

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

SPOLETA CONSTRUCTION, LLC,

Respondent,

-against-

No. 34

ASPEN INSURANCE UK LIMITED,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
February 16, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

STEPHANIE A. NASHBAN, ESQ.  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
Attorneys for Appellant  
77 Water Street  
Suite 2100  
New York, NY 10005

JANET P. FORD, ESQ.  
WHITE FLEISCHNER & FINO, LLP  
Attorneys for Respondent  
61 Broadway, 18th Floor  
New York, NY 10006

Meir Sabbah  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Good  
2 afternoon. First matter on today's calendar is  
3 number 34, Spoleta Construction against Aspen  
4 Insurance.

5 Counsel.

6 MS. NASHBAN: Good afternoon, Your Honors,  
7 my name is Stephanie Nashban, I represent defendant  
8 Appellant Aspen Insurance in this matter. I would  
9 like to request three minutes of rebuttal time.

10 CHIEF JUDGE DIFIORE: You have your three.

11 MS. NASHBAN: Your Honors, the question  
12 certified to this court is whether the Fourth  
13 Department was correct in deciding that Spoleta, an  
14 additional insured by contract under the CGL policy  
15 issued to my client, properly saw to it that Aspen  
16 was notified of an occurrence that could give rise to  
17 a claim under the Aspen policy. Respectfully, our  
18 answer to this question is no.

19 JUDGE PIGOTT: Are you arguing that the - -  
20 - the notice of the occurrence was untimely, or the  
21 way that it was noticed to you did not give you  
22 appropriate notice?

23 MS. NASHBAN: Both, Your Honor. The - - -  
24 the letter was - - - was untimely because it did not  
25 give proper notice.

1 JUDGE PIGOTT: Because of what?

2 MS. NASHBAN: Because it did not give  
3 proper notice of the occurrence. The - - - Spoleta,  
4 who was the purported additional insured by contract  
5 in this case, first found out about the case in late  
6 2009. It then sent a letter, the January 27th letter  
7 that is all over our briefing, to Hub-Langie, who is  
8 our named insured. And in that letter, all they said  
9 was, Hub-Langie, we are seeking contractual  
10 indemnification - - -

11 JUDGE PIGOTT: That - - - that shouldn't  
12 have surprised anybody, though; I mean, you're  
13 talking - - - you're talking to construction people.  
14 That's why I was curious. I mean, if you're saying,  
15 we got notice but you gave us notice under  
16 indemnification, not under named insured, and  
17 therefore we didn't get notice, which I think is a  
18 very weak argument.

19 MS. NASHBAN: Well, when - - - when you're  
20 saying "we're talking construction people", who do  
21 you mean, Your Honor, the - - -

22 JUDGE PIGOTT: Spoleta.

23 MS. NASHBAN: Spoleta - - - well, under - -  
24 - understandable, but the letter did not come from  
25 Spoleta - - -

1 JUDGE PIGOTT: The Hub sub.

2 MS. NASHBAN: The - - - well, the letter  
3 came from Lincoln General, Spoleta's carrier.

4 JUDGE PIGOTT: Right.

5 MS. NASHBAN: So the carrier is not a  
6 construction person; she deals with a lot of  
7 construction - - -

8 JUDGE PIGOTT: But all of you know - - -  
9 all of you know, you know, you want - - - you want to  
10 know what happened so you can investigate it. You're  
11 not - - - you're not going to get notice of a - - -  
12 of a - - - of an accident and say, oh, well, we're  
13 not going to go and investigate this because they're  
14 saying they're looking for indemnification as opposed  
15 to named insured, right?

16 MS. NASHBAN: Well, they - - - the - - -  
17 the - - - Aspen did investigate the claim, but they -  
18 - - they thought that the claim was only for a  
19 contractual indemnification against their named  
20 insured, right? They asked for information in their  
21 response; when they got the January 27th letter, they  
22 said, we need the contract - - - which was not  
23 provided to them in the letter, when - - - when  
24 Lincoln General sent the January 27th letter to - - -

25 JUDGE PIGOTT: But would your investigation

1 have been different? In other words, you wanted to  
2 know who - - - who got hurt, when they got hurt - - -  
3 how they got hurt, you know, what the damages are - -  
4 -

5 MS. NASHBAN: I don't - - - I think the - -  
6 - the investigation would have been a little  
7 different, Your Honor, because, as I stated  
8 originally, this is an additional insured by  
9 contract, Spoleta; they are not named as an insured  
10 anywhere on the policy, they are only an additional  
11 insured by virtue of the fact that they had a  
12 contract with the named insured, Hub-Langie, one - -  
13 -

14 JUDGE STEIN: You received that contract,  
15 didn't you?

16 JUDGE GARCIA: Right.

17 MS. NASHBAN: We eventually received the  
18 contract, Your Honor, not - - - it was not provided  
19 to Aspen originally with the January 27th letter; all  
20 the January 27th - - -

21 JUDGE STEIN: Do you - - - do you deny that  
22 when you received the contract, you - - - you - - -  
23 that put you on notice that they were an additional  
24 insured?

25 MS. NASHBAN: I - - - I respectfully

1 disagree with that, Your Honor, because the contract  
2 was sent in February of 2010; it was sent not by  
3 Lincoln General or Spoleta, it was sent by Hub-  
4 Langie's broker because that's who they asked it for.

