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#### And The Defense Wins

##### Edward Ruberry



In a recent ruling from the Supreme Court of New York, New York County, DRI member [Edward Ruberry](#) of the Chicago law firm **Bollinger, Ruberry & Garvey** obtained a finding from the court that the insurance policy issued by his client, Lincoln General

Insurance Company, was excess to two other insurers with respect to nearly \$5 million in defense costs incurred by an additional insured under all three policies. The court's decision stemmed from a lawsuit initiated by a property owner/developer who sought coverage for numerous claims that sprung from a 2008 crane collapse in New York City.

The collapse occurred on March 15, 2008, at a construction site in mid-town Manhattan, resulting in the deaths of seven people, as well as numerous bodily injury and property damage claims. These claims led to multiple lawsuits filed and consolidated in New York state court. At the time of the collapse, East 51st Street Development Company, LLC (the owner/developer) was an additional insured under a commercial general liability policy issued by Lincoln General to Joy Contractors, a subcontractor on the project. East 51st Street was also an additional insured under commercial general liability policies issued by Axis Surplus Insurance Company and Interstate Fire & Casualty Company to Reliance Construction Limited, the construction manager for the project.

On behalf of Lincoln General, Mr. Ruberry argued that the agreement between East 51st Street and Reliance Construction, the language of the additional insured endorsement in the Axis policy, and the competing language of the Lincoln General and Axis policies required a finding from the court that Axis owed a primary duty to pay the defense fees of East 51st Street. Mr. Ruberry also contended that Interstate, pursuant to the language of the policy it issued to Reliance Construction, was required to provide coverage to East 51st Street that was primary to any other policy maintained by or issued to East 51st Street, including the Lincoln General policy.

On December 16, 2010, Justice Carol Robinson Edmead ruled that Lincoln General's policy was excess to the policies issued by Axis

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and Interstate. Justice Edmead specifically held that Axis owes a primary duty to pay all or a portion of the claimed defense fees of East 51st Street, and that Interstate is obligated to provide primary coverage to East 51st Street for the defense of the claims arising out of the crane collapse litigation.

Justice Edmead's ruling was Mr. Ruberry's second victory on behalf of Lincoln General with respect to litigation arising out of the crane collapse on March 15, 2008. On February 18, 2010, Justice Karen Smith entered an order in the underlying lawsuits in which she found that Lincoln General extinguished its duty to defend Joy Contractors, East 51st Street and Reliance Construction when it paid its liability limits in settlement of two of the crane collapse claims. (discussed in the May 12, 2010, edition of *The Voice*).

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