Three months later, the insured notified the insurer that the state had filed suit against it and others involved in the project and that a global settlement was being negotiated. The insurer responded that it was not required to defend so long as the underlying insurance was not exhausted. The insured continued settlement negotiations, provided the insurer with updates and eventually reached an $85 million settlement. The insurer refused to contribute toward the settlement, taking the position that the amount in excess of the underlying insurance was for "political value" and "not any actual legal exposure" of the insured.

Subsequently, a motorist was killed by falling concrete ceiling panels in one of the project's tunnels. This event led to several lawsuits against the insured and others. The insured reported the matters to the insurer and proceeded with negotiations directed at a global settlement. The insured kept the insurer apprised of those

negotiations but, according to the insured, the insurer "never agreed to defend [the insured] and never stated it was willing to consent to the settlements being discussed." A global settlement ultimately was reached, and the insurer again refused to contribute on behalf of the insured.

In the coverage litigation that followed, the insurer moved to dismiss the insured's breach of contract claims on the grounds that the insured failed to seek its approval before entering into both settlements and, as a result, vitiated the insurer's obligation to provide coverage. The insured responded that the insurer's refusal to cover the first settlement and later refusals to defend the actions excused it from complying with the policy's consent to settle provision. In this regard, the court observed that consent-to-settle provisions are a condition precedent to coverage under New York law that "may be waived by words or from an inference from the [insurer's] conduct." The court next noted that a distinction must be drawn between "a denial of coverage and a disclaimer of coverage." The former, according to the court, is "a 'repudiation' of the contract of insurance" that relieves the insured of its obligations under the policy. As the court further explained, however, where the insurer's position is not "'unequivocal' or 'absolute'" and is based on the particular set of factual circumstances presented by an individual matter, "this is a disclaimer [and] the insured continues to be obligated to comply with its contractual responsibilities." Here, according to the court, while one of the insurer's earlier letters appeared to be a "disclaimer, not a denial," the nature of the insurer's alleged subsequent refusals was "unclear." Therefore, drawing all reasonable inferences in favor of the insured, the court concluded that it would be premature at this stage to dismiss the contract claims and denied the insurer's motion as to these counts.

The court, however, took a different view of the insured's cause of action under New York General Business Law Section 349. This law prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of service in [the] state." According to the court, the statute is intended to address "consumer oriented" conduct that has "ramifications for the public at large" and a private contract dispute, such as the one here, does not meet this criteria. Dismissing this count, the court recognized that courts in New York routinely refuse to apply Section 349 to "[coverage] disputes between policyholders and insurance companies."