UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLACK & VEATCH CORPORATION,

Plaintiff-Appellant,

v.

ASPEN INSURANCE (UK) LTD; LLOYD'S SYNDICATE 2003,

Defendants-Appellees.

No. 16-3359

ORDER

(Filed Sep. 19, 2017)

Before **BRISCOE**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

This matter is before the court to direct simultaneous supplemental briefing. Specifically, the court is considering whether to certify a question of state law to the New York Court of Appeals to clarify whether Commercial General Liability insurance policies cover damage to an insured's own work when the damage results from the faulty workmanship of a subcontractor. *See* N.Y. Comp. Code, Rules & Regs., tit. 22, Rule 500.27(a) (2016) (permitting "any United States Court

of Appeals" to certify "dispositive questions of [New York] law to the [New York] Court of Appeals"); *see also* 10th Cir. R. 27.2(describing certification procedures).

The parties are directed to file separate memorandum briefs to address: (1) whether this question should be certified to the New York Court of Appeals, and (2) if the court certifies the question, what suggested language should be presented to the New York Court of Appeals on the question? The simultaneous briefs shall be limited to 10 pages in length in a 13 or 14 point font, and must be filed electronically within 10 days of the date of this order. No hard copies need be submitted.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BLACK & VEATCH CORPORATION, Appellant, v. ASPEN INSURANCE (UK) LTD., and LLOYD'S SYNDICATE 2003 Appellees.	)	Appeal No. 16-3359

APPELLEES' STATEMENT IN OPPOSITION TO CERTIFICATION

(Filed Oct. 10, 2017)

NOW COME Appellees ASPEN INSURANCE (UK) LTD., and LLOYD'S SYNDICATE 2003 ("Appellees"), and pursuant to this Court's Order of September 29, 2017, make this Statement in opposition to the certification of questions of state law to the New York Court of Appeals.

Standard for Certification of Questions of State Law

A federal court will certify a question only where the question "(1) may be determinative of the *case at hand* and (2) is sufficiently novel that [the court] feel[s] uncomfortable attempting to decide it without further guidance." *Pino v. United States*, 507 F.3d 1233, 1236

(10th Cir. 2007) (emphasis added). This Court will certify only questions of state law that are both "unsettled and dispositive." *Anaconda Minerals Co. v. Stoller Chem. Co.*, 990 F.2d 1175, 1177 (10th Cir. 1993) (citation omitted).

Certification of the question suggested here would meet neither of these predicates, as New York law on the "occurrence" issue is not "novel" or "unsettled," and the certification would not be "dispositive" of all issues in dispute. The answer from the New York Court of Appeals would not result in a final disposition of the case unless it were consistent with the District Court's view that there was no "occurrence." If the New York Court of Appeals were to find an "occurrence," that answer would raise several other coverage issues to be decided under New York law, all of which would require a return of this case to the District Court to rule on the Defendants' other coverage defenses.

Further, no "novel" or "unsettled" question is presented by the issue of an "occurrence" when an insured's own work forms the basis of the claim. Decades of New York insurance coverage case law have found there is no "occurrence" where the claim is to the insured's own work.

Finally, Black & Veatch never sought certification, and in fact addressed the issue of certification in its Briefs and affirmatively declined to seek certification. Br. of Appellant, p. 32, n. 5. *See*, 10th Cir. R. 27.2, (B) and (C) (the time frame for certification is in the early briefing stages). Certification was raised by this Court

sua sponte after oral argument. Certification at this juncture would delay the ultimate resolution of this case and would frustrate the interests of judicial economy.

The N.Y. Court of Appeals Rules, Rule 500.27(b) governs the Court of Appeals' response to certified questions:

> (b) The certifying court shall prepare a certificate which shall contain the caption of the case, a statement of facts setting forth the nature of the case and the circumstances out of which the questions of New York law arise, and the questions of New York law, *not controlled by precedent*, that may be *determinative*, together with a statement as to why the issue should be addressed in the Court of Appeals *at this time*.

