

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION  
CIVIL ACTION NO. \_\_\_\_\_

WESTCHESTER SURPLUS LINES )  
INSURANCE COMPANY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
CLANCY & THEYS CONSTRUCTION )  
COMPANY )  
 )  
Defendant. )  
\_\_\_\_\_ )

**FIRST COMPLAINT  
FOR DECLARATORY RELIEF**

NOW COMES the Plaintiff, WESTCHESTER SURPLUS LINES INSURANCE COMPANY, and states as follows:

**INTRODUCTION**

1. This lawsuit arises out of Clancy & Theys Construction Company's ("Clancy") attempt to impermissibly utilize a third-party liability insurance policy issued to it by Westchester Surplus Lines Insurance Company ("Westchester") to offset potential losses arising from the construction of a student housing project located in Raleigh.
2. The Project, now known as Valentine Commons, was developed by Capstone Development Corporation ("Capstone") and constructed by Brasfield & Gorrie, LLC/Clancy & Theys, A Joint Venture ("Joint Venture").
3. The Joint Venture is not an Insured under the Policy, and no entity or individual has made any "claim" against Clancy as that term is defined by the Policy.
4. Nonetheless, Clancy contends that Westchester is obligated to "defend" and indemnify Clancy and/or the Joint Venture in connection with ongoing efforts by the Joint Venture to obtain reimbursement from its subcontractors for construction cost overruns that may total in excess of \$10,000,000.

5. Westchester, therefore, seeks a declaration of its rights and obligations under the Policy, and more specifically, a declaration that it has no duty to defend or indemnify Clancy and or the Joint Venture.

### **THE PARTIES**

6. Westchester is a corporation organized and existing under the laws of the State of Georgia.
7. Clancy is a general contracting corporation organized and existing under the laws of the State of North Carolina.
8. The most substantial part of the alleged acts or omissions giving rise to the instant dispute occurred in Raleigh, North Carolina.

### **JURISDICTION AND VENUE**

9. There is more than \$75,000 in dispute as the Joint Venture and Clancy contend that the Joint Venture had to make significant alterations and repairs in order to allow the \$57,000,000 Project to open as scheduled.
10. Upon information and belief, the Joint Venture contends that it incurred more than \$10,000,000 in additional construction costs, and it is now seeking that amount from its subcontractors.
11. As Westchester is seeking a declaration that its \$5,000,000 Policy Limit cannot be utilized by Clancy or the Joint Venture to defray the Joint Venture's costs, the amount in controversy exceeds \$75,000.
12. By virtue of the complete diversity of citizenship of the parties, and the fact that the amount in controversy exceeds \$75,000, this Court has subject matter jurisdiction over this action, pursuant to 28 U.S.C. § 1332(a).
13. An actual controversy exists among the parties to this action concerning the applicability of coverage under a policy of insurance issued to Clancy. This Court is, therefore, authorized to declare the rights of the parties pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57.
14. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the questions surrounding coverage under the policy of insurance at issue occurred in Raleigh, North Carolina.
15. The Defendant is subject to personal jurisdiction in this District.

### THE VALENTINE COMMONS PROJECT

16. Valentine Commons is a ten-story, apartment-style student housing project located near the campus of North Carolina State University in Raleigh.
17. Capstone is a Birmingham, Alabama-based real estate development company that, upon information and belief, owns and/or operates Valentine Commons and served as the Project's developer.
18. Capstone contracted with the Joint Venture to construct the Project on or around January 28, 2011. A true and accurate copy of Capstone's contract with the Joint Venture is attached as Exhibit A.
19. The Joint Venture is an entity formed by Clancy and Brasfield & Gorrie, LLC pursuant to a Joint Venture Agreement dated December 14, 2010. A true and accurate copy of the Joint Venture Agreement is attached as Exhibit B.
20. The Joint Venture hired subcontractors for various aspects of the Project, including the design and construction of the Project's foundation.
21. In early September 2011, the Joint Venture and its subcontractors discovered that the Project's east wing had experienced unacceptable foundation settlement.
22. Capstone sought immediate correction of the foundation settlement problems and demanded that the Joint Venture provide it with a "100% solution to the problem."
23. More specifically, Capstone requested that the Joint Venture deliver the Project "as designed and intended" "on a schedule that makes it possible for Capstone to effectively market and pre-lease the Project." A true and accurate copy of Capstone's Request is attached hereto as Exhibit C.
24. Beyond Capstone's request of a "100% solution" and the delivery of the Project "as designed and intended," Westchester possesses no evidence of any demand for money or services made by Capstone to the Joint Venture or to Clancy.
25. Upon information and belief, after considering various options, the Joint Venture and Capstone decided to reinforce the Project's foundation and accelerate the construction schedule to complete the Project on schedule and in time for leasing in August 2012.

