To be Submitted by:
CAITLIN J. HALLIGAN

APL-2020-00044
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Court of Appeals

of the

State of New York

J.P. MORGAN SECURITIES INC., J.P. MORGAN CLEARING CORP.
and THE BEAR STEARNS COMPANIES LLC,

Plaintiffs-Appellants,

– against –

VIGILANT INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY and FEDERAL INSURANCE COMPANY,

Defendants,

– and –

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., LIBERTY MUTUAL INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendants-Respondents.

BRIEF FOR DEFENDANT-RESPONDENT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

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Corporate Disclosure Statement

National Union Fire Insurance Company of Pittsburgh, Pa. is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

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Preliminary Statement

In their opening brief, Plaintiffs-Appellants J.P. Morgan Securities Inc., J.P. Morgan Clearing Corp., and The Bear Stearns Companies LLC (collectively, "Bear") assert that the policies of Defendants-Respondents Certain Underwriters at Lloyd's, London ("Underwriters") and American Alternative Insurance Corporation ("AAIC") contain an exclusion for known wrongful acts (the "Known Wrongful Act Exclusion") "that does not appear in the other Insurers' policies." Bear Brief at 49.

Defendant-Respondent National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") writes separately to make clear to the Court that Bear's statement is incorrect, to the extent that National Union's coverage is also subject to the Known Wrongful Act Exclusion per the terms of a fully executed insurance binder signed by both National Union and Bear in August 2001. Thus, for the reasons set out in Underwriters and AAIC's joint-brief, which National Union adopts in its entirety, the Known Wrongful Act Exclusion prevents Bear from receiving coverage from National Union.

With respect to all other issues presented in this appeal, National Union adopts and incorporates by reference the briefs of Co-Defendants Vigilant Insurance Company ("Vigilant"), The Travelers Indemnity Company ("Travelers"), and Underwriters and AAIC.

Counter-Statement of Questions Presented

1. Should Bear be bound to a fully executed insurance binder it proposed and ultimately agreed to with National Union that included an exclusion for known wrongful acts?

With respect to all other issues presented in this appeal, National Union incorporates herein by reference the Questions Presented in the Vigilant brief, the Travelers brief, and the Underwriters and AAIC brief.

Statement of the Case

National Union adopts and incorporates by reference the Statements of the Case set forth in the briefs of Vigilant, Travelers, and Underwriters and AAIC.

A. The National Union Excess Policy

The National Union Excess Policy was originally issued to Bear in April 2000 with a $25M Limit of Liability in excess of $100M of total underlying limits, including Defense Costs. R. 687-695. The National Union Excess Policy had a policy period of March 21, 2000 to May 5, 2003. R. 687-695. A revised policy was issued in February 2001 with substantially similar terms. R. 658-667.

B. The March 2000 Insurance Binder

At the same time Bear was negotiating with National Union for excess liability coverage, Bear was also negotiating with Underwriters for excess liability cov-

erage. R. 683. On March 21, 2000, Bear's broker—Frank Crystal & Co., Inc. ("Crystal")—issued insurance binders to National Union, R. 681, Underwriters, R. 683, and Liberty Mutual Insurance Company, R. 685, for their respective coverage policies in the Bear tower. The binders noted that the excess policies had a coverage period of March 21, 2000 to May 5, 2003, and outlined the individual details of each policy. R. 681, 683, 685. Among the "Specifications" listed in each binder, the following statement was included: "Pending and Prior Litigation Exclusion and Known Wrongful Acts Exclusion effective March 21, 2000." R. 681, 683, 685. National Union's subsequently issued policy, however, did not include an exclusion for known wrongful acts. R. 658-667, 687-695. Underwriters' policy, however, did. R. 4159.

C. The August 2001 Insurance Binder

On August 17, 2001, Crystal prepared and sent an insurance binder to National Union. R. 669-671. The insurance binder categorized its contents as providing an "Endorsement" to the National Union Excess Policy. R. 671. The "Specifications" for the insurance binder stated:

> It is hereby understood and agreed that notwithstanding anything contained in Excess Insurance Policy Form 74675 (11/99) attached to Policy No. 278-73-26, it is hereby understood and agreed that Policy No. 278-73-26 shall follow the terms and conditions of underlying Vigilant Insurance Company Policy No. 7023-22-82 and Federal Insurance Company Policy No. 7023-24-81 *except*

> *with respect to any loss arising out of any Pending or Prior Litigation or Known Wrongful Act as of March 21, 2000* and at set forth on the Declarations Page attached to Policy No. 278-73-26.

R. 671 (emphasis added). The insurance binder was executed on behalf of National Union and returned to Crystal on August 20, 2001. R. 673.

The insurance binder does not contain any applicable expiration date or other time limitations; to the contrary, it explicitly states its terms are "binding" and that the Binder "automatically will be extended for additional consecutive periods of 60 days until acceptance of the Policy, Bond, and/or Endorsement by the Assured." R. 673. Neither party alleges a subsequent policy, bond, and/or endorsement was adopted or accepted by either National Union or Bear.

Argument

I. The Known Wrongful Act Exclusion Precludes Bear from Receiving Coverage from National Union

For the same reasons Underwriters are not obligated to cover the disgorgement award assessed against Bear by the SEC due to the Known Wrongful Act Exclusion, National Union is not obligated to provide coverage to Bear. National Union adopts and incorporates by reference all of the arguments contained in the brief submitted by Underwriters and AAIC. (As noted above, National Union also incorporates by reference all of the arguments set forth in the briefs of Vigilant and Travelers.)