5 JUDGE STEIN: Well, are you saying that  
6 that makes a difference, who sent it?

7 MS. NASHBAN: No - - - I - - - I'm not - -  
8 - I'm not saying - - - I mean, I think it makes a  
9 little bit of a difference, Your Honor, respectfully,  
10 because they would do - - - they, being Aspen, was  
11 doing an investigation on behalf of their named  
12 insured, Hub-Langie, not on behalf of Spoleta,  
13 because they did not believe that Spoleta was looking  
14 for coverage under the policy. And the - - - the - -  
15 -

16 JUDGE ABDUS-SALAAM: What would have put  
17 them on notice that - - -

18 MS. NASHBAN: I'm sorry, Your Honor, I  
19 didn't hear - - -

20 JUDGE ABDUS-SALAAM: What would have put  
21 Aspen on notice that Spoleta was looking for  
22 additional insured coverage as opposed to  
23 indemnification?

24 MS. NASHBAN: That's an excellent question,  
25 Your Honor, and I think the relevant case law bears

1           that out. I think there are a trigger words in  
2           insurance, right, there's words like pick - - - pick  
3           up for us, or, we are tendering a defense and  
4           indemnification to you under the policy; those words  
5           were not used in the January 27th 2010 letter. All  
6           it said is, place your carrier on notice of this  
7           claim so they may do their own investigation of this  
8           claim.

9                         JUDGE PIGOTT: And that's what you need,  
10           right, because - - - I forget when the - - - the  
11           accident - - - the accident was in '08, right?

12                        MS. NASHBAN: Yes, it was in '08, October  
13           '08, I believe.

14                        JUDGE PIGOTT: So - - - so - - - if - - -  
15           if you'd received timely notice on October 20th of  
16           '08, you would have no idea whether or not Spoleta  
17           would be - - - would be involved in the lawsuit, but  
18           you would want to know what the accident was or what  
19           it was about - - -

20                        MS. NASHBAN: Well, of course - - -

21                        JUDGE PIGOTT: - - - so that you could  
22           prepare to properly cover your - - -

23                        MS. NASHBAN: Yeah. I mean, that's part -  
24           - - that's all - - - and that's required under the  
25           notice provisions of the policy, you have to give

1           particulars of the accident, et cetera. What - - -  
2           what we're arguing here, Your Honors, is for an  
3           additional insured by contract, which this was - - -  
4           again, they were not - - - Spoleta was not an  
5           additional named insured, nor were - - - their name  
6           did not appear on the policy anywhere.

7                   JUDGE PIGOTT: Is that because of the way  
8           you write your policy?

9                   MS. NASHBAN: Most of these policies, yes,  
10          the CGL policies in construction-type cases are  
11          written that way, Your Honor, yes, because - - -

12                   JUDGE PIGOTT: So you don't - - - you don't  
13          - - - you don't need to know, at least in your own -  
14          - - in your view, if you're going to - - - if you're  
15          going to insure Hub here - - -

16                   MS. NASHBAN: Right.

17                   JUDGE PIGOTT: You know you're going to be  
18          - - - you're going to be having any of the generals  
19          as a named insured on your policy, regardless of  
20          where they go and what they do.

21                   MS. NASHBAN: Well, in - - - in certain  
22          situations, I mean, a lot of times, and I think that  
23          the majority of the times, in these subcontractors  
24          like - - - subcontracts, excuse me, between general  
25          contractors and subcontractors - - - here Spoleta was

1 the general contractor, Hub-Langie was the paving  
2 subcontractor on this project - - - that you have in  
3 - - - in the contracts indemnification by contract  
4 provision and insurance requirements.

5 Now, sometimes the insurance requirements,  
6 all they say are, you, subcontractor, have to have  
7 your own insurance; it doesn't necessarily say that  
8 the general contractor or the owner has to be named  
9 as an additional insured. In this case, it did; and  
10 that's not disputed. What we're saying, for purposes  
11 of an insurance company knowing what they're looking  
12 at, and for triggering the notice provision of the  
13 policy or, as the Fourth Department majority referred  
14 to it, seeing to it that the carrier receive proper  
15 notice, there has to be something more than just  
16 letting them know that an accident has happened.

17 JUDGE STEIN: Well, there's - - -

18 JUDGE ABDUS-SALAAM: Counsel - - -

19 JUDGE FAHEY: So - - - so let me ask this,  
20 is the "you" that you're referring to, in the  
21 language where they say "you" must do these things -  
22 - -

23 MS. NASHBAN: Correct.

24 JUDGE FAHEY: - - - to notify somebody - -  
25 -

1 MS. NASHBAN: Uh-huh.

2 JUDGE FAHEY: you're saying that the  
3 additional insured, Spoleta, is the "you" that is  
4 responsible?

5 MS. NASHBAN: I - - - I - - - that's  
6 correct, Your Honor.

7 JUDGE FAHEY: So is - - - so - - - because  
8 any other reading of the policy would always be the  
9 "you" would be the insured,

10 MS. NASHBAN: Right.

11 JUDGE FAHEY: The insured, "you", are told  
12 to do these things - - -

13 MS. NASHBAN: But - - -

14 JUDGE FAHEY: - - - and that Spoleta - - -  
15 let me just finish.

16 MS. NASHBAN: I'm sorry.

17 JUDGE FAHEY: But - - - but that the  
18 additional insured wouldn't be the "you" of the  
19 policy; that being the case, you have a more  
20 difficult role to hold. Go ahead.

