

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED

**E-FILE** PART 60

**HON. BERNARD J. FRIED** Justice

Liberty Insurance Underwriters, Inc.,

INDEX NOS. #113946-2006  
#590955-2007

Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. #002

Perkins Eastman Architects, P.C.,

MOTION CAL. NO. \_\_\_\_\_

Defendant.

Perkins Eastman Architects, P.C.,

Third-Party Plaintiff,

-v-

Ace American Insurance Company,

Third-Party Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with  
the accompanying memorandum decision.

SO ORDERED

Dated: 5/3/2011



J.S.C.

**HON. BERNARD J. FRIED**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST [ ] REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 60

----- X  
LIBERTY INSURANCE UNDERWRITERS, INC.,

Plaintiff,

- against -

Index No. 113946/06

PERKINS EASTMAN ARCHITECTS, P.C.,

Defendant.

----- X

PERKINS EASTMAN ARCHITECTS, P.C.,

Third-Party Plaintiff,

- against -

Index No. 590955/07

ACE AMERICAN INSURANCE COMPANY,

Third-Party Defendant.

----- X

**APPEARANCES:**

For Plaintiff:

Kissel Hirsch & Wilmer LLP  
580 White Plains Road, 5th Floor  
Tarrytown, New York 10591  
(Frederick J. Wilmer)

For Defendant/Third-Party Plaintiff:

Clifton Budd & DeMaria, LLP  
420 Lexington Avenue, Suite 420  
New York, New York 10170  
(Robert J. Tracy, Stefanie R. Munsky)

For Third-Party Defendant:

Kramer Levin Naftalis & Frankel LLP  
1177 Avenue of the Americas  
New York, New York 10036  
(Philip S. Kaufman, Alissa R. Goodman)

**FRIED, J.:**

Motion sequences numbers 002, 003 and 004 are hereby consolidated for disposition.

This is an insurance coverage dispute. Defendant and third-party plaintiff Perkins

Eastman Architects, P.C. (Perkins Eastman) seeks coverage from either of two insurers for claims arising out of work Perkins Eastman performed on a nursing home project. The two insurers -- plaintiff Liberty Insurance Underwriters, Inc. (Liberty) and third-party defendant ACE American Insurance Company (ACE) -- issued successive "claims made" professional liability policies to Perkins Eastman. When Perkins Eastman was sued in federal court in November 2005 in connection with the nursing home project, Liberty denied coverage and brought this action for a declaratory judgment that it has no duty to defend or indemnify Perkins Eastman. The architectural firm, in turn, initiated a third-party action against ACE.

All parties now seek summary judgment. In motion sequence 002, ACE seeks dismissal of the third-party complaint. Perkins Eastman filed motion sequence 003, seeking a ruling that Liberty is required to defend and indemnify Perkins Eastman in the underlying federal action, or, in the alternative, defense and indemnity from ACE. And in motion sequence 004, Liberty asks for a declaration that it has no obligation to provide coverage for claims that Liberty contends arose approximately 21 months after the Liberty policy expired. For the foregoing reasons, I find that the undisputed documentary evidence establishes that Perkins Eastman gave timely and sufficient notice of circumstances that might give rise to a claim for coverage and that Liberty is obligated to provide insurance coverage to Perkins Eastman.

This action arises from the construction of a 700-room, 280-bed nursing home in Southampton, Suffolk County, New York, known as the Payton Lane Nursing Home. In 2001, IDI Construction Company, Inc. (IDI) was hired by the owner, Payton Lane Nursing Home Inc. (Payton Lane), to construct the nursing home for the sum of \$29,717,385. Perkins

Eastman was hired by Payton Lane to design the project and render certain construction administration services in or about July 1998.

