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

PRESENT: SHIRLEY WERNER KORNREICH PART 54
Justice

American Guarantee + Liability Insurance Company

- v -

Perry Lerner and Lerner + Squire LLP

INDEX NO. 600992/06

MOTION DATE 5/31/07

MOTION SEQ. NO. 1

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 ...	1,2,3
Answering Affidavits — Exhibits	4,5,6,7
Replying Affidavits	8

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 8/16/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---------- X

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY,

Plaintiff,

Index No.: 600992/06

- against-

DECISION and ORDER

PERRY LERNER and LERNER & SQUIRE, LLP,

Defendant.

---------- X

KORNREICH, SHIRLEY WERNER, J.:

Plaintiff American Guarantee & Liability Insurance Company ("American Guarantee") seeks a declaration that it is not obligated, under a professional liability insurance policy, to defend or indemnify defendants Perry Lerner ("Lerner") and Lerner & Squire LLP, in an underlying California bankruptcy action filed by the trustee of Imperial Credit Industries Inc. ("Imperial"). American Guarantee now moves for summary judgment. It argues: (1) it was not provided with immediate notice of an actual or potential claim by Imperial against Lerner and was not immediately provided with the complaint; (2) the claims asserted fall outside the policy's insuring clause because they are not based upon Lerner's rendering or failing to render legal services; (3) the complaint and first amended complaint are barred from coverage under policy exclusion D, because the claims arise out of Lerner's capacity or status as an officer, director or shareholder of a business enterprise; and (4) the complaint and first amended complaint are barred from policy coverage under exclusion E, because the claims arise out of

business enterprises in which Lerner had a controlling interest. American Guarantee also seeks dismissal of defendants counterclaims with prejudice, costs and disbursements.

Defendants oppose, contending that there are triable issues of fact as to whether Lerner gave notice as soon as reasonably possible. They further contend that American Guarantee has failed to show that none of the claims in the Imperial action arose from Lerner's legal services or that the allegations in the Imperial complaint are clearly and unmistakably excluded from coverage.[1]

I. *Statement of Facts*

A. *Plaintiff's Proof*

1. *Imperial's Original Complaint*

On July 14, 2005, Imperial filed its original complaint against defendant Lerner, Corona Film Finance Fund, LLC ("Corona") and Santa Monica Pictures, LLC ("SMP").[2] The complaint alleged that from October through December 1997, Imperial was seeking an investment opportunity to offset capital gains it had realized. Imperial claimed that since Lerner was a member of Imperial's Board of Directors ("the Board"), was an attorney who specialized in tax matters for nearly 30 years and was Chairman of Imperial's Audit Committee, he knew that any representations he made to the Board regarding tax matters would be considered credible and authoritative.

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[1]The timeliness of plaintiff's disclaimer is not raised.

[2]Lerner & Squire LLP was not sued by Imperial in its original complaint and is only a party to this action because Lerner choose to invoke his professional liability insurance policy which covers his law firm, not him personally.

Lerner allegedly recommended that Imperial acquire a controlling interest in Corona (a company formed by Lerner earlier that year in which he had an interest) from SMP (a company in which Lerner owned a majority interest). Lerner allegedly convinced the Board that investing in these companies would yield Imperial a tax saving of more than $25 million, since Corona's assets included a $79 million dollar note ("the note") which, though in default and worth only $250,000, had a basis for income tax purposes of $79 million. Allegedly, Lerner planned to cause Corona to sell the note before the end of 1997, creating a large capital loss for Corona which he advised Imperial it could then use to offset the capital gains it realized in 1997.

The complaint further alleged that, relying on Lerner's representations and tax expertise, Imperial purchased a 93.85% interest in Corona from SMP during the period December 15 to 23, 1997. On December 29, 1997, Corona sold the note to Tro Metro Films, LLC ("Tro Metro")[3] for $120,000 cash plus a $1,024,000 note (which was subsequently increased to $1,180,000) and reported a $78,768,955 long-term capital loss on its 1997 income tax return. Imperial reported a capital loss of $74,671,378 as its share of Corona's capital loss on its 1997 income tax return.