21 MS. NASHBAN: I - - - I don't think so,  
22 Your Honor, I think in New York law has made it clear  
23 that - - - that duty is imputed to an additional  
24 insured - - -

25 JUDGE PIGOTT: But - - - but because you're

1 talking about - - - you were saying that they're not  
2 a named insured.

3 MS. NASHBAN: Right.

4 JUDGE PIGOTT: So you don't know who they  
5 are; so when you're - - -

6 MS. NASHBAN: Which is - - - which is - - -

7 JUDGE PIGOTT: So when you're saying "you",  
8 you have to be talking about your own insu - - - you  
9 have to be talking about Hub, saying, you have the  
10 obligations, because you don't even know that they're  
11 working for Spoleta until and unless you get notice.

12 JUDGE FAHEY: And taking it further, when  
13 you, in your policy, you say who is an insured, "any  
14 person or organization for whom you are performing  
15 certain operations when you in such person or  
16 organization have agreed in writing". That sounds to  
17 me like an additional insured.

18 MS. NASHBAN: Right. The - - -

19 JUDGE FAHEY: And so the "you" there refers  
20 to the person with whom you have a contract, here, I  
21 guess Hub-Langie, right?

22 MS. NASHBAN: Well - - - well, when you  
23 say, you have a contract, Aspen does not have a - - -  
24 well, Aspen has a contract with Hub-Langie, it's  
25 their insurance contract - - -

1 JUDGE FAHEY: For whom you are performing  
2 operations.

3 MS. NASHBAN: Right, that's - - -

4 JUDGE FAHEY: So - - - so that "you" would  
5 be Hub-Langie, but you're saying, in the notice  
6 provision, the "you" is not Hub-Langie, but instead  
7 is the additional insured?

8 MS. NASHBAN: I say that the "you" is both.  
9 I think they have - - - New York law makes it clear  
10 that - - - that an additional insured and an insured  
11 both have an independent duty to give notice under an  
12 insurance policy; timely notice under an insurance  
13 policy. And I don't think that there's any dispute  
14 as to that, I think - - -

15 JUDGE PIGOTT: How - - - how does that  
16 work? You're saying that you did not know that  
17 Spoleta was a named insured, because he wasn't a  
18 named insured, they were just - - - they were just an  
19 additional insured, right?

20 MS. NASHBAN: Correct.

21 JUDGE PIGOTT: Right, so you have no idea  
22 they even exist, let alone - - - but you're saying  
23 they somehow had to find out that you existed and  
24 that they have to notify you?

25 MS. NASHBAN: No, I'm not saying they have

1 to notify us directly; we're not arguing that at all,  
2 Your Honor. All we're saying is - - - look, at the  
3 time that this accident happened - - -

4 JUDGE PIGOTT: Right.

5 MS. NASHBAN: - - - in October of 2008, I  
6 think I have that date correct, Spoleta didn't even  
7 know that the accident had happened, right?

8 JUDGE PIGOTT: Right.

9 MS. NASHBAN: Only Hub-Langie knew because  
10 Hub-Langie was notified the date of the accident,  
11 Hub-Langie, for whatever reason, decided not to  
12 report it to their insurance carrier, they reported  
13 it to their workers' comp carrier. They eventually  
14 did, when they sent the January 27th letter, but we  
15 already won on late notice, vis-a-vis Hub-Langie.

16 JUDGE PIGOTT: You already what?

17 MS. NASHBAN: We already won on late notice  
18 vis-a-vis Hub-Langie at the trial level.

19 Spoleta was the one with all of the  
20 information with respect to the insurance  
21 requirements, the contractual indemnification  
22 requirements, and the accident. They - - -

23 JUDGE STEIN: I'm confused though about - -  
24 - there are two notice provisions, one is about the  
25 occurrence - - -

1 MS. NASHBAN: Right.

2 JUDGE STEIN: Which certainly you got  
3 notice of that occurrence, and then the other is  
4 about a claim. And it seems to me that the - - -  
5 that the - - - the importance of knowing that this -  
6 - - that this request for coverage was based on the  
7 additional insured coverage, contractual coverage,  
8 would be important at the time when they're asking  
9 for defense and indemnification of you, of an actual  
10 claim, but I'm - - - I'm - - - it's not clear to me,  
11 and I think this goes to what Judge Pigott has been  
12 asking - - -

13 MS. NASHBAN: Uh-huh.

14 JUDGE STEIN: - - - is why it would - - -  
15 it made - - - it would make a difference, when you  
16 got notice of the occurrence - - -

17 MS. NASHBAN: Uh-huh.

18 JUDGE STEIN: - - - at that time?

19 MS. NASHBAN: I think it makes - - - it  
20 makes a huge difference, because the insurance starts  
21 investigating the potential for a claim at that time,  
22 and at the time - - - and it - - - the record makes  
23 clear that Aspen did not see this as a notice of  
24 occurrence on behalf of Spoleta, so they weren't  
25 doing any investigation on behalf of Spoleta. When -

1 - - when Aspen writes back to Spoleta on March, I  
2 believe, 9th 2010, and they say, we received your  
3 claim for contractual indemnification against them,  
4 they didn't think it was a tender on behalf of them.  
5 So - - -

6 JUDGE GARCIA: But - - - but that, counsel,  
7 that - - - doesn't that go back to Judge Stein's  
8 earlier question about the February 22nd e-mail?  
9 Because as of February 22nd, from Aspen - - - and  
10 it's 168 of the record - - -

11 MS. NASHBAN: Uh-huh.

12 JUDGE GARCIA: - - - doesn't your - - -  
13 doesn't Aspen have notice that this is - - - this is  
14 a contractual arrangement between Hub-Langley and  
15 Spoleta?