Per the terms of the insurance binder executed by both Bear and National Union on August 20, 2001 (the "NU 2001 Insurance Binder"), the National Union Excess Policy was to "follow the terms and conditions of underlying Vigilant Insurance Company Policy No. 7023-22-82 and Federal Insurance Company Policy No. 7023-24-81 *except with respect to any loss arising out of any Pending or Prior Litigation or Known Wrongful Act as of March 21, 2000* . . ." R. 673 (emphasis added).

The NU 2001 Insurance Binder's inclusion of the Known Wrongful Act Exclusion was consistent with the parties' clear intentions since the inception of the National Union Excess Policy. Indeed, the original insurance binder issued to National Union in March 2000 also included the Known Wrongful Act Exclusion. R. 681. And contemporaneous communications between the parties in March 2000 clearly stated that the parties had agreed that "[t]he excess layer will contain a . . . 'No Known Wrongful Acts' Exclusion . . ." R. 678.

It is well accepted that an insurance binder immediately establishes insurance coverage upon its execution. *See R.D. Mgmt. Corp. v. Ace Fire Underwriters Ins. Co.*, 7 F. App'x 67, 69 (2d Cir. 2001) (disagreeing with the plaintiff's argument that "the terms of its insurance coverage must be contained in the policy and cannot come from the binder"); *Westchester Resco Co., L.P. v. New England Reinsurance Corp.*, 648 F. Supp. 842, 845 (S.D.N.Y. 1986), *aff'd*, 818 F.2d 2 (2d Cir. 1987) (noting that "a binder alone is sufficient to establish coverage"). And it is also well accepted that

an insurance binder is effective based on its "specified start and end dates." *Springer v. Allstate Life Ins. Co. of New York*, 94 N.Y.2d 645, 650 (2000). While some binders limit their coverage to a set amount of days, the NU 2001 Insurance Binder automatically extended "until acceptance of the Policy, Bond, and/or Endorsement by the Assured." R. 673; *compare with Springer*, 94 N.Y.2d at 650 (noting the binder terminated after 60 days). Neither party alleges a subsequent policy, bond, and/or endorsement was adopted or accepted by the parties. Thus, by its plain terms, the NU 2001 Insurance Binder stayed in effect for the remaining duration of the original National Union Excess Policy.

In its brief to the Appellate Division, Bear argued that even if "some form of exclusion was intended" through the NU 2001 Insurance Binder, the exclusion was not effective because "precise terms" detailing the exclusion were "entirely absent from the 2001 Binder." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, Brief for Plaintiffs-Respondents, First Dept., Mar. 13, 2018, at 152-153 ("Bear First Dept. Brief"). But courts have repeatedly recognized that insurance binders cannot be expected to include extensive details regarding the coverage they enshrine. As explained by this Court:

> It is a common and necessary practice in the world of insurance, where speed often is of the essence, for the agent to use this quick and informal device to record the giving of protection pending the execution and delivery of a more conventionally detailed policy of insurance. Courts, rec-

> ognizing that the cryptic nature of binders is born of necessity and that many policy clauses are either stereotypes or mandated by public regulation, are not loath to infer that conditions and limitations usual to the contemplated coverage were intended to be part of the parties' contract during the binder period.

Employers Commercial Union Ins. Co. v. Firemen's Fund Ins. Co., 45 N.Y.2d 608, 612–13 (1978). In instances where a claim arises "after the binder has been issued but before the policy has, courts will infer that the binder is conditioned by the 'limitations usual to the contemplated coverage,' on the assumption that 'many policy clauses are either stereotypes or mandated by public regulation.'" *Westchester*, 648 F. Supp. at 845 (quoting *Employers Commercial*, 45 N.Y.2d at 613); *see also Matter of Seiderman v. Herman Perla, Inc.*, 268 N.Y. 188, 190 (1935) (noting that when a binder is signed, it includes "by inference all the terms of a regular policy").

Here, the Court can infer the limitations usual to the Known Wrongful Act Exclusion by looking at Underwriters' policy, which was negotiated at the same time as the original National Union Excess Policy and which also included the Known Wrongful Act Exclusion. R. 683. Given that Underwriters' policy was issued at the same time as the National Union policy, the binders issued as part of those policies were also identical, and that both Underwriters' and National Union were excess insurers in the Bear tower, it is perfectly reasonable and consistent with the applicable case law to incorporate the exclusion language to which Bear agreed to with

respect to an endorsement issued by another excess carrier in the same tower of insurance.

Before the Appellate Division, Bear also argued that Underwriters' Known Wrongful Act Exclusion language cannot be transmuted to National Union's policy because "it cannot simply be assumed that Bear Stearns and National Union would have agreed to those same terms." Bear First Dept. Brief at 153. And yet, this argument, if accepted, would undermine the holding of *Employers Commercial* and its progeny, which state unequivocally that such assumptions have to be made due to the unique circumstances surrounding the execution of insurance binders. Even more, in an affidavit submitted to the trial court, National Union's underwriter at the time the NU 2001 Insurance Binder was executed stated that the terms of Underwriters' Known Wrongful Act Exclusion "would have been acceptable to me if it had been presented by Bear Steams' broker to National Union after the Endorsement Binder was executed . . ." R. 1006.

For the reasons explained above and in the Underwriters/AAIC companion brief, the fact that at least one officer of Bear knew by March 21, 2000 of the Wrongful Acts or that they could lead to a claim precludes coverage for both Underwriters as well as National Union.

CONCLUSION

For the reasons stated above and in the brief submitted by Underwriters and AAIC, the Known Wrongful Act Exclusion provides an alternative basis to uphold the Appellate Division's Order reversing the trial court and granting judgment as to National Union. In the alternative, the matter should be remanded for further consideration by the Appellate Division, which did not reach the Known Wrongful Act Exclusion issue in its opinion, or determine whether National Union's coverage included the Known Wrongful Act Exclusion.

Date: August 20, 2020

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using [name of word processing system].

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