

NY High Court Says Deadline Unenforceable In Coverage Suit

By **Bibeka Shrestha**

Law360, New York (February 13, 2014, 3:36 PM ET) -- New York's highest court held Thursday that a normally reasonable requirement that policyholders bring coverage suits within two years had transformed into an unenforceable provision because it made coverage “valueless,” siding with the owner of an office building that suffered more than \$1 million in fire damage.

The New York Court of Appeals weighed in on a dispute between Peerless Insurance Co. and Executive Plaza LLC, after the Second Circuit asked it to interpret a fire insurance policy stating property replacement costs would be reimbursed only after the property was replaced, while requiring Executive to bring its suit within two years of the loss.

Executive claimed that its Island Park, N.Y., office building could not be fully repaired until October 2010, more than two years after a February 2007 fire, and that its lawsuit should not be held to the two-year limit.

The Court of Appeals concluded that while there was nothing inherently unreasonable about setting a two-year limit on coverage suits, the clause was unenforceable in this case, where the requirement that the property be completely replaced could not be met within the two-year period — an assumption the Second Circuit directed the New York court to make.

“A 'limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim,” the Court of Appeals said. “It is true that nothing required defendant to insure plaintiff for replacement cost in excess of actual cash value, but having chosen to do so defendant may not insist on a 'limitation period' that renders the coverage valueless when the repairs are time-consuming.”

The state high court said this was the first time it had squarely held that an otherwise reasonable limitation period may be rendered unreasonable by an inappropriate accrual date.

It agreed with the principle put forward in a dissent in another case that a time limit on bringing suits should be fair considering the circumstances of each particular suit.

Peerless paid nearly \$760,000 for the fire claim, but Executive said it would seek the remaining amount available under its \$1 million policy for replacement costs.

Executive filed its lawsuit to recover those costs on the date of the second anniversary of the fire, but

Peerless successfully extinguished the suit by arguing it was premature because Executive had not finished replacing the building.

After the replacement was complete, Executive brought the present suit, which Peerless persuaded a federal court to toss. The Eastern District of New York held that the Peerless fire policy unambiguously barred all suits that were commenced more than two years after the date of loss.

Executive's attorney, David Jaroslawicz of Jaroslawicz & Jaros LLC, said the decision is important because it makes clear that New York courts won't rely on the two-year limitation if doing so would make coverage illusory.

"We filed before two years; they said, 'Too early.' We filed after two years; they said, 'Too late.'" Jaroslawicz said. "The courts don't like it when you fool around."

An attorney who represented Peerless was not immediately available to comment Thursday.

"Insurance companies display endless ingenuity in finding ways to use suit limitation clauses, as well as other policy provisions, to attempt to deny coverage for claims clearly within the coverage grant," said William Passannante, an Anderson Kill PC attorney who filed an amicus brief for United Policyholders. "The New York Court of Appeals has rightly rejected a wrongful attempt at 'nullification' of a covered claim."

Executive is represented by David Jaroslawicz of Jaroslawicz & Jaros LLC.

Peerless is represented by John Love of Robins Kaplan Miller & Ciresi LLP.

United Policyholders is represented by William Passannante of Anderson Kill PC.

The case is Executive Plaza LLC v. Peerless Insurance Co., case number 2, in the Court of Appeals of the State of New York.

--Editing by Edrienne Su.