16 MS. NASHBAN: They had a - - - they had a -  
17 - - when you say, I'm sorry, Your Honor, when you  
18 say, this is a contractual arrangement - - -

19 JUDGE GARCIA: They know - - - at this  
20 point, they have the contract between Hub-Langley  
21 and Spoleta, so at that point, do you know they're an  
22 additional insured?

23 MS. NASHBAN: I don't think - - - I don't  
24 necessarily think that you do, I - - - based - - - if  
25 you read the entire record - - -

1 JUDGE GARCIA: So why would they send that  
2 contract to you if they're not an additional - - -

3 MS. NASHBAN: They - - - they didn't; Hub-  
4 Langie sent the contract, Spoleta did not send the  
5 contract.

6 JUDGE GARCIA: Right, why would Hub-Langley  
7 send that - - -

8 MS. NASHBAN: Because - - -

9 JUDGE GARCIA: - - - except to highlight to  
10 you that this is a - - -

11 MS. NASHBAN: - - - Aspen asked for it.

12 JUDGE GARCIA: Right.

13 MS. NASHBAN: That's why they sent it to  
14 them, not - - -

15 JUDGE GARCIA: But you're saying, later we  
16 asked for things, we never got it, but you already  
17 had these things.

18 MS. NASHBAN: I - - - I - - - Your Honor, I  
19 understand that completely. I'm - - - the - - - when  
20 Aspen received that contract on February 22nd 2010,  
21 it responded to, I think, Mrs. Everdike (ph.) who was  
22 - - - who was their broker who sent it and said,  
23 thank you, we're looking - - - we're still waiting  
24 for stuff from Hub-Langie, we're - - - we're still  
25 investigating the claim.

1                   They didn't - - - because they were - - -  
2                   they didn't think Spoleta was looking for coverage  
3                   under the policy, that's not the way that they looked  
4                   at that contract. And the case - - - the relevant  
5                   case law bears this out, Your Honors, there has to be  
6                   something more to a notice than just, here is an  
7                   accident.

8                   CHIEF JUDGE DIFIORE: So counsel, just back  
9                   up to the - - -

10                  MS. NASHBAN: Sure.

11                  CHIEF JUDGE DIFIORE: - - - January 27th  
12                  letter; what was the purpose of that?

13                  MS. NASHBAN: What was the purpose - - -  
14                  I'm sorry.

15                  CHIEF JUDGE DIFIORE: Of the letter; the  
16                  January 27th letter.

17                  MS. NASHBAN: The January - - - the purpose  
18                  of it for whom? For the - - - for Spoleta?

19                  CHIEF JUDGE DIFIORE: If it - - - if it  
20                  wasn't being sent - - - yeah, to - - -

21                  MS. NASHBAN: In our view, the purpose of  
22                  the January 27th letter - - - remember, the January  
23                  27th letter was sent not to Aspen, it was sent only  
24                  to Hub-Langie; it was not cc'd to Aspen, it didn't  
25                  say anything about, we're looking for coverage under

1 your policy - - -

2 JUDGE STEIN: Well, in that letter they  
3 asked - - - they asked Hub-Langie who their insurer  
4 was - - -

5 MS. NASHBAN: Correct.

6 JUDGE STEIN: They didn't even know at that  
7 time so they couldn't - - -

8 MS. NASHBAN: Right.

9 JUDGE STEIN: - - - they couldn't have sent  
10 it directly.

11 MS. NASHBAN: No, and I appreciate that,  
12 Your Honor; I'm not - - - we're not arguing at all  
13 that, and I think that the majority points this out,  
14 that the notice had to come directly into Aspen's fax  
15 machine, right; all we're saying is, and again, the  
16 case law bears this out, that they have to say  
17 something more than just, okay, here's - - - here's  
18 an accident; it's, we are looking for coverage under  
19 your policy because you don't know who we are. You  
20 didn't - - - you don't know who we are. Hub-Langie  
21 could have - - - could have contracts with dozens of  
22 people.

23 JUDGE STEIN: I don't understand how the  
24 investigation would be different. I keep coming back  
25 to that; you're investigating an occurrence,

1 something that happened, an accident, to see whether  
2 you might possibly have some liability.

3 MS. NASHBAN: Correct.

4 JUDGE STEIN: What difference does it make

5 - - -

6 MS. NASHBAN: I - - - I think makes a

7 difference - - -

8 JUDGE STEIN: - - - at that stage?

9 MS. NASHBAN: - - - because there - - -

10 there could be a different investigation involved

11 vis-a-vis the general contractor, then there could be

12 vis-a-vis the - - - the - - -

13 JUDGE STEIN: Give me an - - - give me an

14 example of that.