26. The Joint Venture completed the Project on schedule, and residents are currently occupying the Project.
27. Upon information and belief, the Joint Venture incurred more than \$10,000,000 in costs associated with the foundation reinforcement and accelerated construction schedule.
28. Upon information and belief, to induce Capstone to permit it to reinforce the foundation and pursue the accelerated construction schedule, the Joint Venture entered into an agreement with Capstone in which the Joint Venture agreed to absorb all additional expenses arising from the foundation settlement, including Capstone's administrative, consulting and legal expenses, and to release Capstone's design professionals from liability. A true and accurate copy of an October 25, 2011 Memorandum discussing this arrangement between Capstone and the Joint Venture is attached hereto as Exhibit D.
29. Upon information and belief, because the Joint Venture has agreed to absorb all costs and expenses arising from the foundation settlement, including Capstone's administrative, consulting and legal expenses, and because the Joint Venture has completed the Project, Capstone has not been damaged by the foundation settlement.
30. Upon information and belief, Capstone is not or is no longer seeking any damages or services – beyond services required under its construction contract with the Joint Venture – from the Joint Venture.
31. Capstone is not seeking any damages or services directly from Clancy.
32. Capstone has never sought any damages or services directly from Clancy.

**CLANCY'S DEMAND FOR INSURANCE COVERAGE**

33. Simultaneously with its negotiations with Capstone to complete the Project, the Joint Venture retained litigation counsel, A. Holt Gwynn of the Connor, Gwynn, Schenck, PLLC law firm, to seek reimbursement of the Joint Venture's costs and expenses from its subcontractors.
34. On or around May 10, 2012, Mr. Gwynn, on behalf of the Joint Venture, invited the Joint Venture's subcontractors and their insurers to participate in a mediation process by which the "Principally

Responsible Parties” or “PRPs” would exchange information and enlist experts to review the cause of the foundation settlement followed by a voluntary pre-litigation mediation. A true and accurate copy of Mr. Gwynn’s May 10, 2012 correspondence is attached hereto as Exhibit E.

35. Mr. Gwynn’s May 10, 2012 correspondence indicates that the “Joint Venture’s” damages “appear to be reasonably quantifiable,” based on costs incurred by the Joint Venture in connection with its work to stabilize the foundation as “agreed with the [Capstone] and its consultants” in November 2011.
36. Mr. Gwynn, on behalf of the Joint Venture, invited Westchester to participate in the mediation process, claiming that the Policy had been triggered because “the Joint Venture” “is claimed to be ultimately liable” to Capstone. A true and accurate copy of Mr. Gwynn’s May 10, 2012 correspondence is attached hereto as Exhibit F.
37. Although Mr. Gwynn’s correspondence with Westchester made reference to claims by Capstone against the Joint Venture and damages incurred by Capstone, Capstone is not participating in the pre-litigation mediation process.
38. Similarly, in connection with the mediation process proposed by Mr. Gwynn, Clancy has demanded that Westchester immediately assign it defense counsel and participate in the mediation process by making some portion or all of its Policy Limits available for contribution to the Joint Venture’s alleged losses.
39. Clancy has demanded that Westchester appoint Mr. Gwynn – though he represents the Joint Venture – as its defense counsel.
40. Westchester has at all times timely and thoroughly reserved its rights in connection with Clancy’s demands.
41. Westchester has advised Clancy that it intends to treat Clancy’s demand as a potential claim, investigating the matter at its discretion while continuing to reserve its rights.
42. Clancy has rejected Westchester’s continued investigation and reservation of its rights and has threatened to sue Westchester for breach of contract and bad faith.
43. Westchester has not breached its contract with Clancy.