Imperial also alleged that on January 12, 1998, it paid an additional $14,755,557 in cash to Corona. Lerner allegedly stated that this charge would represent a valid deduction for income tax purposes. The complaint contended that three days later, Lerner retroactively amended Corona's operating agreement, without Imperial's knowledge, allowing SMP to withdraw approximately $15 million and that from 2001-2003, SMP withdrew all of its funds for the benefit of Lerner and others. SMP and Lerner also allegedly attempted to derive substantial tax savings as a result of these transactions. That is, on the sale by SMP to Imperial of part of its

[3]The complaint alleged that Tro Metro was formed in December 1997 by a friend and business associate of Lerner for the purpose of purchasing SMP and Corona's receivables.

interest in Corona, SMP reported a capital loss of $62,237,061 allocated to its members including Lerner.

The IRS investigated the capital losses taken by Imperial in 2002 and determined them to be illegal. One reason for the impropriety was Lerner's attempt to double up on the losses attributable to the note. The IRS proposed the imposition of over $10 million in fines against Imperial. Imperial claimed Lerner, or companies he controlled, specifically SMP, retained nearly $15 million and incurred significant tax savings. In sum, Imperial's complaint alleged Lerner "abused his position of trust and superior tax knowledge, disregarded his fiduciary duties to Imperial, and caused Imperial to enter into the Corona transactions, leaving Imperial with nothing to show for it except over $10 million in income tax penalties and substantial interest owed to the IRS." As against Lerner, Corona, and SMP, it sought to void the transaction pursuant to California Corp. Code § 310(a) ("§ 310") and asked for restitution in excess of $26,000,000 including, but not limited to "(1) all funds which Imperial paid to acquire its interest in Corona; (2) the nearly $15 million contribution Imperial made to Corona, which Lerner and SMP subsequently withdrew; (3) any penalty (including interest thereon) imposed on Imperial by the IRS; and (4) interest on these sums and on the tax adjustment the IRS seeks to impose that reverses the 1997 Corona-related write-off of $74,671,378." The second claim alleged breach of fiduciary duty against Lerner, seeking the same relief as well as punitive damages.

2. *Terms of the Policy*

Section I. A, entitled "Coverage", of the professional liability insurance policy ("the policy") issued by plaintiff to defendants provides:

> The Company will pay on behalf of an insured, subject to the limit of liability, all amounts in excess of the deductible shown in the Declarations that an Insured becomes

legally obligated to pay as Damages and Claim Expenses because of a Claim that is made in the Policy period, any subsequent renewal of the policy or any extended reporting period based on an act or omission in the Insured's rendering or failing to render Legal Services for others.

Section VI of the policy contains the following definitions:

A. CLAIM means a demand for money or Legal Services.

H. LEGAL SERVICES means those services performed by an insured as a licensed lawyer in good standing, arbitrator, mediator, title agent, notary public, administrator, conservator, receiver, executor, guardian, trustee or in any other fiduciary capacity but only where the act or omission was in the rendition of services ordinarily performed as a lawyer.

Section V of the policy contains the following conditions:

B. NOTICE TO THE COMPANY
1. Notice to the Company shall be made at such location as is indicated on the Declarations. Notice given by or on behalf of any Insured to any licensed agent of the Company in the State of New York with particulars sufficient to identify the Insured shall be deemed Notice. Failure to give Notice within the time prescribed within this Policy shall not invalidate any Claim if it shall be shown not to have been reasonably possible to give such Notice within the prescribed time and that Notice was given as soon as reasonably possible.

2. NOTICE OF AN ACTUAL CLAIM
The Insured, as a condition precedent to this policy, shall immediately provide Notice to the Company of any Claim made against an insured. In the event suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received directly or by any Insured's representative.

