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Expert Analysis

Key Rulings Concerning Cleanup Of Former Grumman Sites

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Over the course of more than half a century, starting in the 1930s, Grumman operated naval aircraft manufacturing and testing facilities on Long Island in Calverton and Bethpage. In the mid-1990s, as demand for military aircraft and related defense industry products decreased, Grumman was purchased by Northrop (now Northrop Grumman) and the facilities on Long Island were closed and redeveloped. The former operations, however, left behind environmental contamination at the Calverton facility, the Bethpage facility and a park site within the Bethpage facility, each of which has been the subject of investigation and remediation operations over the last couple of decades. These cleanup operations have in turn led to insurance disputes between Northrop Grumman and its insurers.

On Nov. 4, 2013, Judge Katherine B. Forrest of the Southern District issued a lengthy Opinion and Order in *Travelers Indemnity v. Northrop Grumman* which addresses several important issues including the scope of the insurer's defense obligation where only some claims are potentially covered, reporting of claims in the context of consecutive claims-made policies and late notice of claims and occurrences.[1]

Allocation of Defense Costs

The issues before the district court included whether Travelers was obligated to defend Northrop Grumman in a suit filed by the Town of Oyster Bay.[2] The Town of Oyster Bay alleged that Grumman had disposed of hazardous materials at the park site in connection with operations that took place between 1930 and 1962. On an earlier motion, the court had ruled that Travelers had a duty to defend, but had also determined that Travelers was only responsible for a 25 percent allocated share of defense costs.

Northrop Grumman moved for reconsideration, contending that once the court ruled that Travelers had a duty to defend, Travelers was obligated to defend the entire action and pay all of the defense costs, not just an allocated share. Northrop Grumman cited *Fieldston Prop. Owners Ass'n v. Hermitage Ins.* for the usual propositions that the duty to defend is broader than the duty to indemnify and that the "duty to defend arises whenever the allegations in the complaint give rise to the possibility of recovery under the policy."[3] The Court of Appeals in *Fieldston* also stated the well-settled law that if any of the claims against an insured are arguably covered, the insurer is required to defend the entire action.[4]

Forrest discussed this precedent in the Opinion and Order but nevertheless denied Northrop Grumman's motion. Forrest held that pro rata allocation of defense costs was appropriate because, as a matter of undisputed fact, the Town of Oyster Bay case concerned some occurrences that took place outside of the Travelers' policy periods and were therefore not covered by Travelers. Forrest acknowledged that if there was ambiguity as to whether or not all of the claims were covered, Travelers would likely owe a complete defense. But where there is no such ambiguity, the court explained that "to hold otherwise would allow a party to incur potentially millions of dollars of defense costs when within the four corners of the complaint it simply could not—as pled—be responsible for all of the discovery costs and motion practice involved in litigating those other periods."[5] In so ruling, however, the court granted the parties leave to further address the percentage of defense costs that should be allocated to Travelers.

Reporting Requirements

The district court also addressed Travelers' motion for partial summary judgment seeking a ruling that it was not obligated to provide coverage for the claim concerning the Bethpage Facility under two environmental hazard policies. The first of the environmental hazard policies provided coverage to Northrop Grumman for claims made and reported during the period from Jan. 1, 1983, to Jan. 1, 1984. The second policy provided coverage for claims made and reported from Jan. 1, 1984, to Jan. 1, 1985.

> An opinion addresses the scope of the insurer's defense obligation where only some claims are potentially covered, reporting of claims in the context of consecutive claims-made policies and late notice.

By letter dated Dec. 6, 1983, the New York State Department of Environmental Conservation (NYSDEC) asserted that Grumman was subject to liability for response costs and damages to natural resources at and around the Bethpage facility. While Grumman received the NYSDEC letter during December 1983, it did not report the claim to Travelers until late January 1984 (at the earliest).

This essentially placed Northrop Grumman between the two policies. The claim was made against Northrop Grumman during the first environmental hazard policy, but not reported to Travelers until the second policy had commenced. Unfortunately for Northrop Grumman,

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the policies did not contain specific language, often included in more modern policies, which extends the reporting period for 60 days after policy expiration. Since the claim was not both made and reported during either policy period, Travelers denied coverage and filed a motion seeking summary judgment.

Northrop Grumman contested the motion, arguing primarily that because it had purchased consecutive environmental hazard policies from Travelers it was entitled to seamless coverage for claims made and reported during the period from Jan. 1, 1983, to Jan. 1, 1985. The district court disagreed, holding that the policies' claims reporting provisions were clear, unambiguous and enforceable. According to Forrest, "by failing to report the Bethpage facility claim to Travelers in 1983, the policy period in which the claim was made to Grumman, Grumman failed to comply with the terms of the policy."[6] Therefore, Forrest granted Travelers' motion for summary judgment on this issue.

Notice by Insured

The issue of whether Century Indemnity had a duty to defend the Town of Oyster Bay action was also before the district court. Century Indemnity took the position that it had no duty to defend because Northrop Grumman had not provided timely notice, a condition precedent to coverage under the Century Indemnity policies.