44. Westchester is entitled to investigate circumstances such as those that are described here at its discretion.
45. Westchester is not obligated to appoint defense counsel to Clancy or the Joint Venture.
46. Westchester is not obligated to participate in the mediation process.
47. Westchester is not obligated to indemnify the Joint Venture for losses it contends it has suffered as a result of the foundation settlement issues at the Project.
48. Westchester is not obligated to indemnify Clancy.

#### **THE POLICY**

49. The Policy is an Environmental Policy with a Policy Period of May 1, 2011 through May 1, 2012. A true and accurate copy of the Policy is attached hereto as Exhibit G.
50. The Policy's main coverage form is a Contractors Pollution Liability Insurance Policy coverage form.
51. That form is modified by a Professional Liability Coverage Endorsement.
52. If a Claim is covered by the Professional Liability Coverage Endorsement, there is a \$5,000,000 per claim and aggregate limit of liability for such claims.
53. The Professional Liability Coverage Endorsement's Insuring Agreement provides that Westchester "will pay those sums in excess of the retention shown in the Declarations that the Insured becomes legally obligated to pay as damages because of **Claims** that result from the rendering or failure to render **professional services** for others to which this insurance applies." (Bold terms defined in original document.)
54. Clancy & Theys Construction Company, a corporation, is the Named Insured.
55. There are no other Named Insureds listed in the Policy's Declarations, forms or endorsements.
56. The Joint Venture is not a Named Insured.
57. The Policy contains a Joint Venture Endorsement, but that Joint Venture Endorsement does not extend coverage to the Joint Venture.
58. The Policy's Joint Venture Endorsement extends coverage to Clancy for its work under joint ventures generally.

59. The Joint Venture Endorsement reads:
- Item A.2 is deleted and replaced with the following: A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business. You are also an insured with regard to your participation in a joint venture that is not designated in the Declarations, but solely with respect to your liability arising from the performance of **your work** under the respective joint venture.
60. Absent the Joint Venture Endorsement, any Claim made against Clancy for work it performed as part of any joint venture would be excluded by the plain language of the “Who is An Insured” section of the Policy which reads, “No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a **Named Insured** in the Declarations.”
61. In the event of a “suit,” Westchester has the obligation to appoint counsel, but not until a “suit” is commenced.
62. A “suit” is defined as “a civil proceeding in which damages because of any acts, errors, or omissions to which this insurance applies are alleged. Suit includes: (1) An arbitration proceeding...; or (2) Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.”
63. The Policy reads:
- [Westchester] shall have the right and duty to defend the insured against any **suit(s)** seeking those damages. However, we have no duties to pay damages as a result of **claim(s)** nor shall we have any duty to defend the insured against any **suit(s)** seeking damages that result from rendering or failure to render **professional** services to which this insurance does not apply.
64. The Policy further provides: “[Westchester] may, at our discretion, investigate any alleged act, error, or omission and settle any **claim(s)** that may result.”
65. The Policy also contains a number of Exclusions that are applicable to Clancy’s demand for coverage.
66. First, the Policy does not apply to “**Claim(s)** based upon or arising from any liability of others assumed by the insured through contract or agreement,” subject to certain exceptions that do not apply here.

67. Second, the Policy does not apply to “**Claim(s)** based upon or arising from express warranties or guarantees.”
68. Third, the Policy does not apply to “**Claim(s)** based upon or arising from expenses incurred by the insured for professional services performed by the salaried staff and **employees** of the insured.”
69. Finally, in the event of a Claim, “No insured will, except at your own cost, voluntarily make a payment, assume any obligation, or incur any expense without our consent.”
70. Westchester reserves its right to amend its pleadings to the extent required and to rely on other exclusions and Policy provisions as this lawsuit progresses.

**WESTCHESTER’S REQUEST FOR DECLARATORY RELIEF**

71. Westchester incorporates each of the preceding paragraphs into its request for declaratory relief as if fully set out herein.
72. Westchester is entitled to a declaration that it is not obligated to defend or indemnify Clancy or the Joint Venture from any “claim” arising out of the construction of the Project.