3. NOTICE OF A POTENTIAL CLAIM
The Insured, as a condition precedent to this policy, shall immediately provide Notice to the Company if any insured has any basis to believe that any Insured has breached a professional duty or to foresee that any such act or omission might reasonably be expected to be the basis of a Claim. If during the Policy Period the Insured shall become aware of any act or omission that may reasonably be expected to be the basis of a Claim against an Insured and gives Notice to the Company of such act or omission and the reasons for anticipating a Claim, then any such Claim that is subsequently made against the Insured and reported to the Company shall be deemed to have been made and reported at the time such Notice was given.

Section II of the policy contains the following exclusions:

This policy shall not apply to any claim based upon or arising out of, in whole or in part:
D. The Insured's capacity or status as:
1. An officer, director, partner, trustee, shareholder, manager, or employee of a business enterprise, charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust.
E. The alleged acts or omissions by any Insured, with or without compensation, for any business enterprise, whether for profit or not-for-profit, in which any insured has a Controlling Interest.

3. *Correspondence Between Lerner and American Guarantee*

On September 27, 2005, more than two months after the complaint was filed, Marc Rappel, Esq. ("Rappel"), defendants counsel, orally provided American Guarantee with its first notice of the Imperial action. A hard copy of the complaint was forwarded to American Guarantee on September 28, 2005, and American Guarantee, then, reserved its rights under the policy.

On October 4, 2005, in a telephone conversation between Rappel and Axel Brinkhoff, Esq. ("Brinkhoff") of American Guarantee, Rappel purportedly told Brinkhoff that Lerner received a courtesy copy of a draft complaint by Imperial in January 2005, at which time Lerner retained counsel. Lerner was formally served in the Imperial action in late July 2005. Brinkhoff memorialized this conversation and a copy of these notes is submitted in support of this motion.

On October 6, 2005, American Guarantee faxed a request to Rappel seeking information as to Lerner's interest in Imperial. On October 21, 2005, American Guarantee's counsel Kevin Cavaliere ("Cavaliere") sent a letter to Lerner seeking information about the suit and reiterating American Guarantee's reservation of rights under the policy. Subsequently, on November 17, 2005, Cavaliere sent a letter to Lerner, cc'd to Rappel, stating that American Guarantee had reserved its rights with respect to the Imperial compliant on numerous specified grounds

including Lerner's late forwarding of the compliant to American Guarantee and late notice of an actual or potential claim (based upon plaintiff's understanding that Lerner received a courtesy copy of the compliant, before it was actually filed, in January 2005). The letter also contained a separate request for Lerner to be examined pursuant to the terms of the policy.

Cavaliere sent another letter to Lerner and Rappel on December 5, 2005, reiterating American Guarantee's requests as stated in its previous letters dated October 21 and November 17, 2005. Another letter was sent on December 8, 2005 by Cavaliere, with a copy of the November 17 letter, reiterating these requests.

Rappel responded on January 5, 2006 and provided some of the information requested. The letter stated that Lerner: was a director of Imperial from 1997 through 2000; owned approximately 40,000 shares of Imperial common stock; was the managing member and a shareholder of SMP; and was the managing partner, tax managing partner, and a shareholder of Corona. This letter also stated that Lerner owned less than 10% of the equity in Corona, Imperial, and SMP.

On February 21, 2006, Cavaliere informed Lerner and Rappel that, subject to its reservation of rights under the policy, American Guarantee proposed to share in the reasonable costs of Lerner's defense in the Imperial action. The letter also contained another copy of the November 17 request for information. Cavaliere then requested more information on March 22, 2006.

4. *Imperial's First Amended Complaint*

On June 15, 2006, Lerner's counsel sent Imperial's first amended complaint ("FAC") to plaintiff. The FAC contained much of the same information as the original, but included an

additional cause of action for declaratory relief against all defendants and alleged further details regarding Lerner's business dealings.

In sum, the FAC alleged that in 1996 Lerner, along with his long time business associate Peter Ackerman, made an unsuccessful $1.2 billion bid to buy New MGM from Credit Lyonnis ("CL"). New MGM was eventually sold for $1.3 billion to Kirk Kerkorian. Following the sale, New MGM was left with a $79 million debt obligation ("the note") to CL. Allegedly, New MGM transferred the note to MGM Holdings, which later became SMP.

