

**National Union Fire Insurance Company of
Pittsburgh, Pa. v Xerox Corporation**

2006 NY Slip Op 30037(U)

April 10, 2006

Supreme Court, New York County

Docket Number:

Judge: Charles E. Ramos

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

53

Charles Edward Ramos

PART

PRESENT: Index Number : 6033360/2003
NATIONAL UNION FIRE INS.

VS

XEROX

Sequence Number : 010
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 010
MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH MOTION SEQUENCE... 09..

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

Dated: 4/10/06

[Signature]

CHARLES E. RAMOS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.,

Plaintiff,

Index No. 603360/03

-against-

XEROX CORPORATION, PAUL ALLAIRE, G.
RICHARD THOMAN, BARRY ROMERIL,
PHILIP FISHBACH, GREGORY TAYLER,
ANN MULCAHY, EUNICE M. FILTER,
B.R. INMAN, ANTONIA A. JOHNSON,
VERNON E. JORDAN, Jr., YOTARO
KOBAYASHI, RALPH S. LARSEN, HILMAR
KOPPER, JOHN D. MACOMBER, GEORGE
J. MITCHELL, N.J. NICHOLAS Jr., JOHN E.
PEPPER, PATRICIA F. RUSSO, MARTHA R.
SEGER, THOMAS C. THEOBALD and
WILLIAM F. BUEHLER,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In motion 09, defendants Xerox Corporation, Paul Allaire, G. Richard Thoman, Barry Romeril, Philip Fishbach, and Gregory Tayler (collectively "Xerox") move pursuant to CPLR 2221(d) to reargue their motion to dismiss. In motion 010, Xerox moves pursuant to CPLR 2221(e) to renew its motion to dismiss the action.

Originally, in motion 006, Xerox Corporation moved for an order, pursuant to CPLR 3001, 3211(a)(1) and (a)(7) dismissing the sixth cause of action (based on an improper profits exclusion in the underlying policy), the seventh cause of action (based on an ill-gotten gains exclusion) and the eighth cause of action (based on duty to seek consent for settlements/duty to cooperate) all set forth in the complaint, dated October 24, 2003, on the

grounds that the court lacks subject matter jurisdiction because there is no justiciable controversy, and because these claims fail to state causes of action. In motion 007, defendants Paul Allaire, B. Richard Thoman, Barry Romeril, Philip Fishbach and Gregory Tayler sought the same relief as that sought by Xerox. By order dated July 12, 2005, the Court denied the motions on procedural grounds; the single motion rule. This was an error. Accordingly, Xerox's motions to renew and reargue its motions to dismiss is granted.

This is a declaratory judgment action brought to resolve a controversy regarding insurance coverage for numerous securities fraud lawsuits brought by individuals, classes of individuals and regulators against the Xerox Corporation and many of its present and former directors and officers based on their alleged fraudulent reporting of Xerox's finances from 1997 through 2000. Specifically, Xerox sought coverage for seven actions, two by the SEC. Complaint ¶7.

The background of the action is set forth in the decision dated November 10, 2004, and will not be repeated here. By that decision, the Court granted in part, and denied in part defendants' prior pre-answer motions to dismiss. *National Union Fire Insurance Co. Of Pittsburgh v Xerox Corp.*, 6 Misc 3d 763 (Sup Ct, NY County, 2004), affirmed, 807 NYS2d 344, NOC (1st Dept 2006). Specifically, the Court dismissed the first, second, third, fourth and ninth causes of action, leaving the sixth, seventh and eighth. Subsequently, Xerox declared that it will

not seek coverage from National Union under the Excess D&O policy at issue here. Affidavit of Maria C. Diaz, January 24, 2005. Specifically, Xerox relinquished its claim to recover the \$10 million penalty it paid to the SEC and the \$19 million disgorgement its inside directors paid to the SEC which was reimbursed to the inside directors by Xerox. Now, the parties disagree whether anything remains to this action.

In the Sixth cause of action, National Union alleges:

76. In the event that National Union is not entitled to rescind the policy ab initio, there is no coverage with respect to the claims made in the Securities Litigation based on the Federal Primary Policy's improper profit exclusion.

77. The Federal Policy, as Exclusion 6(C), also applicable to the Policy, provides as follows:

The Company shall not be liable under Insuring Clause for **Loss** on account of any **Claim** made against any **Insured Person**:

(C) based on, arising from, or in consequence of such Insured Person having gained in fact any personal profit, remuneration or advantage to which such Insured Person was not legally entitled;

78. Plaintiff in the Securities Litigation alleges that certain of the individual defendants gained personal profits, remuneration and advantages to which they were not legally entitled, including insider sale of over \$50 million of Xerox common stock. Accordingly, there is no coverage for any Loss in the Securities Litigation arising out of any individual's gaining of an illegal profit.

