

EXPERT COMMENTARY

SELLING YOUR PREMISES—DOES CGL COVERAGE APPLY AFTER THE SALE?

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The story you are about to read is true; only the names have been left out to distill an important coverage issue—does the commercial general liability (CGL) policy provide coverage for a named insured that sells its commercial location if bodily injury takes place *after* the location has been sold?

A commercial real estate owner purchased a CGL policy for the period May 2007 to May 2008. On July 31, 2007, the named insured sold its New York location.

The Injury and Lawsuit

A patron was injured when she allegedly slipped and fell at the New York location on August 10, 2007, a mere 10 days after the location was sold to new owners. The patron sued the new owner, as well as the *prior owner*, for her injuries.

Liability after the Sale

Typically, a seller of real estate is not liable for a dangerous condition on the premises that existed at the time of the sale. But, in New York,

there is an exception to this general rule—courts will impose liability on the *prior* owner after the sale under certain limited circumstances:

- the prior owner knew a dangerous condition existed at the premises;
- the buyer had no knowledge of the dangerous condition; and
- the buyer did not have reasonable time to discover and fix the dangerous condition.

The Allegations

The injured patron did allege in her complaint the “prior owner exception” to the general rule of liability—she alleged the seller was liable for her injuries because a dangerous condition existed at the time of the sale and the new owner did not have reasonable time to discover and remedy the condition once it was known. While denying any liability to the injured patron, the prior owner demanded that its CGL insurer defend the allegations in the patron’s complaint.

The CGL Insurer’s Coverage Denial

The CGL insurer flatly denied any obligation to defend the prior owner against the injured pa-



tron's complaint. No liability coverage applied, according to the insurer, as the location had been deleted from its policy. To demonstrate that the New York location had been deleted from the CGL policy, the insurer offered affidavits from a "technical specialist" and executive officer of the insurer—all as evidence that the named insured had directed the insurer to remove the New York location from the CGL policy as the property was being sold. In conjunction with deleting the location, the insurer also demonstrated that it refunded premium to the seller.

Seller's Position

The seller did concede that the title to its New York property was transferred to the new owner and did not deny that the location was deleted from the CGL policy as of July 31, 2007. Nonetheless, the seller argued that, unless it could be concluded as a matter of law that there was no possible factual or legal basis on which the insurer might eventually be held to pay damages, it was premature for the insurer to deny coverage for at least defense.

Expanding on its argument, the seller argued that, if liability can be imposed on the seller because of its conduct when it owned the location, the insurer is obligated to defend the seller and, if damages are awarded, pay the damages to the injured patron. Thus, the seller argued, if it was *potentially* liable to the patron, defense was owed to it as a matter of law.

According to the seller, it would be an injustice and unreasonable to find that the CGL insurer has no duty to defend a seller when the law permits a claim to be asserted against the seller because the CGL policy covered the seller *before* the property was sold. In other words, if liability insurance was in effect when the dangerous condition was allegedly created, then that liability insurance should continue to provide protection for the seller *after* the sale *because* the dangerous condition was created *before* the sale.

Insurer's Position

As the location had been deleted from the policy at the time of the injury to the patron, the insurer argued that no coverage could possibly apply. As respects the seller's potential liability for the patron's injury, the insurer asserted that the duty to defend applied only within the coverage afforded by the CGL policy.

Since the location had been removed from the CGL policy before the injury happened, there could be no coverage—the CGL policy is potentially triggered only if bodily injury occurs during the policy period. Because the bodily injury did not occur during the policy period for which coverage was afforded for the New York location, there was no factual or legal possibility of coverage.

Further, the insurer argued, the question of the seller's potential liability to the injured patron was irrelevant in the coverage dispute. The fact that the seller may be responsible for a dangerous condition does not trigger coverage under the CGL policy.

The Seller's Last Word

The seller responded to the insurer's position by arguing that the insurer was obligated to defend on the theory that the basis for the named insured's liability for the patron's injuries arose *during* the policy period.

The Trial Court—The Motion Judge's Ruling

The court found that allegations by the injured patron did "bring the claim even potentially within the protection purchased" because the allegations of the condition that caused the injuries existed when the seller *did* have CGL coverage. As the duty to defend is "exceedingly broad" and a defense is to be provided whenever the allegations of a complaint "suggest ... a reasonable

possibility of coverage,” the court granted summary judgment for the seller and ordered the CGL insurer to defend the seller and to reimburse the seller for attorneys’ fees and legal cost that had already been incurred. The court also deferred on determining the seller’s right to be paid damages—until after the underlying case of the injured patron was resolved.

