HUNTON& WILLIAMS

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U.S. District Court for the Southern District of New York Finds Term "Contaminant" Contained in Definition of Pollution In First Party Property Insurance Ambiguous Precluding Summary Judgment in Case Involving WTC Particulates

In *Ocean Partners, LLC v. North River Insurance Co.*, No 04 CV 470 (BSJ) (GWG), 2008 U.S. Dist. LEXIS 14967 (S.D.N.Y. Feb. 28, 2008), the Southern District of New York denied an insurer's motion for summary judgment with regard to the application of a pollution exclusion in a first party property policy to the infiltration of particulates from the WTC collapse in a nearby insured building. Relying on a previous opinion of the Second Circuit, the court found that the term "contaminant" as contained in the definition of "pollutant" was ambiguous, precluding summary judgment. The court also refused to consider the insurer's argument based on a corrosion exclusion because the insurer had failed to adequately raise the exclusion in its motion for summary judgment.

Background Facts and Procedural History

Plaintiffs brought suit against their insurer to recover for damages sustained to a building located at 17 Battery Place ("Battery Place") resulting from the collapse of the nearby World Trade Center Twin Towers on September 11, 2001. *Id.* at *1-2. The alleged damage was the influx of "WTC Particulate" into Battery Place. The allegedly damaging particulate came primarily from insulation and from fireproofing containing asbestos, lead and mercury. Allegedly, a cloud of this WTC Particulate moved through Battery Place's pathways, including its HVAC, mechanical, and electrical systems. The insured claimed that the WTC Particulate must be removed to "protect human health and to address damage to the Building's systems." *Id.* at *7.

The insurer had issued a first party property policy covering Battery Place for the period January 26, 2001 to January 26, 2002 (the "Policy"). The insurer determined that the insured suffered "some compensable loss," and paid over $3.1 million. After the insurer declined to make further payments, the policyholder filed suit. *Id.* at *1-2.

The insurer moved for summary judgment, arguing that coverage was not available because of two exclusions in the Policy, including the pollution exclusion. The pollution exclusion provided as follows:

> 2. We will not pay for loss or damage caused by or resulting from
>
> * * *
>
> j. Discharge, dispersal[,] seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss."

Id. at *6-7. The Policy defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot[,] fumes, acids, alkalis, chemicals and waste." *Id.* at *7. The insurer argued that the damage was caused by

or resulting from the dispersal of "pollutants" because the Policy's definition of "pollutant" included the word "contaminant." *Id.* at 7-8.

The magistrate judge issued a Report and Recommendation ("R&R"), recommending that the motion be denied. The R&R found that, following the Second Circuit's decision in *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33 (2d Cir. 2006), the meaning of the pollution exclusion contained in the Policy must be resolved by the trier of fact. *Id.* at *4, 8. The term "contamination" was also contained in the policy at issue in *Parks Real Estate*, which also involved infiltration of WTC Particulate. The *Parks Real Estate* court found the term "contamination" was ambiguous in the context of the policy because the breadth of its common definition would function to exclude coverage in "a limitless variety of situations." *Id.* at *8 (quoting *Parks Real Estate*, 472 F.3d at 45). Because the term was ambiguous, the Second Circuit concluded that the parties could introduce evidence of what they intended "contamination" to mean. Because of the strong similarities between the policy in *Parks Real Estate* and the Policy in the present case, the magistrate found that it was not clear that the term "contamination" in the Policy was intended to exclude WTC Particulate, and, thus, such a determination should be made by a trier of fact. *Id.* at *8.

The R&R also rejected the insurer's argument that the collapse of the WTC was the "efficient" cause of the loss, and, therefore, the "collapse" exclusion did not apply. Furthermore, the R&R refused to address the insurer's argument that the "corrosion" exclusion also barred coverage because that exclusion was invoked for the first time in the insurer's reply brief. *Id.* at *2-3.

The insurer filed timely objections to the R&R in which it challenged the denial of the summary judgment motion on two grounds. First, the insurer argued that the magistrate judge did not address whether a question of material fact existed with respect to whether WTC Particulate was a "contaminant" in light of the expert reports submitted. The insurer contended that evidence and admissions established that the WTC Particulate was a contaminant under the "contextual approach" described in *Parks Real Estate*, making summary judgment appropriate. Second, the insurer objected to the magistrate's failure to consider the applicability of the corrosion exclusion. *Id.* at *3-4.

The District Court's Opinion

The Pollution Exclusion

On review, the district court explained that the insurer's objection to the magistrate's R&R did not appear to challenge the magistrate's conclusion that the term "contaminant" was ambiguous. Instead, the insurer argued that, because Plaintiffs' expert reports referred to WTC Particulate as a "contaminant" or "contamination," over 25 times, the magistrate erred in finding that a question of fact remained regarding the meaning of this term. The insurer contended that the experts' use of these terms constituted proof that the WTC Particulate was a "contaminant" and therefore an excluded pollutant. *Id.* at 8-9.

The court deemed the insurer's argument "not tenable." *Id.* at *9. The experts' use of the words "contaminant" or "contamination" in their reports was consistent with the holding of the Second Circuit in *Parks Real Estate* "that the word 'contaminant' has a commonly-used meaning, but that meaning is so 'broad' that it is ambiguous in the context of the insurance policy that is being considered." *Id.* (quoting *Parks Real Estate*, 472 F.3d at 47-48). The court explained that the Second Circuit had found that the term "contamination" "may be used improperly as a synonym for various types of damage and chemical processes, which may or may not properly be classified as contamination or excluded from coverage under the terms of a policy." *Id.* at 9-10 (quoting *id.* at 45). Thus, the district court could not accept the insurer's argument that the use of the term by the experts in their scientific and environmental reports was evidence of the parties' intent with respect to use of the term in the Policy. Accordingly, the court found that the term "contaminant" as it related to the pollution exclusion in the Policy was ambiguous, and that its meaning must be determined by the fact finder, precluding summary judgment. *Id.* at 10.

The Corrosion Exclusion

The insurer also objected to the magistrate judge's failure to address its argument that the corrosion exclusion precluded coverage. The magistrate had noted that the insurer's notice of motion and initial brief raised only the pollution and collapse exclusions, not the corrosion exclusion and declined to address it because it was first raised in the reply brief, relying on a series of cases. *Id.*

The insurer argued that it had raised the corrosion exclusion in its initial memorandum. The court held that the brief reference to corrosion in a footnote was not enough of a basis to deviate from the general rule that a party cannot raise arguments for the first time in reply papers.

The district court then adopted the magistrate's opinion in full and denied the insurer's motion for summary judgment. *Id.* at *12.

Implications

The *Ocean Partners* opinion follows the Second Circuit lead on finding the term "contaminant" to be ambiguous. The decision also highlights the importance of identifying and adequately pleading all defenses available in a summary judgment motion.