79. With respect to improper profits by Xerox, Endorsement 6 at section 5 of the Federal Primary Policy, applicable to the Policy as well, provides that there is no coverage, other than defense costs, for any claim that alleges that Xerox gained an improper profit. Said exclusion provides:

The Company shall not be liable under Insuring Clause 3 for that part of Loss, other than Defense Costs:

(b) which is based upon, arises from, or is in

consequence of any Insured Organization having gained in fact any profit or advantage to which it was not legally entitled.

80. Plaintiffs in the Securities Litigation allege that Xerox gained profits and/or advantages to which it was not legally entitled. Accordingly, there is no coverage for any Loss, other than Defense Costs, in the Securities Litigation arising out of Xerox's gaining of an illegal profit or advantage.

In the seventh cause of action, National Union seeks a declaration that defendants' alleged losses, to the extent they represent disgorgement of ill-gotten gains, would not fall within the definition of "Loss" under either the Primary Policy or the Policy, and would therefore not be covered (Complaint ¶¶ 82-83).

This cause of action appears to be directed at all defendants.

In the November decision, with regard to the sixth and seventh causes of action, the Court held that:

Defendants move to dismiss these causes of action primarily on the ground that it is premature.

With respect to the defendants involved in, and who settled, the SEC Actions, whereby they consented to disgorgement of sums, this cause of action is not premature. Specifically, the issues raised by National Union in the sixth and seven causes of action - to wit, whether the money judgments entered, by consent, against Xerox and each of the individuals in the SEC actions (i.e., Allaire, Thoman, Romeril, Fishbach, and Tayler), are barred by the improper profit exclusions in the Policy, or otherwise constitute ill-gotten gains, and are not covered losses under the Policy - are clearly ripe for consideration now [citations omitted].

Accordingly, the motions to dismiss the sixth and seventh causes of action are denied with respect to Xerox, Allaire, Thoman, Romeril, Fishbach, and Tayler, to the extent that these causes of action concern the judgments and settlements in the SEC Actions. [footnote omitted]. With respect to all other defendants, even if these causes of action might otherwise state claims, they are premature, and the motion to dismiss these causes of action are therefore

granted with respect to said defendants (*see, First State Ins. Co. v J & S United Amusement Corp., supra*).

Having withdrawn its claims for \$29 million, Xerox maintains that nothing is left to this action. National Union counters that there are other actions in which \$50 million in disgorgement is sought by litigants other than the SEC, but which "concern" the SEC actions. National Union's focus on the word concern is unnecessary. Rather, the complaint defines "the Securities Litigations" in paragraph seven as including seven actions. The relief sought in the complaint is as to the Securities Litigations, not just the SEC actions. As to the two SEC actions set forth in paragraph seven of the complaint, clearly, nothing is left to this action. Since Xerox has said nothing about the other five actions in paragraph seven of the complaint, the sixth and seventh causes of action continue as to those actions. Should Xerox withdraw its claims for insurance coverage in these actions, then the sixth and seventh causes of action shall be dismissed in full.

In the November decision, this Court held with regard to the remaining issue:

In the eighth cause of action, as clarified, National Union maintains that Xerox breached the duty to cooperate contained in the Policy, by failing to procure National Union's consent in connection with Xerox's settlement of the SEC Action against it. This cause of action adequately states a claim. In denying Xerox's motion to dismiss the eighth cause of action, the court makes no ruling on Xerox's claim that the demand for relief in this cause of action is broader than the relief authorized under the Policy.

Xerox maintains that by withdrawing its claim for coverage, the

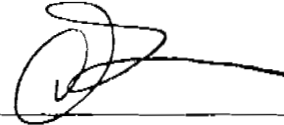
eighth cause of action becomes moot. As this claim only concerns the SEC actions, and Xerox has withdrawn its insurance claims for those actions, the eighth cause of action is dismissed.

Accordingly, it is

ORDERED that both motions 009 and 010 are granted and upon reconsideration the sixth and seventh causes of action are dismissed as to the SEC action, but not as to the other five actions; and it is further

ORDERED that the eighth cause of action is dismissed.

Dated: April 10, 2006



CHARLES E. RAMO

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.