

New York Insurance Coverage Law Update

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Court Rejects Insured's Contention That Exclusions Violated Public Policy

After a subcontractor's worker allegedly was injured at a construction site and filed suit against the property owner, it sought coverage as an additional insured under the subcontractor's policy. The insurer disclaimed based upon an "employee" exclusion, an exclusion for "roofing work," and an exclusion for liabilities assumed under contract or agreement. The property owner argued that these exclusions violated "the core objective and declared public policy of the Labor Law to protect construction workers by providing them with additional responsible entities and persons." The Supreme Court, Bronx County, rejected this argument, noting that the insurer had been "repeatedly successful" in having its policy exclusions judicially upheld. It then granted the insurer's motion to dismiss the complaint. [*720-730 Fort Wash. Ave. Owners Corp. v. Utica First Ins. Co.*, 2009 N.Y. Slip Op. 29443 (Sup. Ct. Bronx Co. Nov. 4, 2009).]

Circuit Court Of Appeals Rejects Judgment Against Excess Insurer Based Upon "Adjudication" Of Liability In Personal Injury Action

A contractor's employee was injured while doing work at the New York City Passenger Ship Terminal and thereafter brought suit against the terminal's owner and operator. The defendants filed a third party claim against the contractor, seeking indemnification. The contractor's primary insurer settled the third party claim, agreeing that the contractor would pay 75% of any amount awarded to the employee. After a state trial court directed a verdict in favor of the employee and a jury awarded the employee \$3 million, which an appellate court reduced to \$2.175 million, the

contractor's primary insurer turned to the excess insurer to pay the excess over its \$1 million policy limit. The excess policy applied to excess damages "for which the Insured is legally liable" which may be established by "adjudication." A federal judge found that the state court verdict was "an 'adjudication' of liability" as to the defendants and "ultimately" of the contractor, and it ruled against the excess insurer.

The U.S. Court of Appeals for the Second Circuit vacated that decision. When the personal injury action was decided, the Circuit Court explained, judgment was not entered against the contractor because the settlement disposing of the third party action had resulted in all claims against the contractor being dismissed. Accordingly, it ruled that there had been no "adjudication" of legal liability on the part of the contractor. The Circuit Court then remanded the case to the District Court to determine whether the settlement had established the legal liability of the contractor and, therefore, had obligated the excess insurer to pay the amount in excess of the primary insurer's policy limits. [*General Star National Ins. Co. v. Universal Fabricators, Inc.*, 2009 U.S. App. Lexis 24325 (2d Cir. Nov. 5, 2009).]

Insured's Failure To Timely Notify Insurer Dooms Coverage

The insured received a letter from a law firm in May or June 2004 that said the law firm had been retained on behalf of a claimant but did not mention an accident or location, and then a letter in July 2004 from the same firm that referred to an accident but not a location. The insured did not contact the firm and did not forward the letters to its insurance carrier. After a lawsuit was filed in November 2005, the insured notified its insurer, which issued a

disclaimer due to late notice. The court found that notice was untimely as a matter of law. Further, it ruled that the insured did not have a reasonable belief of non-liability, explaining that the letters notified the insured of a potential lawsuit and that the insured had offered no explanation for failing to inquire as to the location of the accident. The court granted judgment in favor of the insurer. [*Tower Ins. Co. of N.Y. v. Rose Venture, LLC*, 2009 N.Y. Slip Op. 32715(U) (Sup. Ct. N.Y. Co. Nov. 12, 2009).]

Action Dismissed When Insurer Demonstrates That One Plaintiff Was Added As An Additional Insured After The Alleged Accident, And The Other Was Never Covered

An employee of Delight Contracting Corp. allegedly was injured on September 12, 2006. Thereafter, a different company, Delight Construction Corp., and the alleged owner of the construction site filed a declaratory judgment action seeking a declaration that they were entitled to a defense and indemnity in the employee's personal injury action. The insurer contended that Delight Construction had been added as an additional insured after the accident – on September 15, 2006 – and that the alleged owner of the site had never been covered. The court found that the plaintiffs had failed to raise a factual issue to counter the insurer's showing that they were not covered by the policy at the time of the alleged injury, and granted the insurer's motion for summary judgment. [*Neighborhood Partnership Hous. Dev. Fund Co., Inc. v. Certain Underwriters & Underwriting Syndicates at Lloyds of London*, 2009 N.Y. Slip Op. 32604(U) (Sup. Ct. N.Y. Co. Nov. 3, 2009).]

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