Liberty issued to Perkins Eastman a professional liability insurance policy for the period January 16, 2003 to January 16, 2004, which was extended by endorsement to February 16, 2004. The Liberty policy had a limit of \$15 million both per claim and in the aggregate, subject to a \$250,000 deductible. The Liberty policy is a “claims made” policy that covered only claims first made during the policy period, provided that notice of any such claim was given to Liberty “as soon as practicable, but in no event later than 60 days after expiration or termination of this Policy.” Complaint, Ex. A, § I. Despite this limitation, Section VII (A) of the Liberty policy contained a mechanism through which claims made after its term expired could also be covered. A section entitled “Reporting of Circumstances That May Give Rise To A Claim,” states, in pertinent part:

“If during the Policy Year you become aware of a **Circumstance** that may reasonably be expected to give rise to a **Claim** against you, and if you report such **Circumstance** to us during the **Policy Year** in writing, then any **Claim** subsequently arising from such **Circumstance** duly reported in accordance with this paragraph shall be deemed under the Policy to be a Claim made during the **Policy Year**. Such written notice to us shall include:

1. particulars as to the reasons for anticipating such a **Claim**; and
2. the nature and dates of the alleged **Circumstance**; and
3. the alleged injuries or **Damages** sustained; and
5. the manner in which you first became aware of the specific **Circumstance**.”

*Id.*, § VII (A).

On February 13, 2004, three days before the Liberty policy expired, Perkins Eastman's insurance broker (Michele Bondurant of the insurance agency Singer Nelson Charlmers) faxed to Liberty a copy of an e-mail she received from Perkins Eastman entitled "Loss Prevention Notices." Complaint, Ex. B. The one-page attachment states, with respect to the Payton Lane nursing home project, "The Contractor is looking to pursue major claims and is alleging some design errors." *Id.*

By letter dated February 24, 2004, Eileen Carlton, a Senior Claims Specialist employed by Liberty, acknowledged receipt of this notice of what she called a potential "design error claim" against Perkins Eastman by the contractor, and advised Perkins that Liberty had established a file with respect to this potential claim. Complaint, Ex. C. However, Carlton's letter noted that Perkins Eastman had not provided information concerning the factual particulars of the situation as required by the above-quoted language of Section VII (A) of the policy. Although advising that Liberty did not consider the notice conditions of the policy satisfied, the letter advised that if Perkins Eastman had any additional information regarding the matter, it should furnish that information to Liberty within 30 days or Liberty would consider that Perkins Eastman was no longer seeking coverage under the policy and close its file.

Perkins Eastman responded directly by a three-page, single-spaced letter dated March 17, 2004 from Charles M. Eisenberg, its Director of Operations. Complaint., Ex. D. Perkins Eastman advised Liberty that the Payton Lane nursing home project "has been beset by problems throughout the course of the construction." *Id.* Perkins reported that the contractor, IDI, had been terminated and then reinstated twice; that there were extensive

delays from various construction difficulties; that the owner was experiencing serious legal and financial problems; that the owner was in negotiation with the contractor's sureties to get them to honor the performance bond; and that the contractor was attempting to deflect responsibility for the project's problems by blaming the owner, the engineering firm, and Perkins Eastman and its consultants "for purported delays and material defects in the drawings that have caused them damages." *Id.*

When describing the "nature and dates of the alleged **Circumstance**" (Policy, § VII [A] [2]), the March 17, 2004 letter reported, inter alia, that there are "serious problems with the poured concrete foundation walls (lacking expansion joints), precast concrete plank, masonry, steel bearing, structural steel framing, light gage framing, and roof decking" (the seven design items), as well as a mold problem. Complaint, Ex. D. In describing "the alleged injuries or **Damages** sustained" (Policy, § VII [A] [3]), the letter states:

"IDI will undoubtedly make claim for delays and damages that will be in the range of several million dollars. The Owner may try to assess partial responsibility for certain change orders including \$350,000 for return ductwork exclusions, \$350,000 for additional fire alarm work, and other miscellaneous items."

*Id.* Potential claimants were identified as including the owner, the contractor and the latter's sureties, and Perkins Eastman reported that it was aware of all these issues as the "Contract Administrator of the project." *Id.*

On May 11, 2004, Payton Lane declared IDI to be in default, and called upon IDI's sureties, American Manufacturer's Mutual Insurance Company and American Motorists Insurance Company (the Sureties), to take over completion of the project pursuant to their performance bond. On July 9, 2004, the Sureties and Payton Lane entered into a Takeover

Agreement, which included the following terms:

--the Sureties would complete the work remaining on the project by March 15, 2005;

-- the contract price was adjusted to \$30.3 million, of which Payton Lane paid \$22.9 million, leaving a contract balance of \$7.4 million inclusive of retainage; and

--the contract balance would be paid by Payton Lane to the Sureties, which may be increased "as a result of any subsequent change orders for extra work- i.e., work that is different from, in excess of, or beyond the scope of the work required by this Agreement - requested or required after the date of the execution of this Agreement" (Takeover Agreement, ¶ 5 [d]).