**joint venture is not an insured.**

73. As noted above, the Joint Venture is not an Insured.
74. The Joint Venture is not listed in the Declarations as a Named Insured.
75. No provision of the Policy including the Joint Venture endorsement extends coverage to the Joint Venture.
76. Because the Joint Venture is not an insured under the Policy, Westchester is entitled to a declaration that it has no obligation to defend or indemnify the Joint Venture.

**no claim against clancy.**

77. To fall within the Insuring Agreement of the Professional Liability Coverage Endorsement, there must be a “claim” against an Insured.
78. Clancy is the only Named Insured.
79. The Joint Venture is not a Named Insured.
80. The Joint Venture is not an insured by virtue of the Joint Venture Endorsement.

81. The Joint Venture is not an insured by virtue of any other Policy provision.
82. The Joint Venture is not Clancy.
83. A claim against the Joint Venture is not a claim against Clancy.
84. Clancy has not provided any evidence or information to Westchester suggesting that Capstone or any other individual or entity is making or intends to make a Claim against Clancy.
85. Because there is no claim against an Insured, Westchester has no obligation to defend or indemnify Clancy.

**no sums legally obligated to pay as damages.**

86. To fall within the applicable Insuring Agreement, Clancy must become “legally obligated to pay” sums “as damages” because of “**claim(s)**.”
87. Although there is no claim against Clancy, Capstone’s requests of the Joint Venture – even if they could be interpreted as requests of Clancy – do not constitute damages.
88. Instead, Capstone asked the Joint Venture to perform under its contract with Capstone, and it appears that the Joint Venture did perform.
89. Any pass-through loss that Clancy might sustain by virtue of its participation in the Joint Venture is not and will not constitute damages Clancy is obligated to pay to a third party.
90. Because there are no damages that Clancy has or will become legally obligated to pay, Westchester has no obligation to defend or indemnify Clancy.

**no duty to defend or participate in mediation.**

91. The contemplated mediation process is not a “suit” against Clancy.
92. The Policy only obligates Westchester to defend Clancy in the event of a suit.
93. The contemplated mediation process does not fall within the definition of a “suit” because it is not an “alternative dispute resolution proceeding in which ... damages are claimed” against Clancy.
94. The contemplated mediation process does not fall within the definition of a “suit” because it is not an “alternative dispute resolution proceeding ... to which” Clancy is submitting with Westchester’s consent.

95. Instead, the contemplated mediation process was initiated by the Joint Venture for the purpose of recouping its losses against its subcontractors.
96. Capstone, whom Clancy contends has made a claim against the Joint Venture, is not participating in the process.
97. No claim for damages against Clancy will be compromised or settled at the contemplated mediation.
98. Westchester is, therefore, entitled to a declaration that it is not obligated to defend Clancy in connection with the mediation process.
99. Westchester is also entitled to a declaration that it is not obligated to indemnify Clancy as part of the mediation process.

**coverage precluded by contractual liability exclusion.**

100. As noted above, there is no claim against Clancy.
101. With that said, were a proper claim to be brought against Clancy in connection with the foundation settlement issue, it would still be barred by the Policy's Contractual Liability Exclusion.
102. The Joint Venture's liability to Capstone is defined by the construction contract between the Joint Venture and Capstone.
103. As a joint venture participant, Clancy's liability to the joint venture is defined by the Joint Venture Agreement.
104. If Capstone were making a claim for damages against the Joint Venture, Clancy would only be liable for damages assessed against the Joint Venture to the extent that it assumed liability within the Joint Venture Agreement.
105. Because the only potential claim that might be asserted against Clancy arises from liability assumed by Clancy under the Joint Venture Agreement, Westchester is entitled to a declaration that it has no obligation to defend or indemnify Clancy.

