

3rd Circ. Backs Insurer In \$667K Building Collapse Fee Battle

By **Mike Curley**

Law360 (April 27, 2021, 8:36 PM EDT) -- The Third Circuit sided with Berkley Assurance Co. on Tuesday in its dispute with another insurer over defense costs for a deadly building collapse that led to a \$227 million settlement, finding that Berkley is entitled to reimbursement after its policy was declared void from the start.

The panel affirmed a summary judgment that found Colony Insurance Co. owed more than \$667,000 to Berkley, as Colony would have had to pay those fees itself in the absence of Berkley's coverage since Colony had been contracted as the secondary insurer.

According to the opinion, the district court was right in finding that, while Berkley had initially defended the case under a reservation of rights, Colony would have been the one on the hook for defense costs in the case after Berkley's policy was declared void from the start.

The fee dispute stems from litigation over the uncontrolled collapse of a four-story building undergoing demolition on Market Street, one of the Philadelphia's most active commercial corridors, which sent an unbraced wall falling onto an adjacent Salvation Army store, killing seven people and injuring 12 more.

Berkley had been contracted by Griffin Campbell, the demolition contractor involved in the catastrophe, prior to the demolition, while Colony had been separately contracted by STB Investment Corp., the building's owner, as a secondary insurer.

Berkley had been fighting since 2013 for a declaration that it was not bound to indemnify Campbell or building owner Richard Basciano and his companies. Basciano and a series of businesses he controlled were parties to the \$227 million settlement that ended the civil trial in 2017, after a jury assigned liability but before it reached a decision on damages.

In April 2017, a Pennsylvania state judge ruled that Berkley was not obligated to provide a defense as the policy was void from the start because Campbell had made misrepresentations on his application.

In November that year, Berkley sued Colony, seeking \$667,272 to cover the defense payments that it made before the policy was declared void and won summary judgment on the case, prompting Colony's appeal.

On appeal, Colony challenged every aspect of the equitable subrogation claim that Berkley won, starting

with the argument that Berkley's coverage of defense costs were its own obligation that it can't now seek reimbursement for.

The panel, however, found that Colony was asking the court to treat the policy as canceled, rather than void from the start, which provides relief retroactively. Denying Berkley's ability to recover would make the void order meaningless, the panel wrote.

In addition, Berkley was not volunteering its coverage but instead covering defense costs because it needed to protect itself from the possibility of bad faith claims in the event its policy was not voided, the panel wrote.

And while Colony argued Berkley entered a separate contract with STB to assist its personal defense counsel, the court concluded that the emails exchanged do not constitute a new contract but rather were part of Berkley's existing coverage obligations.

Finally, the panel rejected Colony's argument that Berkley has "unclean hands" by withdrawing its defense a month before trial, then entering an appearance with counsel instructed not to attend proceedings, resulting in a resignation by defense counsel.

According to the opinion, Colony's allegations about Berkley's conduct "fall far short" of unclean hands, saying its actions were efforts to mitigate costs, which were to the benefit of the insureds, and to Colony.

"Had Berkley invested more in its defense, Colony would owe Berkley more now," the panel wrote.

Nor does STB's decision to choose its own defense lead counsel doom Berkley's bid, the panel wrote, saying that Berkley's attorney still provided support work in support of the defense — work that Colony would have had to provide for as primary insurer in the absence of Berkley's policy.

An attorney for Colony declined to comment Tuesday.

Representatives for Berkley could not immediately be reached for comment Tuesday.

Circuit Judges Thomas Ambro, Luis Felipe Restrepo and Marjorie Rendell served on the panel.

Colony is represented by William F. Stewart and Michael F. Metzger of Stewart Smith.

Berkley is represented by Kevin T. Coughlin and Gabriel E. Darwick of Coughlin Midlige & Garland LLP.

The case is Berkley Assurance Co. v. Colony Insurance CO., case number 20-2673, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Dan Packel. Editing by Gemma Horowitz.