An exhibit to the Takeover Agreement included a non-conforming work notice log (the NCWN Log) prepared by Perkins Eastman as of April 5, 2004, which purported to identify all work performed by IDI which was not in compliance with the contract documents and would have to be corrected. *Id.*, Ex. D. A new contractor, E.W. Howell Co. Inc. (Howell) was hired in August 2004 to complete the work.

Eileen Carlton of Liberty responded to Perkins Eastman's March 17, 2004 letter on December 2, 2004. In this letter, Carlton stated that, based on the information Liberty had received, it "will conditionally accept the reporting of a problem situation relating to potential design error claims (specifically those related to the [seven design items]) by the contractor. . . ." Complaint, Ex. E. However, as a condition to this acceptance, the letter requests that Perkins Eastman timely forward supporting documentation and/or additional detailed responses relating to the seven design items and the project, and specifically asked for a copy of Perkins Eastman's contract with Payton Lane.

Perkins Eastman, again by Charles Eisenberg, responded to this letter four months

later, on March 11, 2005, reporting that IDI had been defaulted, based on Perkins' recommendation, and that Payton Lane had entered into a negotiated settlement with the Sureties. Eisenberg advised that this settlement was the result of negotiation and mediation that was initiated in April 2004 and resulted in the July 9, 2004 Takeover Agreement and the hiring of Howell. Further details regarding the seven design items is given.

The March 11, 2005 letter then states:

“It has also become clear that the Surety itself is trying to disingenuously back away from a firm completion date based on misrepresentations regarding the scope of the completion work and their understanding of “nonconforming work”. To make matters worse, the Surety is in run-off, as they are removing themselves from the Performance and Payment Bond business.”

*Id.* With respect to this claim, the letter further advises:

“[Howell] has claimed that completion costs may top \$20,000,000, even though there is only \$7,000,000 left to requisition from the Base Bid amount. We regard these costs to be wildly inflated and include costs associated with correcting improperly installed, damaged, or otherwise non-conforming work. We insist that the Surety remains solely responsible for these costs as well as all other yet-to-be-discovered or latent defects although they are pressing their claim that the Owner has somehow lost his right to a compliant project via the Takeover Agreement. The Surety will have a claim for additional time (delays) and money for all corrective work that was not specifically stipulated in the body of the Takeover Agreement or Nonconforming Work Notices.”

*Id.*, at 4. The Sureties are also now listed as potential claimants.

In June 2005, Perkins Eastman received a document subpoena from Coastal Electric, one of the subcontractors on the project, who was involved in unrelated litigation in this county between various subcontractors and suppliers involved in the project. Wilmer Affirm., Ex. V. Perkins Eastman advised Liberty of the subpoena and sought pre-claim

assistance under the Liberty policy. Liberty agreed to pay for an attorney to respond to the subpoena.

On November 3, 2005, Perkins Eastman and Payton Lane were sued by the Sureties in the Eastern District of New York, in an action entitled *American Mfr. Mut. Ins. Co., et al. v Payton Lane Nursing Home, Inc., et al.*, Case No. 05-5155 (the federal action). The Sureties alleged that, after commencing work on the project, Howell discovered substantial items of work performed or completed by IDI which were not in accordance with the contract documents, and which were not identified on the NCWN Log. The Sureties alleged that all of this work was known or should have been known by Payton Lane and Perkins Eastman prior to the execution of the Takeover Agreement. Howell performed this corrective work, and the Sureties submitted change order requests totaling over \$2.3 million, but Perkins Eastman rejected the change orders. The Sureties also claimed that they were forced to pay Howell \$1.2 million for extra work that was required due to design changes by Perkins Eastman and/or Payton Lane, for which the Sureties have not been reimbursed.

