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Construction Co. Insurers Denied NYU Settlement Clawback

By **Danielle Ferguson**

Law360 (August 4, 2026, 9:05 PM EDT) -- A construction company's insurers cannot recoup $50 million they paid to resolve a lawsuit from New York University over project damage, the Delaware Superior Court has ruled, finding New York law would not allow insurers to recover payments made under a reservation of rights when the policy didn't expressly allow it.

Judge Paul R. Wallace said Monday that AIG units Lexington Insurance Co. and National Union Fire Insurance Co. of Pittsburgh, Pa. cannot recoup the $25 million they each paid toward Turner Construction's settlement with the university over the damage sustained during Hurricane Sandy. That's because, the judge ruled, the policies didn't have language giving insurers the right to do so or allow the insured to agree to it.

The ruling addressed a national split on the issue of whether an insurer can unilaterally reserve the right to recoup settlement costs.

Judge Wallace, who was tasked with predicting how the New York Court of Appeals would rule on the issue, considered New York appellate decisions and said that state's top court would not permit the insurers to "create this right unilaterally." The insurers could have included such language in their policies, but did not, the judge said.

"The Court of Appeals derives the parties' rights and obligations from their enforceable agreement. And when that agreement doesn't provide for a right, a New York court will not extract that right from thin air," Judge Wallace said.

The coverage dispute stems from damage done to NYU's Langone Medical Center after Superstorm Sandy in 2012. NYU had hired Turner in 2011 to build an energy building that would house a stand-by boiler plant and emergency generator for Tisch Hospital. The storm pushed water from the East River and New York Harbor into Lower Manhattan, including onto the NYU Langone Campus, according to the opinion.

NYU said it directed Turner to cover a large opening around a ventilation shaft, but Turner failed to do so, according to the opinion. As a result, NYU said, millions of gallons of water entered the exposed ventilation shaft and spread to multiple buildings on the NYU campus.

NYU sued Turner, claiming if the company followed instructions, the damage could have been avoided. NYU asserted breach of contract and negligence claims and later added a claim for gross negligence, alleging it sustained $2.2 billion in damages.

Lexington and National Union eventually agreed to pay $25 million under their respective policies toward the settlement, but said upon agreeing that they reserved the right to recoup the payments, according to the opinion.

Turner sued its insurers in Delaware, raising claims of breach of contract, seeking declaratory judgment on the recoupment issue and a breach of the implied covenant of good faith and fair dealing, among other claims. The insurers launched counterclaims of breach of contract and unjust enrichment and sought declaration that they did not owe coverage.

The parties agreed that New York law governs the dispute.

Judge Wallace recognized the split in New York's intermediate appellate division, which has four judicial departments, regarding recoupment of defense costs.

In the First Judicial Department, there is case law allowing an insurer to recoup defense costs if the insurer paid costs and submitted a reservation of rights letter, the judge said. The Second Judicial Department disagreed in American Western Home Insurance Co. v. Gjonaj Realty & Management Co., holding that an insurer could not recoup defense costs if the policy didn't specifically allow for it, according to the opinion.

In that ruling, the Second Judicial Department "aligned itself" with the Restatement of the Law of Liability Insurance Section 21, Judge Wallace said, although he noted the New York court did not cite the Restatement. The Restatement says that, unless stated in an insurance policy or agreed to by the insured, an insurer cannot get recoupment of defense costs, even if it is later determined the insurer did not have a duty to defend, according to the opinion.

The judge recognized how "deeply rooted" freedom of contract is in New York public policy and said that state has "long enforced commercial contracts according to the terms the parties adopted."

Judge Wallace said that the insurers didn't identify a provision in either policy that allows recoupment of settlement costs. Another part of the policy regarding motorist coverage includes a right to recoup settlement advances, but that right doesn't appear elsewhere in the policies, the judge said.

"Since an express right of recoupment of such settlement costs doesn't appear elsewhere in the Policies — yet easily could have — the New York Court of Appeals would likely view this omission from the relevant sections as intentional," Judge Wallace said.

The judge noted the "national rift" on the issue, saying Texas, Utah, Delaware and Massachusetts have case law that says an insurer cannot recoup settlement costs if the insured doesn't agree to it and if the policy doesn't provide for it. However, he noted that some federal courts have made predictions that their state courts would allow recoupment of settlement costs under a unilateral reservation of rights at the time of payment.

Also in the ruling, Judge Wallace granted the insurers' motion for summary judgment on Turner's breach of contract claim, finding Turner failed to identify a specific provision that the insurers breached.

Judge Wallace also granted Turner's motion for summary judgment on the insurers' unjust enrichment counterclaim and allowed Turner's implied covenant of good faith and fair dealing claim to continue. Turner had alleged the insurers could have sought declaration regarding their coverage obligations before the settlement in the underlying case, according to the opinion. Judge Wallace said additional discovery could demonstrate bad faith conduct.

The Turner Corp. and Turner Construction Co. are represented by Jennifer C. Wasson and Ryan D. Kingshill of Potter Anderson & Corroon LLP, by Robin L. Cohen, Adam Ziffer, Meredith Elkins and Orrie Levy of Cohen Ziffer Frenchman & McKenna LLP and by Gregory D. Podolak and K. Alexandra O'Neill of Saxe Doernberger & Vita PC.

National Union Fire Insurance Co. of Pittsburgh, Pa. and Lexington Insurance Co. are represented by Robert J. Katzenstein and Julie M. O'Dell of Smith Katzenstein & Jenkins LLP and by Christopher J. St. Jeanos and Jocelyn M. Sher of Willkie Farr & Gallagher LLP.

The case is The Turner Corporation v. Lexington Insurance, case number n25c-03-301, in the Delaware Superior Court.

--Editing by Nick Petruncio.