Following this failed bid to purchase New MGM, the FAC alleged Lerner sought to obtain tax advantages based upon the note owed to CL. Lerner, while a member of Imperial's Board, proposed that Imperial acquire a 25% interest in SMP so that it could diversify its investments in the film industry and obtain certain tax advantages. Following Imperial's agreement to purchase the 25% interest for $5 million, Lerner allegedly, at the last minute, changed the investment into the eventual purchase of membership interests in Corona, a company in which Lerner was the managing partner and tax managing partner.

As in the original complaint, the FAC alleged that Lerner caused Corona to declare a capital loss of $78,768,955 from its sale of the note to Tro Metro and had Corona allocate $74,671,378 of this loss to Imperial. In addition, the FAC alleged that Lerner caused SMP to report a $73 million loss on the sale of its Corona interests to Imperial. Imperial alleged that Lerner intended to report this duplicate loss to undermine Imperial's position, and that the loss attributable to SMP was not disclosed to Imperial's Board.

Thus, the FAC alleges three causes of action. First, to void the transaction pursuant to § 310 against all defendants, seeking: "(1) all funds which Imperial paid to acquire its interest in

Corona; (2) the nearly $15 million Imperial paid to Corona that Lerner and SMP withdrew from Corona; (3) any interest or penalties (including interest thereon) ultimately imposed on Imperial by the IRS as a result of the Corona transaction, through settlement or otherwise; and (4) interest on these sums and the tax adjustment the IRS seeks to impose." Second, for breach of fiduciary duty against only Lerner, it requested the same relief. Finally, the FAC, inter alia, sought a declaratory judgment that voided the Corona transaction because it was not just and reasonable to Imperial.

On July 25, 2006, Cavaliere sent a letter to Rappel indicating that American Guarantee would not defend or indemnify Lerner with respect to the FAC.

B. *Defendant's Opposition*

In opposition, defendants submit the affidavits of Rappel, Lerner, and Bridget Durand, Lerner's administrative assistant. Lerner avers that a few weeks after the February 2005 policy was purchased, he began suffering heart problems. Over the course of six months, Lerner claims his heart trouble impaired his ability to work and function. Thus, beginning on January 10, 2005, Lerner avers he went to his office infrequently, and stopped going to the office completely in August 2005. Lerner further avers that he "seldom" visited the office in July 2005 when the Imperial complaint was served.

Durand then avers that she received a copy of the Imperial complaint in late July 2005. She forwarded it to Lerner, and he retained Rappel and his firm as counsel on August 12, 2005. Once Rappel received the complaint, he states he began to prepare a defense. However, it was difficult to obtain information from Lerner due to his heart problems. Subsequently, due to Imperial's bankruptcy proceedings, the litigation against Lerner was stayed.

On September 14, 2005, Lerner was hospitalized to undergo heart valve replacement and heart by-pass surgery. Lerner spent nearly a week in the hospital, including two days in the intensive care unit. Around this time, Lerner's law firm was moving offices. Durand avers that all of Lerner's files were temporarily placed in his apartment and that she worked from home. Due to his poor health, Lerner had not yet given Rappel a copy of his American Guarantee policy. Durand claims that although Lerner was not fully recovered from surgery, he sent her to his apartment to retrieve the policy and forward a copy to Rappel. Durand did so on September 27, 2005. Rappel subsequently contacted American Guarantee.

Rappel admits that he called Brinkhoff on October 4, 2005 but claims he told him that the Imperial action was "on hold" due to bankruptcy proceedings and that Lerner had recently undergone heart surgery. Defendants dispute the allegation that Rappel told Brinkhoff that Lerner received a "courtesy copy" of the complaint in January 2005. Defendants aver that the original Imperial complaint referenced a May 11, 2005 opinion of the Tax Court and, therefore, Lerner could not possibly have received a courtesy copy in January. Lerner avers that he was not aware of any of the claims against him until late July or early August 2005. Lerner further avers that he did not receive a courtesy copy of the complaint in January 2005 and did not retain counsel regarding this matter until August 2005 after he had received the complaint.