Perkins Eastman was named as a defendant in three of the complaint's eight claims. The sixth claim alleged that Perkins Eastman had made negligent misrepresentations in connection with the NCWN Log. The seventh and eighth claims were based on the claim that Perkins Eastman had over-certified how much of the base contract work IDI had properly completed. The Sureties alleged that, prior to execution of the Takeover Agreement, Perkins Eastman had certified that 83% of the base contract had been completed by IDI. The Sureties alleged that, after execution of the Takeover Agreement, they determined that IDI had completed only 58% of the base contract work in accordance with

the contract documents, and, thus, IDI had been overpaid by \$6.8 million. The seventh claim was based on a theory of negligent performance of its duties as contract administrator, while the eighth claim was based on a breach of contract theory, with the Sureties claiming to be subrogated to the contractual rights of Payton Lane against Perkins Eastman.

Perkins Eastman received the summons and complaint on November 7, 2005, and immediately retained the law firm of Gogick, Byrne & O'Neill to defend it in the case, the firm that handled the subpoena from Coastal Electric. Perkins Eastman tendered the defense of the federal action to Liberty by providing a copy of the summons and complaint, which was received by Liberty on November 18, 2005. Liberty denied coverage by letter dated February 20, 2006, stating that the federal action was a separate and distinct claim from the potential litigation arising out of the seven design items that Liberty claimed had been reported to them by Perkins Eastman's February 13, 2004 and March 17, 2004 letters. Accordingly, Liberty advised that it considered the federal action to be a claim first made against Perkins Eastman in November 2005, at a time when the Liberty policy was no longer in effect, and that it would not defend or indemnify the firm in connection with the federal action. Perkins Eastman was advised to give notice to its current professional liability insurer.

Perkins Eastman, by its insurance broker, Michelle Bondurant, responded to Liberty's declination of coverage on March 6, 2006. Bondurant noted that Liberty had failed to document Eisenberg's March 11, 2005 letter, which addresses the Takeover Agreement and relates details of possible litigation with IDI's sureties. Bondurant also noted that Liberty's December 2, 2004 letter had requested this additional information from Perkins Eastman.

Liberty responded by letter dated April 10, 2006, contending that the claims asserted against Perkins Eastman in the federal action involve the firm's role as a contract administrator and do not relate to the potential design claims that were previously identified by Perkins Eastman, which involved its role as a design professional.

Liberty commenced this litigation on September 28, 2006, seeking a declaratory judgment that Perkins Eastman is not entitled to insurance coverage for the claims made against the firm in the federal action.

Meanwhile, in the federal action, Payton Lane and Perkins Eastman filed a motion to dismiss the complaint. By order dated February 28, 2007, the sixth and seventh claims were dismissed against Perkins Eastman on the ground that there was no privity of contract between Perkins Eastman and the Sureties, leaving only the eighth claim for subrogation. An amended complaint was filed on October 17, 2007, and the allegations of the eighth claim were amended to increase the amount of work the Sureties claimed that IDI actually completed, from 58% to 71%, thereby reducing their claim against Perkins Eastman to \$3.4 million. The case was tried before Magistrate Judge Tomlinson in the Spring of 2010, but a decision has not yet been rendered.

With regard to third-party defendant ACE, it replaced Liberty as Perkins Eastman's insurance carrier in February 2004. For the period February 16, 2004 to February 16, 2007, Perkins Eastman was insured by ACE pursuant to three consecutive one-year policies of insurance. Each ACE policy has a per claim and aggregate limit of \$15 million, with a \$200,000 deductible. Following the denial of coverage by Liberty in February 2006, Michelle Bondurant left a voice message with Jeffrey Desrosiers, a Senior Specialist for

ACE, on March 30, 2006, and the following day, she e-mailed him a copy of Liberty's February 20, 2006 declination of coverage and her March 7, 2006 response, advising that she was overnighting the summons and complaint and a complete set of the correspondence between Perkins Eastman and Liberty. Kaufman Affirm., Ex. 23.

