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The Newsletter from

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COVERAGE UPDATE

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Miranda & Sokoloff LLP attorneys, Steven Verveniotis, Benjamin P. Malerba, III, and Jason B. Gurdus represented Mount Vernon Fire Insurance Company and U.S. Underwriters Insurance Company in the two lawsuits discussed in this Update.

Webster, obviously, provides an easily workable standard on both sides. If one is an insured and one wants coverage, one has an obligation to notify the carrier. The carrier has an obligation to disclaim only to the insured or insureds that actually provided notice.

The Second Circuit also certified to the New York Court of Appeals the issue of attorneys' fees. The Court has asked the New York Court of Appeals to determine whether in a case where an insurance company has brought a declaratory judgment action to determine that it does not have obligations under the policy but has defended in the underlying suit, a defendant prevailing in the declaratory judgment action can be awarded attorneys' fees expended in defending the declaratory judgment action.

TIMING OF NOTICE AND DISCLAIMER

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, IN WEBSTER AND SZPAKOWSKI, REDEFINES NEW YORK LAW ON ISSUES OF THE INSURED'S OBLIGATIONS TO PROVIDE NOTICE OF AN OCCURRENCE, CLAIM OR LAWSUIT TO THEIR INSURER AND THE INSURER'S OBLIGATIONS TO PROVIDE NOTICE OF DISCLAIMER TO ITS INSURED

The Second Circuit, albeit two completely different panels of that Court, in one week in April – one day apart - issued two decisions (Webster v Mount Vernon Fire Insurance Co., Docket Number 03-7490(L), 03-7491(XAP) ("Webster"), decided on April 22, 2004, and U.S. Underwriters Insurance Co. v. City Club Hotel LLC, et al, Docket No. 03-7533(L), 03-7543(XAP) ("Szpakowski"), decided on April 23, 2004) which appear, at least to the authors (who represented the respective insurance companies in the two cases), inconsistent.

THE WEBSTER APPROACH

In Webster, the husband was the named insured and there was a lawsuit against the husband and his wife. The Second Circuit, ruled that "[b]ecause an insurer's obligation to disclaim coverage as to a particular insured does not arise until that insured has provided notice of the occurrence or claim, [the failure of the wife of the individual named insured] to provide any notice relieved Mount Vernon of its obligation to disclaim coverage as to her."

THE SZPAKOWSKI APPROACH

The Szpakowski case arose from a personal injury action brought by Marek Szpakowski who was injured on April 27, 2000 while employed by City Club Hotel, LLC ("City Club"). A lawsuit was ultimately asserted setting forth Labor Law claims against Shelby Realty, LLC ("Shelby"), the owner of the property and a named insured, as well as other defendants involved in the construction work, including Forthright Development, LLC ("Forthright"), and Metropolitan Hotels, LLC ("Metropolitan"), who were also members of City Club. The Complaint also asserted that there was a construction agreement between Shelby and City Club. While U.S. Underwriters had previously been given notice by City Club of a letter sent by claimant's counsel to Shelby, the involvement of all of the parties to the lawsuit was not disclosed until the lawsuit was sent to U.S. Underwriters, in December 2000. U.S. Underwriters disclaimer based upon an exclusion applicable to claims by employees of "any insured" and claims by employees of a contractor.

The Second Circuit held that U.S. Underwriters' disclaimer of coverage was untimely as to Shelby even though Shelby did not independently provide notice to the carrier. The Court found that the first notice, although sent by a broker with clear reference only to City Club not Shelby, was in fact sufficient to give notice to U.S. Underwriters of a claim against Shelby. The Second Circuit stated that this was "sufficient to fulfill Shelby's contractual requirement to 'see to it' that U.S. Underwriters was notified of the claim." The Second Circuit also made a separate ruling as to Metropolitan and Forthright, both of which sought coverage as members of City Club, under the definition of "insured" as including members of a named insured. The Court held that U.S. Underwriters' "notice of disclaimer to defendants Metropolitan and Forthright was untimely as a matter of law, insofar – **and only insofar** – as these entities claim coverage as members of City Club, and are being sued in the personal injury action in their capacity as members of City Club." (Emphasis added.)

WHAT IS THE STANDARD?

Webster provides a clear standard. Each insured has to provide its own separate notice and the failure to provide that separate notice excuses the insurance company from the obligation to disclaim to that insured. Szpakowski, on the other hand, asks the insurer to consider what is attached to the notice received and to inquire whether there are related entities (or individuals) and the capacities under which such other entities (and possibility individuals) could be sued in determining who has provided notice and who is entitled to notice of a disclaimer. Szpakowski does not address the outcome if there are exclusions that apply to the sub-entities that do not apply to the named insured that actually provided the notice. For example, what if the claimant is an employee of one but not others? What if one of the entities contracted work to the claimant's employer but others did not? How is the carrier supposed to know that is to be investigated when exclusions do not on their face apply to the one giving notice? The Szpakowski standard is a blurring of the obligations of insureds and insurers and will lead to more litigation.

It is also worthy to note the comparable positions of the wife in Webster to that of the sub-entities in Szpakowski. The husband's notice does not constitute notice on behalf of his wife but one corporate entity's notice could, as to some claims, be notice for its member entities.

The safe approach, of course, is for insureds to provide timely notice and for insurers to take nothing at face value but to investigate all aspects fully and take a coverage position as to all on an expedited basis. Easier said than done.