

## NY High Court Takes On Next-Door Damage Coverage Issue

By **Bibeka Shrestha**

*Law360, New York (January 15, 2013, 7:36 PM ET)* -- At the Second Circuit's urging, New York's highest state court agreed Tuesday to clear up whether damage to insured property from construction work on a neighbor's property could count as malicious damage covered under property insurance policies.

Finding little guidance on the issue in New York, the Second Circuit asked the New York Court of Appeals to decide if malicious damage can result from an act that isn't directed at the insured property. The federal appeals court said the issue was both unsettled and important.

"The answer to this question will likely have broad implications for insurance disputes under New York law," the Second Circuit said in its Dec. 21 opinion. "Resolution of this question will help determine the precise boundaries of property insurance policies in New York."

The question came up in Georgitsi Realty LLC's coverage fight with Penn-Star Insurance Co. over major damage to Georgitsi's apartment building in Brooklyn, N.Y., from construction and excavation work carried out next door, where an underground parking garage was planned.

Georgitsi notified the adjacent property owner, excavators, engineers and architect involved in the project about the damage, and it also secured stop work orders from the New York City Department of Buildings and a temporary restraining order on the construction work.

But the excavators carried out the work anyway, later admitting to violating the stop work orders and paying \$36,500 in fines to the city.

Penn-Star refused to cover the damage to Georgitsi's building, maintaining that the excavation damage didn't count as vandalism under its policy, as Georgitsi had claimed.

"Vandalism," which Penn-Star agreed to cover, was defined in the property policy as the "willful and malicious damage to, or destruction of, the described property."

Agreeing with Penn-Star, a federal district court ruled that the excavators didn't commit vandalism because their actions were directed only to the adjacent property. It said that reckless acts carried out on neighboring property didn't count as vandalism because these acts don't involve malicious intent toward the insured property.

Penn-Star told the Second Circuit that a determination that vandalism coverage could include acts that are not directed to the covered property would represent a "significant expansion of potential liability for insurers."

But the opposite ruling, the Second Circuit noted, would limit property owners' recourse for property damage to the adjacent property owner and its contractors.

Georgitsi asked the Second Circuit to follow the Sixth Circuit's approach and rule that vandalism, as defined under insurance policies, can occur whenever an act that damages insured property was done willfully, as long as there's nothing that intervenes between the willful act and the property damage.

Policyholder attorneys told Law360 on Tuesday that despite the unfavorable lower court ruling, they were optimistic that the New York high court would side with Georgitsi.

John Nevius, a policyholder attorney at Anderson Kill & Olick PC, said he was surprised by the trial court's determination that there was no coverage in Georgitsi, especially when the excavators had ignored multiple work orders aimed directly at the very problem for which Georgitsi sought coverage.

"That is willful, and that is malicious ... If under these circumstances, you don't get vandalism coverage, well then what good is vandalism coverage?" Nevius said. "It's not just some kid spray painting cars. I mean, this is serious damage."

Meanwhile, Jeffrey Schulman, a Dickstein Shapiro LLP attorney, said the Penn-Star property policy's definition of vandalism didn't require a specific intent to damage the insured building.

"I think the right result here is one in favor of coverage," Schulman said. "If the insurer wanted to limit or further limit how they define vandalism, they're free to do so."

Steven Verveniotis, a Miranda Sambursky Slone Sklarin Verveniotis LLP attorney who represents Penn-Star, declined to discuss the case Tuesday. An attorney for Georgitsi was not immediately available to comment.

Georgitsi is represented by Jack Dweck of the Dweck Law Firm LLP.

Penn-Star is represented by Michael Miranda and Steven Verveniotis of Miranda Sambursky Slone Sklarin Verveniotis LLP.

The case is Georgitsi Realty LLC v. Penn-Star Insurance Co. in the New York Court of Appeals. The case number was not immediately available.

--Editing by Eydie Cubarrubia.