On April 18, 2006, ACE advised Perkins Eastman that it was establishing a claims file. On June 6, 2006, Desrosiers faxed a letter to Bondurant referencing certain provisions of the second ACE policy, including Section 1 (Insuring Agreement) and Section XIV (Insured Representations), stating that these provisions "may apply." Kaufman Affirm., Ex. 24; Desrosiers Tr., at 76-77.<sup>1</sup> The letter concludes with:

"The Company reserves the right to deny coverage based upon grounds other than those expressly set forth in this letter and to supplement and/or amend this letter to address additional coverage issues as they may arise, based upon all the provisions, terms, conditions, exclusions, endorsements and definitions found in the Policy. . . ."

Kaufman Affirm., Ex. 24. The next day, June 7, 2006, Desrosiers sent Bondurant the following e-mail:

"What I indicated on the telephone was that based on the information available to ACE right now, and prior to any definitive investigation into "notice dates", "prior or pending proceedings", etc., ACE has accepted tender of this claim, opened a file and is providing a defense in this matter pursuant to the policy as a covered matter.

I fully expect that Liberty will eventually pick this matter up. But for now, ACE is not going anywhere.

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<sup>1</sup>

Although counsel for Perkins argues in its brief that this letter is unsigned and not on the company's letterhead, the fact that it was faxed from Desrosiers at ACE on June 6, 2006 was admitted by Perkins. *See* Perkins' Counter-Statement of Material Facts in Opp. to ACE's Motion For Summary Judgment dated September 21, 2010, at 6, ¶ 37.

This is about as clear as I can get. Hope this will suffice.”

*Id.*, Ex. 26.

In early October 2007, Andrew Adelhardt, Perkins’ General Counsel, asked ACE for a more definitive statement of its coverage position concerning the federal action because he felt, as of that point in time, that ACE needed to “step up and affirmatively declare that they were representing -- defending and indemnifying Perkins.” Adelhardt Tr., at 99-103. On October 17, 2007, Justin Rose, an ACE claims manager who took over for Desrosiers, wrote to Perkins Eastman advising that there are “potential issues that may bear on the availability of coverage.” Kaufman Affirm., Ex. 25. In this letter, ACE contended, inter alia, that the ACE policies only cover a loss arising from claims that were both first made against Perkins Eastman and reported to ACE during the applicable policy period, but that the federal action was first made on November 3, 2005, but not reported until March 31, 2006, after the second ACE policy period. On October 29, 2007, Perkins Eastman commenced the instant third-party action against ACE.

### **Coverage Under the Liberty Policy**

At issue is whether Perkins Eastman timely advised Liberty of a “**Circumstance** that may reasonably be expected to give rise to a **Claim** against [Perkins],” and provided sufficient detail regarding the potential claim in accordance with the requirements of Section VII (A) of the Liberty policy. All parties agree that summary judgment in their favor is appropriate, and counsel could not, at oral argument, articulate any issue of fact that would prevent the court from making a ruling pursuant to CPLR 3212. *See* 12/9/10 Tr., at 9-10, 25-

26..

Liberty argues that Perkins Eastman was not aware of any of the circumstances that resulted in the claims asserted against the firm in the federal action while the Liberty policy was in effect, because the claims arose as a result of the July 2004 Takeover Agreement, and thus Perkins Eastman could not and did not provide notice of those circumstances with the detail required by the policy. In Liberty's view, the only circumstance involving Perkins Eastman's work on the project that it was aware of in February and March 2004 and reported to Liberty were the seven design items that Perkins Eastman referenced in its March 17, 2004 letter.

In New York, "[n]otice requirements are to be liberally construed in favor of the insured, with substantial, rather than strict, compliance being adequate." *Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 304 AD2d 334, 335-36 (1st Dept 2003). "Where the terms of an insurance policy are clear and unambiguous, interpretation of those terms is a matter of law for the court" (*Town of Harrison v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 308, 316 ([1996])), but the provisions are interpreted "in light of 'common speech' and the reasonable expectations of a businessperson" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]).