Century Indemnity argued that the notice it received in 2005 was late because the insured's obligation to provide notice was triggered three years earlier in 2002, when NYSDEC notified Northrop Grumman of a claim concerning the park, and the Town of Oyster Bay provided notice of its intent to file suit against Northrop Grumman regarding contamination in the park.

Northrop Grumman contended that notice of occurrence was actually submitted back in 1984, when it sent the January 1984 notice letter discussed above to Travelers, copying Century Indemnity's predecessor INA, and attaching the NYSDEC letter of Dec. 6, 1983.

The court rejected Northrop Grumman's argument, finding that the January 1984 letter related to the landfill at the Bethpage facility, a geographically distinct site from the park site, and that the reference to natural resources "at and around" the Bethpage facility in the NYSDEC letter was not sufficient to provide notice of an occurrence related to the park site. Crucial to the court's ruling was its view that Northrop Grumman was taking inconsistent positions. On the one hand, Northrop Grumman argued that the reference in the NYSDEC letter to potential liability for damages to natural resources "at and around" the Bethpage facility was sufficient to place Century Indemnity on notice of an occurrence at the Bethpage park site. On the other hand, Northrop Grumman contended that it was not aware of groundwater contamination at the Bethpage park site until the mid-2000s.

The court ruled in favor of Century Indemnity, finding that although the duty to defend is "exceedingly broad," and New York law liberally construes notice requirements in favor of insureds, notice cannot be said to have been given before the insured was even aware of a possible occurrence or claim. Forrest explained that "Northrop Grumman could not have fulfilled the requirements of providing notice of an occurrence or of a claim unless it understood one had occurred or was being made. It did not believe the 1984 Letter attached a 'claim' about groundwater contamination at the Bethpage Community Park. How could Century have intuited that as to which Grumman was not yet aware?"[7]

Under applicable law, the standard for determining whether the insured's obligation to provide notice of an occurrence has been triggered is whether the circumstances known to the insured were such that they would have suggested to a reasonable person the possibility of a claim.

Insured's Knowledge

Finally, the district court also addressed the joint motion for summary judgment on late notice grounds filed by Travelers and Century Indemnity with regard to claims arising from environmental contamination at the Calverton site. On this motion, the insurers contended that Northrop Grumman was aware of its potential liability for contamination at the Calverton site in the 1980s and 1990s, but did not provide notice to the insurers until 2008, when the U.S. Navy threatened suit. Northrop Grumman contested the motion, arguing that it knew of periodic leaks and spills at the Calverton site, but that it had no reason to believe that resulting contamination was serious enough to constitute an occurrence or subject it to claims until the Navy actually asserted a claim.

Under applicable law, the standard for determining whether the insured's obligation to provide notice of an occurrence has been triggered is whether the circumstances known to the insured were such that they would have suggested to a reasonable person the possibility of a claim.[8] However, notice is not required if the insured has a reasonable belief in non-liability or a reasonable belief that a claim is unlikely.[9]

The district court reviewed the documentary evidence presented by the parties and concluded that no rational juror could believe that there had not been a reportable occurrence with regard to the Calverton site by the mid-1990s. By that time, according to Forrest, "there was significant evidence, based on scientific testing, that there were several areas in which groundwater was contaminated at the Calverton site."[10]

In addition, the court rejected Northrop Grumman's position that it was excused from providing notice prior to 2008 because it believed that the Navy would perform and pay for the necessary remediation at the Calverton site. According to the Opinion and Order, the belief that a third party may be obligated to cover an insured's liability does not relieve the insured from providing timely notice.[11] Therefore, according to Forrest, even an actual belief that the Navy would pay for cleanup of the Calverton site would not have excused Northrop Grumman from providing timely notice.

Looking Forward

Forrest's Opinion and Order represents the latest chapter concerning insurance coverage disputes regarding the cleanup of former Grumman sites on Long Island. Absent a settlement, however, we would expect Northrop Grumman to appeal some of these issues to the Second Circuit.

1. *Travelers Indem. v. Northrop Grumman*, Case No. 1:12-cv-03040-KBF (S.D.N.Y. Oct. 31, 2013).
2. The motions for reconsideration addressed rulings previously issued by the court in *Travelers Indem. v. Northrop Grumman*, 2013 WL 3388235 (S.D.N.Y. July 3, 2012).
3. Id.; *Fieldston Prop. Owners Ass'n v. Hermitage Ins.*, 16 N.Y.3d 257, 920 N.Y.S.2d 763 (2011).
4. *Fieldston Prop. Owners Ass'n v. Hermitage Ins.*, 16 N.Y.3d 257, 920 N.Y.S.2d 763 (2011).
5. *Travelers Indem. v. Northrop Grumman*, Case No. 1:12-cv-03040-KBF at 7.
6. Id. at 32.
7. Id. at 20.
8. *Olin Corp. v. Insurance of North Am.*, 966 F.2d 718, 723 (2d Cir. 1992).
9. *Safeguard Ins. v. Angel Guardian Home*, 946 F.Supp. 221 (E.D.N.Y. 1996).
10. *Travelers Indem. v. Northrop Grumman*, Case No. 1:12-cv-03040-KBF at 62.
11. *Commercial Union Ins. v. International Flavors & Fragrances*, 822 F.2d 267 (2d Cir. 1987).

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