(emphasis added). The New York rule states that the certification must show the question is "not controlled by precedent."[1] Moreover, consistent with this Court's rules, New York requires the certified question be determinative of the matter. If the court has uncertainty "whether the certified questions can be determinative of the underlying matters," it may exercise its discretion to deny the certification, which it is entitled to do

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[1] Note that the Court of Appeals' rule requires a certified question is "not controlled by precedent." This means *any* New York precedent, and does not refer specifically to the absence of a decision from the Court of Appeals itself. As noted by the District Court below, there is ample New York precedent on the "occurrence" issue, notwithstanding the absence of a direct decision from the Court of Appeals. AA2508.

under its rules. *Yesil v Reno*, 92 N.Y.2d 455, 457, 705 N.E.2d 655 (1998); *see* N.Y. Court of Appeals Rule 500.27(d) (discretion to deny certification).

I. **An Answer to the Certified Question Would Not Be Determinative.**

As the parties agreed and as addressed during oral argument, the question of whether there is coverage involves a three-step analysis. The District Court framed the analysis as follows: "(1) Were the damages caused by an occurrence? (2) Were the damages the result of property damage resulting from the occurrence? and (3) Are the damages excluded under one or more of the policy exclusions." AA2493, *quoting*, W. Schwartzkopf, PRAC. GUIDE CONSTRUCTION CONT. SURETY CLAIMS, § 22.03 (2016). If there is no "occurrence," the analysis never reaches the "Your Work" exclusion. This point has been admitted by Black & Veatch,[2] and the issue was fully addressed at oral argument. It has never been an issue in dispute.

The District Court only reached the first of the coverage issues, finding there was no "occurrence." As suggested in this Court's September 29, 2017 Order, it is the first of these questions which could be posed to the New York Court of Appeals on certification, *viz.* is

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[2] See AA226 (Appellant's Memo in Support of Motion for Partial Summary Judgment); AA1780-81 (Appellant's Reply in Support of First Motion for Partial Summary Judgment (quoting expert Charles M. Miller)); AA2493 (District Court accepting this analysis as "consonant with the parties' presentations").

there an "occurrence" when the claim relates to the insured's own work. Resolution of the "occurrence' issue would only terminate the litigation if the Court of Appeals agreed with the District Court and found no "occurrence."

In summary, the answer from New York would not be dispositive of the case. There are no novel or unsettled issues of New York law being presented. And certification of the issue "at this time" – after the matter has been fully briefed and argued – would delay disposition, would frustrate the principles of judicial economy, and would not advance the interests of justice or development of the Law.

II. New York Law on the "Occurrence" Issue Is Clear.

The second requirement for certification is that the proposed question be "unsettled." However, as this Court has stated, "[n]ovel, unsettled questions of state law, however, not 'unique circumstances,' are necessary before federal courts may avail themselves of state certification procedures." *Copier By and Through Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 839 (10th Cir. 1998). In its Briefs, Black & Veatch does not dispute that non-conformances relating to a contractor's own work are not an "occurrence" under New York law, which is why Black & Veatch urged this court to follow Colorado law as set forth in *Greystone Construction., Inc. v. National Fire & Marine Ins. Co.*, 661 F.3d 1272

(10th Cir. 2011). Br. of Appellant, at 30-31 (arguing for result consistent with *Greystone*).

Moreover, Black & Veatch's own experts – both of them – concede there is no "occurrence" when the claim arises from a contractor's own work. AA1784-85, Appellant's Reply in Support of First Motion for Partial Summary Judgment ("Not Controverted"). Black & Veatch's own brokers and consultants agree that nonconformances to a contractor's own work are not an occurrence under New York law. AA1358-59. And the most recent pronouncement on this very issue makes clear that "damage" to a contractor's own work is not an "occurrence" under New York law. *Kvaerner North American Construction, Inc., v. Certain Underwriters*, Docket No. 1:15CV210, 2017 WL 2821691 (June 28, 2017) (Irene M. Keeley, J.). Notably, *Kvaerner* was decided on virtually identical facts.

In this Court's September 29 Order, the issue focuses on the interplay between an "occurrence" and the "Your Work" exclusion, Exclusion F. On this issue, New York law is clear and consistent that the "subcontractor exception" as part of the "Your Work" exclusion is not a grant of coverage. *Aquatectonics, Inc. v. Hartford Cas. Ins. Co.*, 2012 WL 1020313 (E.D.N.Y., Mar. 26, 2012) (declining invitation to follow non-New York law on this issue, quoting article by Appellant's counsel, as noted by District Court at AA2508-09); *Illinois Nat'l. Ins. Co. v. Tutor Perini Corp.*, 2012 WL 5860478 (S.D.N.Y., Nov. 15, 2012), *aff'd. sub nom. Metro Trans. Auth. v. Illinois Nat'l. Ins. Co.*, 564 Fed. Appx. 618 (2d Cir. 2014); *Pavarini Constr. Co. v. Continental Ins. Co.*,