The Liberty policy is a "claims made" policy, as opposed to an "occurrence" policy, which means that it protects the policy holder against claims made during the life of the policy, rather than against "occurrences" which happen during the policy period and for which claims may arise later." *Bolden v Niagara Fire Ins. Co.*, 814 F Supp 444, 445 (ED Pa), *affd* 8 F3d 810 (3rd Cir 1993). "The essence of a claims-made policy is notice to the

carrier within the policy period. Such a policy has the distinct advantage for the insurer of providing certainty that, when the policy period ends without a claim having been made, the insurer will be exposed to no further liability. The insurer can better set 'reserves' for potential losses [internal citations omitted]." *American Home Assur. Co. v Abrams*, 69 F Supp 2d 339, 346 (D Conn 1999).

The Liberty policy defines **Circumstance** as "an event reported during the Policy Year from which you reasonably expect a **Claim** may be made." Liberty Policy, § V (A). "Claim" is defined as "a demand for money or services, naming you and alleging a **Wrongful Act or Pollution Incident**." Liberty Policy, § V (B).

Liberty's interpretation of its policy is equating the words **Circumstance** and **Claim**, and thus fails to give the words their common meanings. While Perkins Eastman may not have been aware of the exact claims that the Sureties ultimately asserted in the federal action prior to the expiration of the Liberty policy, the correspondence from 2004 and 2005 between Liberty and Perkins Eastman is clear that Liberty was given notice of events occurring during the policy year regarding problems with the Payton Lane project from which Perkins Eastman reasonably expected that a demand for money or damages could be made by the Sureties. The fact that Perkins Eastman did not believe that any of its work on the nursing home project was deficient is not probative, since the issue is whether there was a reasonable belief that litigation would ensue, and not whether the lawsuit had merit. *Accord JPMorgan Chase & Co. v The Travelers Indem. Co.*, 22 Misc 3d 111(a), 84-5, 2009 NY Slip Op 50087 (U) (Sup Ct, NY County 2009).

This conclusion stems from the February 13, 2004 e-mail from Perkins Eastman's

insurance broker, Michelle Bondurant, and Charles Eisenberg's March 17, 2004 and March 11, 2005 letters. The March 17, 2004 letter must be considered since Liberty specifically gave its insured an additional 30 days from February 24, 2004 to provide more information. Eileen Carlton testified at her deposition that the additional 30 days was given "as a courtesy . . . to provide information to satisfy the policy conditions." Carlton Tr., at 35. The March 11, 2005 letter must also be considered since Liberty asked for more information and documentation in its December 2, 2004 letter, and, more importantly, because Liberty never objected to either the March 17, 2004 letter or the March 11, 2005 letters as beyond the scope of what Liberty now contends was merely notice of potential design defect claims. See *Federal Deposit Ins. Corp. v Interdonato*, 988 F Supp 1, 10-11 (D DC 1997), *affd* 172 F3d 919 (DC Cir 1998); *JPMorgan Chase & Co. v The Travelers Indem. Co.*, *supra*. Had Liberty made some objection, Perkins Eastman would certainly have given notice to its then current insurer -- ACE.

Nothing in Perkins Eastman's correspondence to Liberty justified Liberty into limiting the notice being provided to architectural design errors. The original e-mail speaks of IDI looking to "pursue major claims" against Perkins Eastman in addition to "alleging some design errors." Complaint, Ex. B. In Eisenberg's March 17, 2004 letter, he described a severely-troubled construction project where the contractor was looking to blame everyone else for its own problems. Eisenberg advised that the project has been plagued by construction delays and difficulties, and he disclosed that Payton Lane was in negotiations with the Sureties over their performance bond. Indeed, the Sureties are identified as possible claimants. Eisenberg's March 11, 2005 letter actually predicted with a fair degree of

accuracy the eventual claims that were asserted by the Sureties in the federal action.

Liberty misconstrues the claims for which Perkins Eastman was sued when it argues they arose as a result of the Takeover Agreement in July 2004, and that the circumstances that gave rise to the claims were unknown to Perkins Eastman until well after Liberty's policy had expired. The three claims asserted against Perkins by the Sureties, and the eventual trial, centered upon Perkins Eastman's conduct in monitoring and inspecting IDI's work prior to the execution of the Takeover Agreement. The Sureties are alleging that Perkins Eastman breached its obligations to Payton Lane as a construction manager during the entire course of the construction. IDI's work with respect to at least four of the seven design items (precast concrete planks, steel bearing, structural steel framing and light gage framing), and Perkins Eastman's inspection of that work, were issues at trial. *See* Giacopelli Affirm, Ex. A: Perkins Eastman's Post-Trial Brief, at 16-18; Tracy Affirm., Ex. I: Trial Tr., at 2729-32, 2732-35, 2744-48, 2748-56.