15 MS. NASHBAN: Well, there's different - - -

16 there's different liabilities as to each one of these

17 parties, right, I mean, there's - - - there's

18 different exclusions that could apply to Spoleta as

19 to Hub-Langie. I mean, Spoleta is only entitled to

20 coverage if it arose out of the work of - - - of Hub-

21 Langie, right; I mean, that's also what the policy

22 says.

23 So I think - - - I think it does make a

24 difference, Your Honor, and I think if you look at

25 the case law that we cited in our brief, the courts

1           require more when you're an additional insured by  
2           contract than just letting the named insurance  
3           carrier know that the accident has occurred.

4                       CHIEF JUDGE DIFIORE: Thank you, counsel.

5                       MS. NASHBAN: Thank you very much, Your  
6           Honors.

7                       CHIEF JUDGE DIFIORE: Counsel.

8                       MS. FORD: Good afternoon, Your Honors, my  
9           name is Janet Ford, I'm here for Spoleta  
10          Construction, the insured that's seeking coverage  
11          under Aspen's policy.

12                      JUDGE ABDUS-SALAAM: Counsel - - - counsel,  
13          before you start, why didn't Spoleta respond or  
14          Lincoln, on Spoleta's behalf, respond to the March  
15          communication from Aspen essentially saying, we  
16          believe you're seeking indemnification, and no  
17          mention at all of a defense or anything else  
18          regarding additional insured coverage. Why didn't  
19          they respond to that?

20                      MS. FORD: Your Honor, that's a good  
21          question, and don't take this as sarcasm; I think Ms.  
22          Nashban can ask that at a deposition. And - - -  
23          which we won't have a chance to ask, if in fact - - -  
24          in fact, if the dissent is considered right on this;  
25          which I always bring - - - bring it back to the fact

1           that, this is a pre-answer - - - this is a pre-answer  
2           motion to dismiss that was upheld by the lower court  
3           and then the Appellate Division reversed that, but  
4           the dissent seems to feel that there was documentary  
5           evidence here that conclusively and plainly  
6           contradicts the allegations of Spoleta's complaint.

7                     I don't think there is; I think there's a  
8           lot of question about what - - - what did - - - what  
9           did Lincoln, on behalf of Spoleta, intend by that - -  
10          - her letter, what did Mr. White on behalf of Aspen  
11          intend by - - -

12                    JUDGE ABDUS-SALAAM: One of the things we  
13          do know - - -

14                    MS. FORD: Uh-huh.

15                    JUDGE ABDUS-SALAAM: Is that that January  
16          27th communication didn't say, we're additional - - -  
17          we're an additional insured and were asking for a  
18          defense; we know that, right?

19                    MS. FORD: We know that, but as - - - as  
20          Ms. Nashban said, there's certain trigger words that  
21          claims processors know, and they do speak in  
22          shorthand language; after all, for - - - I would say  
23          for about - - -

24                    JUDGE ABDUS-SALAAM: What's the shorthand  
25          in the January 27th letter that would put Aspen or

1 its carrier on notice?

2 MS. FORD: I - - - I will tell you.

3 "Please provide me" - - - this is to Hub-Langie,  
4 where Lincoln General said, "please provide me with  
5 the name, address, and phone number of your insurance  
6 carrier, along with your policy number."

7 Claims adjusters know what that - - - and -  
8 - - and insurance brokers taking a liability claim  
9 that happened on a construction site, they know  
10 exactly what that means; they - - - that means  
11 there's a contract here, there is a blanket  
12 additional insured endorsement, probably in Hub-  
13 Langie's policy, we want to see it, and if this  
14 matures into a full-blown complaint by the injured  
15 worker, then we want - - - we want Aspen, or whoever  
16 your subcontractor's carrier is, to pick up the  
17 defense as we agreed to.

18 Now, I think the case most on point here is  
19 City - - - the City of New York v. Zurich, that the  
20 trigger line there was, pick it up. I think - - -  
21 now, you can argue that Ms. McFerrin's (ph.) letter  
22 is not the most artfully drafted thing, but I don't  
23 think we're arguing about elegance or artful  
24 drafting, and certainly, in the City of New York  
25 case, how artful is the term "pick it up" that went

1 to Skanska, which was the analogous to our Spoleta?

2 JUDGE ABDUS-SALAAM: At least - - - at  
3 least there's some indication they want a defense.  
4 You're saying that we have to infer from the request  
5 for the name, address, name, you know, of the carrier  
6 and some other information that you're asking for  
7 defense. "Pick it up" seems to me more direct than  
8 "give me the name and address of the carrier".

9 MS. FORD: Perhaps it is, Your Honor,  
10 perhaps it is, but can we say that there is anything  
11 here that conclusively establishes, for the purpose  
12 of a pre-answer motion to dismiss, that this letter  
13 from Ms. McFerrin is not sufficient or adequate?

14 JUDGE ABDUS-SALAAM: Well, you - - - you  
15 have the March communication which we've discussed,  
16 that says - - -

17 MS. FORD: Uh-huh.

18 JUDGE ABDUS-SALAAM: -- from Aspen's - - -  
19 from Aspen's perspective, your - - - your - - - it  
20 seems that you're looking for indemnification and  
21 nothing about a defense. So that brings me back to  
22 my original question, wouldn't you want to clarify  
23 for them that you are looking for more than just  
24 indemnification?