304 App. Div. 2d 501, 759 N.Y.S.2d 56 (2003). Under New York law, an insurance policy cannot expand coverage because "exclusions and exceptions in an insurance policy cannot expand the scope of the agreed coverage." *Cont'l Cas. Co. v. Marshall Granger & Co., LLP*, 921 F. Supp. 2d 111, 123 (S.D.N.Y. 2013), *quoting*, *Bryan Bros., Inc. v. Continental Cas. Co.*, 660 F.3d 827, 831 (4th Cir. 2011). There is nothing "unsettled" in New York about either of these propositions. More to the point, if there is no "occurrence," there is no reason to consider the "Your Work" exclusion.

A recent example of this Court's certification of an insurance coverage question to a state court is *Union Ins. Co. v. Mendoza*, 374 Fed. Appx. 796, 2010 WL 1260130 (10th Cir. 2010). In certifying a question on the application of the "pollution exclusion" to the release of anhydrous ammonia fertilizer during farming, this Court noted the Kansas Supreme Court had not pronounced on that issue, and the two Kansas Court of Appeals cases which addressed it had reached results which differed from two earlier District Court cases interpreting Kansas law. This conflict in the case law showed an "unsettled" question of Kansas law. There is no unsettled rule of decision in this case.

Similarly, in *McArthur v. State Farm Mut. Ins. Co.*, 407 Fed. Appx. 264, 266, 2010 WL 4162161 (10th Cir. 2010), this Court certified a question to the Utah Supreme Court on whether an automobile policy's "exhaustion" clause, a condition precedent to underinsured motorists' coverage, was void under

Utah public policy. This was unsettled as the Utah courts had not ruled on this issue at all.

On the other hand, in *Colony Ins. Co. v. Burke*, 698 F.3d 1222 (10th Cir. 2012), this Court declined to certify to the Oklahoma Supreme Court the question of whether foster children had standing to bring "bad faith" claims against their foster parents' insurers. Commenting that "we apply judgment and restraint before certifying," and "will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks" (698 F.3d at 1235-36, *quoting*, *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007)), the Court rendered the decision itself because "the course is reasonably clear" under Oklahoma law. 698 F.3d at 1236. That same approach should be applied here where New York law is clear, and even Black & Veatch does not dispute the New York rule of decision.

The record of New York cases on the "occurrence" issue is long and consistent. Moreover, there is no question involving the interpretation of a New York statute or a question of New York public policy which may be more suited for a New York resolution. The rule of law is not "unsettled," either through conflicting authorities or lack of any of authority on point.[3]

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[3] Another factor which has been deemed significant in granting certification is "a burgeoning number of similar cases" on this Court's docket. *Branch v. Farmers Ins. Co., Inc.*, 2001 WL 1028385, at *3 (10th Cir. Sept. 4, 2001). There is no evidence that

III. Certification is Untimely.

The case law in this Circuit is clear: an appellant may not decline to seek certification of a question of state law from a District Court and then, after losing there, ask this Court to certify that question. This Court stated that "[w]e generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court." *Martin v. Cornell Cos., Inc.*, 377 Fed. Appx. 762, 766, 2010 WL 1784679, at *3 (10th Cir. 2010), *quoting*, *Enfield ex rel. Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000) (quotation marks omitted), *in turn quoting, Massengale v. Oklahoma Bd. of Exam'rs. in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994).

Appellant did not ask for certification of any question under New York law while the case was pending in the District Court. It recognized the ability to do so, but specifically declined to ask this Court for certification because it believes reversal is warranted based on policy language. Br. of Appellant, at 32 n. 5. Black & Veatch's failure to seek certification at every stage of these proceedings demonstrates that it has no basis for this Court's certification of any questions to the New York Court of Appeals. The only basis for Certification is this Court's discretion. Appellees suggest this Court should not exercise its discretion to certify any

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this New York law insurance coverage issue presents recurring questions for this Court.

questions to the New York Court of Appeals for the reasons set forth herein.