While it is true that a non-specific communication which merely discloses that an insured is experiencing financial problems will not constitute a notice of a potential claim (*see Federal Deposit Ins. Corp. v Mijalis*, 15 F3d 1314, 1335-1336 [5th Cir 1994]), Perkins Eastman provided the best notice the firm could of a problematic construction project until a specific complaint was actually filed. *See Continental Ins. Co. v Superior Court of Los Angeles County*, 37 Cal App 4th 69, 79-80, 43 Cal Rptr 2d 374, 380 (Cal App, 2d Dist 1995).

Relying on *Bolden v Niagara Fire Ins. Co.* (814 F Supp 444, *supra*), Liberty argues that Perkins Eastman itself was not aware of the circumstances that eventually gave rise to the Sureties' claims in the federal action, and that, therefore, the notice to Liberty was

insufficient to trigger coverage. *Bolden* is a very different situation. In that case, notice of a potential legal malpractice claim was not given by the insured (law firm A), but by a former associate now with a different law firm (law firm B) under a separate policy of insurance. The letter spoke only of the potential liability of law firm B. The court ruled that this notice was insufficient, because it was the awareness of the insured (law firm A) that must trigger notification and the insurance company had no duty to trace the associate's past legal associations to law firm A (814 F Supp at 448-50). Thus, in *Bolden*, the purpose of the notice was defeated, since the insurance company could not set reserves for potential losses vis-a-vis law firm A. *American Home Assur. Co. v Abrams*, 69 F Supp 2d at 346. Here, in contrast, there is no question that the insured - Perkins Eastman - was aware that it might get sued prior to the expiration of Liberty's policy and gave timely notice to Liberty that the Sureties were potential claimants.

Perkins Eastman gave timely and sufficient notice of the claims made against it in the federal action in accordance with Section VII (A) of the Liberty policy, and thus Liberty is obligated to provide a defense to that action and to indemnify Perkins Eastman in accordance with the terms and conditions of the Liberty policy.

### **Coverage Under the ACE Policies**

ACE's motion for summary judgment dismissing the third-party action is granted. The undisputed evidence shows that coverage for the federal action is barred by the exclusion in ACE's policies encompassing any claims arising from circumstances required to be, but not disclosed, by Perkins Eastman in its applications for all three of the ACE policies, and

because the federal action was a claim made during the second ACE policy period and not reported to ACE before the end of that policy period.

There is no question that Perkins Eastman had knowledge of potential claims arising from the Payton Lane project as of the effective date of the first ACE policy. Complaint, Ex. B; Eisenberg Tr., at 47. However, in the application that was forwarded to ACE by Bondurant under a cover memo dated January 16, 2004, Perkins Eastman answered “No” to question 26 asking if the firm had any knowledge of “any act, error, omission, unresolved job dispute, accident or any other circumstances which might reasonably be expected to give rise to a claim under this insurance.” Kaufman Affirm., Ex. 9, at 5. The application explicitly warned that any claims arising from facts or circumstances required to be disclosed in question 26 was “excluded” from the proposed insurance. *Id.* Perkins again, in January 2005, answered “No” to Question 28 asking for similar information when it submitted its application for renewal of the ACE policy. *Id.*, Ex. 13.

In addition, the ACE policies only cover a loss arising from claims that were both first made against Perkins Eastman and reported to ACE during the applicable policy period. In addition to the bold language on the first page of the policies’ Declarations, the “Insuring Agreement” in each policy, defining the scope of coverage, states:

The Insurer shall pay the Loss of the Insured for which the Insured becomes legally obligated to pay by reason of a Claim *first made against the Insured Persons and reported to the Insurer during the Policy Period* or, if elected, the applicable Extended Reporting Period, for any Wrongful Acts taking place on or after the Retroactive Date and prior to the end of the Policy Period.