25 MS. FORD: Again, is that something for

1           discovery, if this case goes forward; have we estab -  
2           - - I'm going back - - - and you know, a number of  
3           the cases cited here, while on summary judgment, the  
4           procedural posture here is a pre-answer motion to  
5           dismiss with no discovery, and there are a lot of  
6           questions on - - - that you're bringing up that are  
7           material to the outcome of this case that I would  
8           love to ask at a deposition or in discovery.

9                         And speaking of which, that May 9th letter  
10           is also unclear; what was Mr. White, at Aspen, doing?  
11           He said, you say there's a claim - - - he said to - -  
12           - to Lincoln, you say there is a claim but you didn't  
13           give us the claim - - - which is true, it was  
14           described in that letter - - - and you say there's a  
15           contract, but you don't attach the contract.

16                        So what was he saying? Was he doing an  
17           investigation or was he chiding Lincoln General for  
18           not doing their job right? Or - - - or was he saying  
19           he didn't have the contract when - - - or he wasn't  
20           sure what the contract was, when he did? These are -  
21           - - I'm still looking for the documentary evidence  
22           that conclusively and patently contradicts the  
23           allegations in the declaratory judgment action, which  
24           says, we gave notice of this on January 27th and you  
25           didn't respond. Now - - -

1 JUDGE PIGOTT: Well, they responded, I - -  
2 - you know, I thought they - - -

3 MS. FORD: Or that you didn't - - - you  
4 didn't respond with any position, or you didn't  
5 investigate the claim - - -

6 JUDGE PIGOTT: It's - - - it's totally the  
7 opposite of what I was asking your opponent;  
8 insurers, you know, do what insurers do, and - - -  
9 but - - - and engineers do what engineers do; they  
10 just - - - they don't want to handle these things,  
11 they do what happened here, they turn over to their  
12 broker or their agent, and say, handle this for me,  
13 and it gets handled.

14 MS. FORD: Uh-huh.

15 JUDGE PIGOTT: So I mean, the insurance  
16 companies have a reason why they want people to  
17 notify them when, and where, and how, and why, and  
18 this one is really old. It struck me - - - you know,  
19 I - - - not only with Hub, but with you guys, I mean,  
20 it was pretty late notice; wouldn't you agree?

21 MS. FORD: Late - - - I'm sorry, which is  
22 really old - - - in - - - that January 27th letter  
23 was late?

24 JUDGE PIGOTT: Yeah, when you got an '08  
25 accident.

1 MS. FORD: Yes it is, but it was the first  
2 time Spoleta was - - - learned of the accident, so it  
3 did - - - it does follow the condition as - - - as  
4 what is it - - - as soon as a reasonably practical,  
5 or as soon as reasonably possible.

6 JUDGE PIGOTT: When did the "see to it"  
7 language pop in - - - I've never - - - I've never  
8 seen that; is that in the contract?

9 MS. FORD: No, the "see to it" is on - - -  
10 is the conditions of coverage. It says that the  
11 insured - - - and let's assume insured and additional  
12 insured - - - must see to it that we are notified as  
13 soon as possible.

14 JUDGE PIGOTT: But it says, "must notify",  
15 I mean - - -

16 MS. FORD: Must provide notice of an  
17 occurrence or - - - or an occurrence that may result  
18 in a claim, as soon as reasonably possible. So  
19 that's - - - that's in the CGL contract, that's in  
20 almost every standard CGL form for over the past - -  
21 - I would say since at least the 1950s.

22 JUDGE RIVERA: So it's common industry  
23 parlance - - -

24 MS. FORD: Absolutely.

25 JUDGE RIVERA: Everybody in the industry

1 understands what this phrase means?

2 MS. FORD: No, because I think that's why  
3 we're here, Your Honor; I think that's exactly why  
4 we're here.

5 JUDGE RIVERA: Well, no, because you're  
6 saying it's industry parlance - - - is that not your  
7 - - -

8 MS. FORD: Well, it's - - - the "see to" -  
9 - -

10 JUDGE RIVERA: That's why I don't  
11 understand your argument.

12 MS. FORD: I'm sorry.

13 JUDGE RIVERA: I'm sorry, I'm having - - -  
14 I'm having difficulty understanding this argument  
15 when you're saying, it's been used for - - - since  
16 the last century.

17 MS. FORD: Oh, this standard language is.

18 JUDGE RIVERA: Yes.

19 MS. FORD: Yes.

20 JUDGE RIVERA: Yes, but that's what I'm  
21 asking about.

22 MS. FORD: Uh-huh. Well - - - well, we're  
23 here because - - -

24 JUDGE RIVERA: Why are using language that  
25 nobody understands, if that's your argument?

1 MS. FORD: "See to it"? I mean, why is the  
2 insurance industry using that language?

3 JUDGE RIVERA: Yes, yes, yes, yes, yes.

4 MS. FORD: I'm not sure I understand; it's  
5 not been litigated this - - - to this level before.  
6 No one has - - - no one has questioned it to this  
7 degree until now.

8 JUDGE PIGOTT: Well, because most people  
9 understand - - - most people understand the language  
10 "you must notify us within a reasonable time".