IV. Alternatively, The Following Certification Questions Are Proposed.

This Court's Order asks the parties to propose questions for certification in the event the Court decides to certify questions to the New York Court of Appeals. In that event, the Appellants propose the following questions be certified for review under New York law:

1. Where an insured engaged in the construction process commits acts which damage only its own work, do those acts constitute an "occurrence" under a general liability policy?
2. If the answer to the question above is "no," is that result changed where the acts are committed by a subcontractor performing work under a subcontract with the insured?
3. Should a court consider policy exclusions when there is no "occurrence" under a liability insurance policy?
4. Is the coverage analysis under a general liability insurance policy to first determine whether there is an "occurrence?" If so, does the analysis move to determining whether there is "property damage?" And if there is both an "occurrence" and

"property damage," does the analysis then determine whether the claim is excluded?

WHEREFORE, Appellees ASPEN INSURANCE (UK) LTD., and LLOYD'S SYNDICATE 2003, respectfully request this Honorable Court to decline certification of any questions of law to the New York Court of Appeals.

Respectfully submitted,

ASPEN INSURANCE (UK) LTD. and LLOYD'S SYNDICATE 2003

Dated: October 10, 2017 By: /s/ Robert J. Franco
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No. 16-3359

In the United States Court of Appeals
for the Tenth Circuit

Black & Veatch Corporation,

Appellant,

v.

Aspen Insurance (UK) Ltd.
and Lloyd's Syndicate 2003,

Appellees.

Appeal from the United States District Court
for the District of Kansas,
No. 2:12-cv-02350-SAC-KGS
The Honorable Sam A. Crow, Presiding

APPELLANT'S SUPPLEMENTAL BRIEF

(Filed Oct. 10, 2017)

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[1] **INTRODUCTION**

Appellant Black & Veatch Corporation ("B&V") does not oppose this Court certifying a question to the New York Court of Appeals to clarify whether a manuscript Commercial General Liability insurance policy may provide coverage for damage to an insured's own work when the damage results from faulty workmanship of a subcontractor. Although appellant believes that existing opinions of the New York Court of Appeals dictate the answer to the issue based on principles of contract interpretation, appellant acknowledges that this precise issue has not been addressed by the New York Court of Appeals.

In the event of certification, appellant suggests the question to be certified should be:

> When interpreting a liability insurance policy, does New York law require a court to apply a definition of "occurrence" that precludes a claim for damage to the insured's "work" caused by defective workmanship, even when that interpretation renders other policy provisions surplusage, without force or effect.

DISCUSSION

This Court may "certify a question arising under state law to that state's highest court according to that court's rules." 10th Cir. R. 27.2(A). Pursuant to the laws of New York, a question may be certified by any United States Court of Appeals to the New York Court of Appeals where it is (i) determinative of the [2] cause of action, and (ii) not controlled by precedent. N.Y. Comp. Code, Rules & Regs., tit. 22, Rule 500.27(a) (2016).

The requirements for certification are satisfied in this case.

I. The Proposed Certified Question is Determinative of This Appeal.

The sole basis for the district court's decision was that damage to the insured's own work resulting from the defective workmanship of a subcontractor is not an "occurrence" under New York law. *See* Memorandum & Order at 23-27 and 56-57 (AA 2499-503, 2532-33). The district court found that several provisions contained in the policy addressing the scope of coverage for damages incurred to the insured's own work could not alter New York's case law definition of "occurrence." *Id.* The district court found that at least one of the provisions addressing coverage for damages incurred to the insured's own work was included in the policy only to address hypothetical situations. *Id.* at 52 (AA 2528).

The proposed question to be certified goes directly to this issue and is therefore determinative of this appeal.

II. Although There Is No Precedent Directly on Point, Existing Decisions Evidence How the New York Court of Appeals Would Rule.

There is no New York precedent addressing the specific question to be certified. However, B&V contends that existing decisions by the New York Court of Appeals provide clear direction to guide interpretation of negotiated policy provisions.

[3] The recent case of *In re Viking Pump,* 27 N.Y.3d 244 (2016), confirmed New York's long-standing rule that when interpreting an insurance policy, every provision must be given meaning and effect. The New York Court of Appeals noted that when interpreting an insurance policy, clauses limiting coverage, including exclusions, should be referenced to determine the intent and scope of the coverage, and that the addition of a limiting clause may demonstrate that a prior interpretation of the insuring agreement as to the scope of coverage was too narrow. *Id.* at 264. In other words, the fact that the parties concluded that it was necessary to include an exclusion can demonstrate that the intent was for the insuring agreement to cover that general scope of damages, then subject it to an exclusion.