The Intermediate Court’s Ruling

The insurer appealed the summary judgment of the trial court to the intermediate court. Upon review of the facts and applying the law, the intermediate court reversed the summary judgment and granted the insurer’s motion. The insurer had no *duty* to defend. The intermediate court made the following findings in its order:

1. Here, the subject insurance policy, read as a whole, clearly and unambiguously provides that the duty to defend and indemnify will attach only to bodily injury caused by an “occurrence” that is covered by the policy *and that occurs during the policy period*. [Emphasis added.]
2. Accordingly, [the insurer] made a prima facie showing of its entitlement to judgment as a matter of law by establishing that the bodily injury for which the plaintiff seeks a defense and indemnification occurred after the premises had been removed from coverage.
3. Contrary to the plaintiff’s contention, the [patron’s] allegations that the accident was caused by a dangerous condition that existed on the premises before it was removed from coverage does not obligate [the insurer] to defend and indemnify those allegations.
4. Since the policy predicates coverage upon the *sustaining of bodily injury during the policy period, it is immaterial that the negligent acts which allegedly caused the occurrence took place while the policy covering the premises was still in effect*. [Emphasis added.]

5. Thus, the [motion judge] should have granted the insurer’s motion for summary judgment declaring that it is not obligated to defend and indemnify the plaintiff [the seller], and should have denied that branch of the plaintiff’s [seller’s] cross-motion which was for summary judgment declaring that [the insurer] is obligated to defend it in the underlying action.

Conclusion

The facts and the rulings of law summarized above are taken from the recent (May 15, 2013) case of *Jericho Atrium Assocs. v. Travelers Prop. Cas. of Am.*, 2013 N.Y. App. Div. LEXIS 3381 (N.Y. App. Div. 2d Dep’t May 15, 2013). On the one hand, the intermediate court resolved in short order the continued confusion about the trigger of an “occurrence” CGL policy—the policy is triggered *if and only if* the bodily injury takes place during the policy period. Whether the negligence that caused the bodily injury took place during the policy period does not matter. The court could not have been clearer on the point: *“It is immaterial that negligent acts which allegedly caused the occurrence took place while the policy covering the premises was still in effect.”* [Emphasis added.]

On the other hand, the rulings seem to beg the question: Why is it that deleting a location from a CGL policy “removes coverage” for that location and forecloses any possibility of coverage for that location? After all, the CGL policy is not a location-specific policy. See [“CGL—Covered Locations”](#) (December 2004). In fact, the CGL policy includes an “alienated premises” exclusion that eliminates coverage for property damage to locations *sold* by the named insured.¹

¹This insurance does not apply to: j. Damage to Property; “Property damage” to: (2) Premises you sell, give away or abandon, if the “property damage” arises out of any part of those premises.

It should be evident that the alienated premises exclusion would be unnecessary if the CGL policy did not, in the first instance, apply to locations *sold* by the named insured. Yet, there is no evidence in the public record that the seller ever raised this coverage issue.

Several possible scenarios, none of which is mentioned in the summary judgment ruling or the intermediate court's findings, *may* be a valid basis for the legal conclusion that the CGL policy did not provide any coverage after the sale of the New York location. Here are three such possible reasons:

1. by removal of the New York location, the entire CGL policy terminated;
2. the CGL policy included the "Limitation of Coverage To Designated Premises or Project" (CG 21 44 07 98) endorsement;² or
3. the entity that owned the New York location was also deleted from the CGL policy on the date of the sale.

Absent one of the above scenarios, or evidence of other applicable limitation endorsements found in the seller's CGL policy, the CGL policy should have at least defended the named insured based on the facts in evidence.

Although it is difficult to tell, as it does not appear that the named insured ever raised the coverage issue as to whether deleting a location from a CGL policy *actually* removes cover-

²This insurance applies only to "bodily injury", "property damage", "personal and advertising injury" and medical expenses arising out of: 1) The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or 2) The project shown in the Schedule.

age for that location for bodily injury that takes place after the location was deleted, it is unlikely that the highest court would consider an appeal on the issue.

In sum, it would appear that the motion judge may have arrived at the correct result—the insurer's duty to defend the seller—but for the wrong reasons. The result was that the intermediate court, applying the law to the named insured's arguments, found no possibility of coverage existed as the patron's bodily injury did not take place during the period that the New York location was listed on the CGL policy. What was not addressed is the central question: Why did the CGL policy not provide coverage for the named insured *after* the location was sold and deleted from the policy?

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