11 MS. FORD: And the question - - -

12 JUDGE PIGOTT: The "see to it" - - -

13 MS. FORD: - - - here, is this sufficient  
14 notice, and I'm saying, there's no documentary  
15 evidence that patently - - -

16 JUDGE STEIN: You're saying it's premature  
17 to decide that issue.

18 MS. FORD: At least it's premature, yes;  
19 um-hum, at least. We're not here on summary  
20 judgment, which is - - - which I believe this dissent  
21 - - - and I will say that the dissent had facts  
22 wrong, for instance, that they didn't have this - - -  
23 the contract, I think the panel understands that  
24 Aspen did have the subcontract that said that Spoleta  
25 must be named as an additional insured. Said that

1 Ms. McFerrin didn't see to it, but she did see to it,  
2 right on the - - - right in the record on appeal,  
3 171, 504 Ms. McFerrin saw that the broker did - - -  
4 did forward her information to Aspen.

5 And then, saying that Spoleta and Lincoln  
6 did not know Spoleta was an additional insured on  
7 Aspen policy, I - - - again, I don't know what  
8 documentary evidence establishes, without  
9 contradiction, what was in - - - in Lincoln General's  
10 mind; I don't even know.

11 And then again, the question of intention,  
12 Spoleta/Lincoln did not intend to provide notice  
13 under Aspen - - - under the Aspen policy by that  
14 letter. Again, Ms. Nashban can ask that in a  
15 deposition, what did you intend, I don't see, by this  
16 letter, "please provide me with the name and address  
17 of your insurance carrier", I - - - I don't know that  
18 that - - -

19 JUDGE ABDUS-SALAAM: That would be true if  
20 they were seeking indemnification or defense,  
21 wouldn't it?

22 MS. FORD: Correct, and these letters - - -

23 JUDGE ABDUS-SALAAM: Yeah - - -

24 MS. FORD: You ask - - - you normally ask  
25 defense, please - - - please provide us defense and

1 indemnification period, you don't specify whether  
2 it's under the AI endorsement, or under the contract,  
3 or what; just - - -

4 JUDGE FAHEY: I guess the question that  
5 really strikes you though is, why would you use such  
6 obscure language?

7 MS. FORD: Which - - - which part, Judge?

8 JUDGE FAHEY: I would - - - well, let's  
9 just go with the January 27th letter, you know, in  
10 2010, why didn't you just say, we're - - - we're  
11 asking you to pick up coverage and - - - pursuant to  
12 our policy with you.

13 MS. FORD: I can speculate, we don't have  
14 those facts, Your Honor. I can - - - knowing the  
15 industry, I can guess, but I don't think that's - - -  
16 is that relevant? I don't know.

17 JUDGE FAHEY: Well, it will be someday.

18 MS. FORD: Yes. And - - - are there - - -  
19 are there any questions? I can go on. I don't know  
20 where I am in my fifteen minutes, but I wanted to  
21 address the panel's burning questions.

22 CHIEF JUDGE DIFIORE: Proceed.

23 MS. FORD: Okay. The - - - also the united  
24 in interest issue that - - - there is this issue - -  
25 - there is lots of - - - well, not lots, but there's

1 ample case law that a named insured could give notice  
2 of an occurrence or a claim on behalf of their - - -  
3 of their additional insured, when they're - - - as  
4 long as they're not adverse; entities that are  
5 adverse, for clear reasons, can't give notice on  
6 behalf of each other; they don't have each other's  
7 interest on hand.

8 And Aspen seems to think that the moment  
9 Spoleta asked for contractual indemnity, that they  
10 were - - - that they were adverse, but does not cite  
11 any case law for that; there's no case law that says  
12 that they were adverse at that level of things. The  
13 case law says that you're adverse once there is a  
14 third-party claim, or that there are - - - or that  
15 the named insured and purported additional insured  
16 are co-defendants. So - - - and that didn't happen  
17 here and there wasn't even any position by Hub-  
18 Langie's insurer that they were denying coverage for  
19 Spoleta. So I wanted to - - - the panel to note  
20 that, the absence of case law, both in the opening  
21 brief and Aspen's reply brief.

22 So - - - also in terms of - - - I think  
23 this is important, when you give the benefit of the  
24 doubt - - - we already have the benefit of the doubt  
25 - - - that is, Spoleta, as the nonmovant here, has

1 the benefit of the doubt in the inferences that their  
2 allegations are true and any - - - any confusion in  
3 the documents should be also - - - should - - -  
4 should engender inferences that are held in favor of  
5 Spoleta.

6 In addition to 3211(a)1, that differential  
7 standard, there's also the fact that I am here  
8 representing the insured, and all kinds of case law  
9 will - - - will provide coverage over not coverage,  
10 okay. This is the insured; wherever you want  
11 coverage, coverage is always better than no coverage;  
12 so that's even another inference on top of that.

13 I - - - I expect Ms. Nashban to tell you  
14 that, well, look, Spoleta has their own CGL carrier,  
15 and the real party in interest in here is Lincoln  
16 General, who insures Spoleta, but I - - - I will tell  
17 you, we - - - Spoleta, being the construction manager  
18 or contractor, insurance companies provide this  
19 coverage knowing - - - knowing that the additional -  
20 - - that they will be additional insurers on someone  
21 else's policy, so I don't know how business in the  
22 construction area would go if additional insurance -  
23 - - if the subcontractors and lower tier parties are  
24 just going to not pay, for whatever reason.