II. *Conclusions of Law*

A party moving for summary judgment must make a prima facie showing of entitlement to judgement as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce

evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003).

A. *Notice*

An insurer's obligation to cover the insured is not triggered until the insured provides timely notice in accordance with the terms of the policy. *Travelers Ins. Co. v. Volmar Constr. Co., Inc.*, 300 A.D.2d 40, 42 (1st Dept 2002). The notice provision is a condition precedent to coverage and, without a valid excuse, failure to satisfy the notice requirement will vitiate the policy. *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 N.Y.3d 742, 743 (2005); *Travelers*, 300 A.D.2d at 42. "Where an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial." *Id.* quoting *Hartford Acc. & Indem. Co. v. CNA Ins. Cos.*, 99 A.D.2d 310, 313 (1st Dept 1984). However, if no excuse or mitigating factor is offered for the delay, the issue then poses a legal question for the court; courts have found relatively short periods unreasonable as a matter of law. *Travelers*, 300 A.D.2d at 43; *Hartford*, 99 A.D.2d at 313; *see Kahn v. Allstate Ins. Co.*, 17 A.D.3d 408 (2nd Dept 2005) (67-day delay in providing notice of claim and 74-day delay in providing pleading); *Goodwin Bowler Assocs., Ltd. v. Eastern Mut. Ins. Co.*, 259 A.D.2d 381 (1st Dept 1999) (2 months); *Pandora Indus., Inc. v. St. Paul Surplus Lines Ins. Co.*, 188 A.D.2d 277 (1st Dept 1992) (31 days); *Republic New York Corp. v. American Home Assur. Co.*, 125 A.D.2d 247 (1st Dept 1986) (45 days). The insured has the burden of establishing the reasonableness of its proffered excuse. *Great Canal*, 5 N.Y.3d at 744.

Here, the policy requires notice of claim be provided "immediately" and that, in the event of suit, the legal papers "shall immediately [be] forward[ed]". Lerner, however, waited 2 months

before notifying American Guarantee, through counsel, who he had hired to defend the suit at least 1 month before. Plaintiff argues that Lerner is not entitled to coverage since his notice was two months late. Lerner argues that his notice was timely because it was not "reasonably possible to give such Notice within the prescribed time and that Notice was given as soon as reasonably possible."

Lerner contends he was suffering from heart problems when he was served with the complaint in July 2005 and notified American Guarantee as soon as was reasonably possible on September 27-28, 2005. He does not explain why he was healthy enough to retain counsel and forward his attorney a copy of the complaint in early August 2005, but was not capable of forwarding the same complaint to American Guarantee. The court, thus, does not find that Lerner has carried his burden of demonstrating that it was not reasonably possible to give timely notice of the lawsuit.

B. *Legal Services*

An insurer's duty to defend an insured arises whenever the complaint alleges a cause of action that gives rise to a reasonable possibility of recovery under the terms of the policy. *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 443 (2002); *Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 65 (1991). If any of the claims against the insured arguably arise out of the covered events, the insurer must defend the entire action. *Massena*, 98 N.Y.2d at 443; *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997). "The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer...[and it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general

coverage or within its exclusory provisions." *Massena*, 98 N.Y.2d at 444 quoting *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 310 (1984). A duty to defend exists if the complaint contains any facts or allegations which potentially bring the claim within the protections offered by the policy. *City of New York v. Certain Underwriters at Lloyd's of London, England 15* A.D.3d 228, 230 (1st Dept 2005)

Here, the allegations against Lerner in the FAC do not allege a lawyer client relationship or that Lerner was ever retained by Imperial to perform legal services. None of the three causes of action asserted in the FAC allege any legal malpractice or claim that Lerner acted as an attorney. The entire basis of Imperial's pleadings is that Lerner breached his duties as an Imperial Board member.