Further, the New York Court of Appeals has recognized that damages resulting from defective workmanship do in fact constitute an occurrence. For example,

in *Adler & Nielson Co. v. Ins. Co. of N. Am.,* 56 N.Y.2d 540 (N.Y. 1982), the Court of Appeals held that damage to the insured's work was excluded by a "Your Work" Exclusion, but related damage to other property was covered. The reason damage to the insured's work was not covered was because of a "Your Work" exclusion – which did not contain any exceptions not because defective workmanship that damages the insured's work could never amount to an occurrence. *See id.*

[4] Similarly, in *Sturges Mfg. Co.,* a case in which the insured crafted defective ski straps that were sold and then incorporated into ski bindings before breaking, the court found an occurrence:

> The insurance policy at issue covers, among other risks, liability for "property damage" defined as "injury to or destruction of tangible property." The damage must result from an "occurrence", equated with "an accident". The insurer asserts that there was no 'occurrence'. These terms are, however, obviously broad, *and would encompass the unexpected breakage of the [insured's] straps* and other harm flowing from it.

Sturges Mfg. Co. v. Utica Mut. Ins. Co., 37 N.Y.2d 69, 72 (N.Y. 1975) (emphasis added).

The New York Court of Appeals has never held that damages from defective workmanship cannot constitute an occurrence under a liability insurance policy. To the contrary, it has recognized that coverage is triggered, but the scope of coverage may be limited because of applicable exclusions. Lower court decisions in

New York to the contrary either fail to address policy provisions similar to those at issue here, *see, e.g., Amin Realty, LLC v. Travelers Prop. Cas. Co.,* 05-CV-195, 2006 WL 1720401 (E.D.N.Y. Mar. 26, 2006), or fail to follow the rule under New York law that all provisions must be given meaning and effect. *See, e.g., Aquatectonics, Inc. v. The Hartford Cas. Ins. Co.,* 10-CV-2935, 2012 WL 1020313 (E.D.N.Y. Mar. 26, 2012) (failing to give effect to the subcontractor exception to [5] the your work exclusion); *Illinois Nta'l Ins. Co. v. Tutor Perini Corp.,* 11-CV-431, 2012 WL 5860478 (S.D.N.Y. Nov. 15, 2012) (accord).

Many of these lower court decisions finding no "occurrence" rely on the Second Circuit's decision in *Jakobson Shipyard, Inc. v. Aetna Cas. & Sur. Co.,* 961 F.2d 387 (2d Cir. 1992). However, the Second Circuit has recently clarified that the reasoning of *Jakobson* is not applicable to an interpretation of a commercial general liability policy that contains a Your Work Exclusion with a subcontractor exception (similar to Exclusion F in the policy at issue here). *Scottsdale Ins. Co. v. R.I. Pools, Inc.,* 710 F.3d 488, 491 (2d Cir. 2013). The Second Circuit confirmed that where such a provision is included, the policy "unmistakably include[s] defects in the insured's own work within the category of an 'occurrence.'" *Id.* at 492. This same rationale has been adopted by the overwhelming majority of courts to address the issue in recent years. *See, e.g., Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.,* 661 F.3d 1272 (10th Cir. 2011); *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, LLC,* 143 A.3d 273 (N.J. 2016); *Nat'l*

Surety Corp. v. Westlake Inv., LLC, 880 N.W.2d 724 (Iowa 2016).

The decisions by the New York Court of Appeals indicate that the court would reject the rationale adopted by the district court in this case, and decline to construe the definition of "occurrence" in a way that deprives any policy provision of effect. *In re Viking Pump*, 27 N.Y.3d 259-64.

[6] **CONCLUSION**

B&V believes that this Court, applying existing principles of contract interpretation provided by controlling New York Court of Appeals holdings, should reverse the district court's decision and find that damage to B&V's work resulting from faulty workmanship of a subcontractor can constitute an occurrence under the liability policy at issue. Nonetheless, B&V acknowledges that the law on this precise issue – whether damage to the insured's work from faulty workmanship of a subcontractor can be an "occurrence" where the policy provides for such coverage in some circumstances – has not been addressed by the New York Court of Appeals and, therefore, B&V does not oppose certification.

[signature page follows]

[7] **Dated:**
October 10, 2017 Respectfully submitted,

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