25 My point is that Lincoln General issued

1           this policy to Spoleta with the understanding that if  
2           there was an accident they were not actively involved  
3           with - - - and in fact, construction managers are  
4           rarely directly involved in these construction  
5           injuries - - - well, they would've charged more for  
6           the policy, and so forth and so on. I mean, I don't  
7           have these facts in the record on appeal here, but  
8           I'm - - - I'm anticipating what Ms. Nashban will say,  
9           that this is not - - - this is just not a squabble  
10          between insurance companies, neither one of which  
11          wants to pay.

12                        CHIEF JUDGE DIFIORE: Thank you, counsel.

13                        MS. FORD: Thank you very much.

14                        CHIEF JUDGE DIFIORE: We'll hear from  
15          appellant.

16                        Counsel.

17                        MS. NASHBAN: First, thank you to Ms. Ford  
18          for making one of my first points for me, I  
19          appreciate that.

20                        A couple of - - - a couple of points, and  
21          I'm going to refer to the case law on the record for  
22          this. The case law bears out - - - and I - - - what  
23          Judge Abdus-Salaam was talking about, which is, the  
24          January 27th letter should have used, what Ms. Ford  
25          referred to as, the industry parlance. Why didn't

1           that January 27th letter say, "we're looking for  
2           defense and indemnification"?

3                   JUDGE STEIN:   But is that a question that  
4           we ask on a pre-answer motion to dismiss?

5                   MS. NASHBAN:   I - - - I think that it is,  
6           Your Honor, I think that you have a letter that  
7           clearly contradicts the allegations in the complaint;  
8           the allegations in the declaratory judgment complaint  
9           state that - - -

10                   JUDGE STEIN:   Well, it depends on how you  
11           interpret that letter.

12                   MS. NASHBAN:   And - - -

13                   JUDGE STEIN:   On its face, does it clearly  
14           say that?

15                   MS. NASHBAN:   I - - - I believe that it  
16           does; I believe that if you look at that letter  
17           first, as compared to the later letters that were  
18           sent in this case, one in May and one in June, if you  
19           look - - - if you stand those letters side by side,  
20           you see the difference between a tender of defense  
21           and indemnification, and one - - - I don't really  
22           know what the January 27th letter was doing other  
23           than letting Hub-Langie know that it was invoking the  
24           defense and indemnification provisions of the  
25           contract.   And - - -

1 JUDGE STEIN: Well, if that was all it was  
2 doing, why would it have specifically asked that it  
3 be passed along to the insurer?

4 MS. NASHBAN: To the insurer?

5 JUDGE STEIN: To - - - to Aspen.

6 MS. NASHBAN: For them to do their own  
7 investigation of the claim - - - because one, it  
8 wasn't a claim - - - it wasn't a lawsuit yet, right;  
9 they were looking into things.

10 JUDGE STEIN: Exactly. Uh-huh.

11 MS. NASHBAN: Right. I - - - agree that  
12 it wasn't a lawsuit, but they still - - - there was  
13 still a notice provision vis-a-vis a occurrence, not  
14 just on - - - for a claim. There are things that an  
15 additional insured, New York case law says, has to do  
16 in order to let an insurance company know. If you  
17 look at the City of New York case that my - - - that  
18 my adversary referred to, that case specifically  
19 said, when the court found that - - - an - - - the  
20 additional insured did properly see to it, it said,  
21 "Kindly forward this on to the right carrier and  
22 request it that the main insurance carrier pick it up  
23 now". It's completely different then what was going  
24 on here.

25 JUDGE ABDUS-SALAAM: On your main - - -

1 JUDGE STEIN: So that - - -

2 JUDGE ABDUS-SALAAM: I'm sorry.

3 JUDGE STEIN: Go ahead.

4 JUDGE ABDUS-SALAAM: On your main argument,  
5 you've mentioned that you'd already won the late  
6 notice problem with Hub-Langie.

7 MS. NASHBAN: Correct.

8 JUDGE ABDUS-SALAAM: And did you advise  
9 Spoleta that, or did someone advise Spoleta that you  
10 had denied coverage to Hub-Langie?

11 MS. NASHBAN: Yeah. That was in the March  
12 9th letter, Your Honor.

13 JUDGE ABDUS-SALAAM: Okay. So did Spoleta  
14 ever - - - ever say, well, what about us?

15 MS. NASHBAN: No.

16 JUDGE ABDUS-SALAAM: Are you - - - okay.

17 MS. NASHBAN: They - - - they never - - -  
18 and that's my other point - - - and I think that you  
19 were asking Ms. Ford about that, or one of the - - -  
20 one of the judges did, why did you not respond to the  
21 March 9th letter? And I don't think, respectfully,  
22 Ms. Ford had a good answer to that, she wants to - - -  
23 - to ferret that out in discovery, but I - - - I  
24 think it's pretty clear what that March 9th letter  
25 did, or was doing.

1                   The January 27th letter said, send us some  
2                   information; the March 9th letter was providing it to  
3                   them and also said, we understood this to be a  
4                   contractual indemnification claim, not a claim for  
5                   coverage. And in our view, it was at that point that  
6                   Spoleta could have said, hey, guys, no, no, no; we  
7                   are looking for coverage here, why are you not  
8                   covering us?

9                   CHIEF JUDGE DIFIORE: Thank you, counsel.

10                  MS. NASHBAN: Thank you very much.

11                  (Court is adjourned)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Spoleta Construction, LLC v. Aspen Insurance UK Limited, No. 34 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: February 18, 2016