C. *Exclusions*

An insurer may only be relieved of its duty to defend under a policy exclusion if it demonstrates: (1) the allegations of the complaint cast the pleadings completely within the exclusion; (2) the exclusion is subject to no other reasonable interpretation; and (3) there is no other plausible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. *Frontier*, 91 N.Y.2d at 175; *Lloyd's of London*, 15 A.D.3d at 231; *see also Massena*, 98 N.Y.2d at 444 (when an exclusion clause is relied upon to deny coverage, burden rests upon insurance company to demonstrate allegations of complaint can be interpreted only to exclude coverage).

An exclusion must be specific and clear to be enforced. *Sabato Santucci v. Greenwich Ins. Co.*, 37 A.D.3d 513, 514 (2nd Dept 2007). It is well established that unambiguous provisions of an insurance policy must be afforded their plain and ordinary meaning, and the interpretation

of such provisions is a question of law for the Court. *Broad St., LLC v. Gulf Ins. Co.*, 37 A.D.3d 126, 130 (1st Dept 2006). If the exclusion contains ambiguous terms, any doubt as to the existence of coverage must be resolved in favor of the insured. *Id.* at 131; *Sabato, supra.* An insurance policy is ambiguous if its language is susceptible to two or more reasonable interpretations. *Broad St., supra.* An insurance policy is unambiguous if its language has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.* quoting *Breed v. Ins. Co. of North America*, 46 N.Y.2d 351, 355 (1978).

1. *Officer/Director/Shareholder*

Section III.D.1 of the policy contains the following exclusion: "This policy shall not apply to any Claim based upon or arising out of, in whole or in part:...the Insured's capacity or status as:...an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise." The policy defines "Claim" as "a demand for money or Legal Services." This language is clear and unambiguous. It states that the policy shall not apply to any demand for money or legal services arising in any part out of the insured's capacity or status as an officer, director, or shareholder of a business enterprise. Here, Imperial made a demand for money against Lerner, arising out of his status as a director and shareholder of Imperial, Corona and SMP. On January 5, 2006 Rappel sent a letter to Cavaliere indicating that Lerner was a director of Imperial from 1997 through 2000, owned approximately 40,000 shares of Imperial common stock, was the managing member and a shareholder of SMP and was the managing partner, tax managing partner, and shareholder of Corona. All of the allegations in the FAC arise out of Lerner's status as a director and shareholder of these three companies.

Defendants argue that this exclusion applies to claims that are based solely on the Insured's capacity or status as an officer or director, but which do not make any allegations based upon improper legal advice. Consequently, defendants argue since this interpretation is reasonable, the exclusion is ambiguous and must be construed against American Guarantee. The court disagrees. The exclusion explicitly states "the policy shall not apply to any Claim..." This language is clear, definite, precise, and is not subject to another interpretation. The mere assertion by a party that policy language means something to them, when it is otherwise clear, unequivocal and understandable when read in conjunction with the entire policy, is not by itself enough to raise a triable issue of fact. *Broad St.*, 37 A.D.3d at 131. Accordingly it is

ORDERED, ADJUDGED and DECLARED that plaintiff American Guarantee & Liability Insurance Company's motion for summary judgment is granted; and it is further

ORDERED, ADJUDGED and DECLARED that American Guarantee & Liability Insurance Company is not obligated to defend and indemnify Perry Lerner and Lerner & Squire, LLP in the action filed by Imperial Credit Industries, Inc., debtor, and Edward M. Wolkowitz, as chapter 7 trustee for Imperial Credit Industries, Inc.

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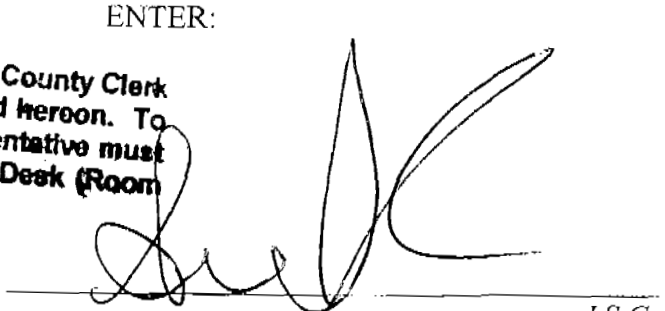

DATE: August 16, 2007
New York, N.Y.

J.S.C.