ACE Policies, § I (emphasis added).

The federal action was a claim that was first made on November 3, 2005, during the

second ACE policy period (i.e., between February 16, 2005 and February 16, 2006), but was not reported to ACE during that policy period. Indeed, even though Liberty disclaimed on February 20, 2006, ACE still did not get notice until March 31, 2006, almost four months after commencement of the lawsuit. Relying on the “extended reporting period” of 60 days referenced in endorsement 14 to the Second ACE policy, called the “New York Amendatory” endorsement, Perkins Eastman argues that it had an additional 60 days following February 16, 2006 to give notice of the claim. *See Kaufman Affirm.*, Ex. 10, at ACE00090. However, this endorsement, by its terms, only applies if the policy terminates or is not renewed, neither of which occurred here. *See Rochwarger v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 192 AD2d 305 (1st Dept 1993).

Perkins Eastman argues that ACE should be estopped from denying coverage, because Desrosiers’ June 7, 2006 e-mail was an acceptance of coverage by ACE, and because ACE delayed in issuing a reservation of rights letter.

Perkins relies on *American Tr. Ins. Co. v Mendon Leasing Corp.* (241 AD2d 436 [1st Dept 1997]), where the Court held that equitable estoppel might preclude an insurance company from denying coverage where the company, though in fact not obligated to provide insurance coverage, undertakes to defend its insured without asserting policy defenses or reserving the privilege to do so, and in reliance on which the insured suffers the detriment of losing the right to control its own defense. This is not the situation presented herein, since ACE promptly reserved its rights to deny coverage in the June 6, 2006 fax and Desrosiers’ June 7, 2006 e-mail, and never undertook to defend Perkins Eastman in the federal action.

In addition, there is no showing of any detrimental reliance by Perkins Eastman. *See*

*Fairmont Funding v Utica Mut. Ins. Co.*, 264 AD2d 581, 581-82 (1st Dept 1999) (even unreasonable delay by the insurer does not give rise to estoppel absent prejudice to the insured). Indeed, the purpose of a reservation of rights is to prevent an insured's detrimental reliance on the defense provided by the insurer. *Federated Dept. Stores v Twin City Fire Ins. Co.*, 28 AD3d 32, 38 (1st Dept 2006). According to the deposition testimony of Andrew Adelhardt, Perkins Eastman neither relied upon nor was prejudiced by ACE's conduct. Perkins Eastman continued to defend itself in the federal action through its own outside counsel, the Gogick firm, and Adelhardt conceded at his deposition that he in no way relied upon anything in Desrosiers' June 7, 2006 e-mail. Adelhardt Tr., at 5, 62-66, 75-78. In addition to admitting that Desrosiers June 7, 2006 e-mail was only a "conditional" acceptance and had a number of "caveats," the fact that Desrosiers inserted the caveats in the e-mail made Adelhardt think that his response was not "sufficient" prompting him, in early October 2007, to ask ACE for a more definitive statement of ACE's position. *Id.*, at 62-65, 99-103.

Q. Can you think of anything that Perkins Eastman did or didn't do with respect to the sureties action in reliance of Mr. Desrosiers's June 7, 2006 e-mail?

A. I'm not aware of anything.

Adelhardt Tr. at 74-75.

Based on this documentary and testimonial evidence, none of which raises any material issues of fact, there is no coverage under the ACE policies for the claims against Perkins Eastman in the federal action, and ACE has demonstrated its entitlement to summary judgment dismissing the third-party action.

Accordingly, it is hereby

**ORDERED** that the motion (seq. no. 002) of third-party defendant Ace American Insurance Company for summary judgment dismissing the third-party complaint is GRANTED, and the third-party action is hereby dismissed; and it is further

**ORDERED** that the motion (seq. no. 003) of defendant/third-party plaintiff Perkins Eastman Architects, P.C. for summary judgment on its first counterclaim is GRANTED; and it is further

**ORDERED** that the motion (seq. no. 004) of plaintiff Liberty Insurance Underwriters, Inc. for summary judgment in its favor is DENIED.

**Settle Judgment.**

Dated: May 3, 2011

ENTER:



J.S.C.

**HON. BERNARD J. FRIED**