**coverage precluded by expressed warranties and guarantees exclusion.**

106. As noted above, there is no claim against Clancy.

107. With that said, were a proper claim to be brought against Clancy in connection with the foundation settlement issue, it still would be barred by the Policy's Expressed Warranties and Guarantees Exclusion.
108. The Joint Venture's liability to Capstone is defined by the construction contract between the Joint Venture and Capstone.
109. That construction contract contains numerous express warranties and guarantees – most notably that the project would perform as designed and intended.
110. To the extent that Capstone has made a claim against the Joint Venture, that claim arises out of the express warranties and guarantees in the construction contract.
111. Because the only potential claim that might be asserted against Clancy would arise out of the same express warranties and guarantees, Westchester is entitled to a declaration that it has no obligation to defend or indemnify Clancy.

**coverage precluded by insured's internal expenses exclusion**

112. Again, there is no claim against Clancy.
113. With that said however, the amounts sought in connection with the anticipated mediation process are amounts incurred by the Joint Venture to complete the Project.
114. Amounts incurred by the Joint Venture to complete the Project are the internal expenses of the Joint Venture.
115. To the extent Clancy contends it is liable for its share of the Joint Venture's internal expenses, the Policy's internal expenses exclusions bars coverage for such a claim.
116. Westchester is, therefore, entitled to a declaration that it has no obligation to defend or indemnify Clancy.

**settlements without westchester's consent are precluded from coverage.**

117. The Joint Venture has entered into an agreement with Capstone by which Capstone permitted the Joint Venture to complete the Project subject to certain financial and other accommodations.

118. Upon information and belief, Capstone has resolved any claim it might have made or might make against the Joint Venture.
119. If Clancy contends it is liable to pay amounts to Capstone by virtue of the Joint Venture's agreement with Capstone, such amounts are due under a settlement agreement that was entered into without Westchester's consent or knowledge.
120. Westchester is not obligated to indemnify or reimburse Clancy or the Joint Venture for a settlement with Capstone that was negotiated without Westchester's consent, and, therefore, Westchester is entitled to a declaration that it has no obligation to indemnify Clancy.

**WESTCHESTER'S ALTERNATIVE CLAIM FOR BREACH OF CONTRACT**

121. Westchester incorporates each of the preceding paragraphs by reference as if fully set out and alleged herein.
122. The Policy is a contract between Clancy and Westchester.
123. If this Honorable Court were to conclude that the Joint Venture is an insured or if this Honorable Court were to conclude that a claim against the Joint Venture is a claim against Clancy, then the Joint Venture's settlement of Capstone's claims against it constitutes a breach of the Policy's voluntary payment provision and also a breach of Clancy's obligation to cooperate under the Policy.
124. If this Honorable Court were to conclude that the Joint Venture is an insured or if this Honorable Court were to conclude that a claim against the Joint Venture is a claim against Clancy, then the Joint Venture's settlement of Capstone's claims against it constitutes a compromise of Westchester's subrogation rights against other potentially liable individuals and entities in breach of the Policy's subrogation provisions.
125. If this Honorable Court were to conclude that the Joint Venture is an insured or if this Honorable Court were to conclude that a claim against the Joint Venture is a claim against Clancy, then Clancy has breached its contract with Westchester and Westchester is entitled to a declaration that it has no obligation to cover Clancy because of Clancy's material breach of contract.

126. If this Honorable Court were to conclude that the Joint Venture is an insured or if this Honorable Court were to conclude that a claim against the Joint Venture is a claim against Clancy, then Westchester is entitled to damages exceeding the jurisdictional amount as a result of Clancy's breach of contract.

WHEREFORE, Westchester respectfully requests of this Honorable Court the following:

- a. A declaration that the Joint Venture is not an Insured;
- b. A declaration that there is no claim against Clancy;
- c. A declaration that Westchester is not obligated to defend Clancy;
- d. A declaration that Westchester is not obligated to participate in the ongoing mediation process;
- e. A declaration that Westchester is not obligated to indemnify Clancy;
- f. A declaration that Clancy has breached its contract with Westchester;
- g. In the alternative, an award of damages against Clancy for Clancy's breach of contract;
- h. An award of the costs and fees incurred by Westchester in the pursuit and prosecution of this action;
- i. A trial by jury of all issues so triable; and
- j. An award of such other legal or equitable relief as this Honorable Court may deem proper.

This, the 28<sup>th</sup> day of September, 2012.

[SIGNATURE PAGE TO FOLLOW]

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