RIVKIN RADLER LLP
ATTORNEYS AT LAW

First Department Rejects Additional Insured Coverage Where Named Insured's Acts Or Omissions Were Not Proximate Cause Of Injury

A security guard employed by Protection Plus Security Corporation sued the Manhattan School of Music, alleging that he slipped and fell on a recently mopped floor while working at the school. The school sought coverage as an additional insured under the insurance policy issued to Protection. The Appellate Division, First Department, ruled that the insurer did not have to defend or to indemnify the school, citing *Burlington Insurance Company v. N.Y.C. Transit Authority*, 29 N.Y.3d 313 (2017). The court explained that the school was an additional insured "only with respect to liability for 'bodily injury'. . . caused, in whole or in part, by" acts or omissions of the named insured – Protection – in the performance of Protection's operations for the school. Because Protection's acts or omissions "were not a proximate cause of the security guard's injury," coverage was not available to the school under its policy, the First Department concluded. [*Hanover Ins. Co. v. Philadelphia Indem. Ins. Co.*, 2018 N.Y. Slip Op. 02121 (1st Dep't Mar. 27, 2018).]

New York Court Of Appeals Rules That Additional Insured Coverage Required Written Contract Between Named Insured And Purported Additional Insured

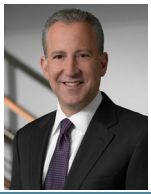
The Dormitory Authority of the State of New York ("DASNY") entered into separate contracts with a construction manager ("CM") and a general contractor ("GC") for a construction project. DASNY's contract with the GC required the GC to obtain additional insured coverage for the CM. After the CM was sued for an accident at the project, it sought additional insured coverage under the GC's insurance policy. The New York Court of Appeals ruled that the CM was not covered as an additional insured under the GC's policy, which limited additional insured coverage to "any person or organization with whom you [the GC] have agreed to add as an additional insured by written contract." The Court found this language "facially clear," and that it did not provide additional insured coverage unless the CM was an organization "with whom" the GC had a written contract. Because the CM had no written contract with the GC requiring additional insured coverage for the CM, it was not entitled to additional insured coverage under the GC's policy, the Court concluded. [*Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire and Marine Ins. Co.*, No. 22 (N.Y. Mar. 27, 2018).]

New York Court Of Appeals Holds That Insurer Need Not Indemnify Insured For Property Damage Attributable To Periods When Liability Insurance Was Unavailable

Keyspan Gas East Corporation sought indemnification for the costs of cleaning up environmental contamination caused by two gas plants in New York. The environmental contamination occurred before, during, and after the insurer's policy periods at issue, including during periods when Keyspan claimed it had no insurance because pollution property damage liability was commercially unavailable. The insurer maintained that any covered costs should be allocated pro rata over the entire period during which the property damage at each site occurred and that it was not responsible for the property damage outside its policy periods. Keyspan did not dispute that a pro rata time-on-the-risk allocation applied under the policies, but argued that the insurer's share should not be reduced by factoring in the years in which coverage was unavailable in the marketplace. New York's highest court, the Court of Appeals, rejected Keyspan's argument and held that, under the "pro rata time-on-the-risk" method of allocation, Keyspan, not the insurer, must bear the risk for those years during which coverage was unavailable. The Court pointed out that the policies limited the insurer's liability to "occurrences" happening "during the policy period" and that "it would be incongruous to include harm attributable to years of non-coverage within the policy periods" as it "would effectively provide insurance coverage to policyholders for years in which no premiums were paid and in which insurers made the calculated choice not to assume or accept premiums for the risk in question." [*Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.*, No. 20 (N.Y. Mar. 27, 2018).]

Second Circuit Decides Violation Of Dram Shop Statute Was An "Occurrence"

Central Terminal Restoration Corporation ("CTRC") obtained a temporary license to sell liquor at a fundraising event and allegedly served alcohol to Thomas Gilray on the evening he struck two pedestrians with his vehicle. The pedestrians sued CTRC under New York's Dram Shop statutes, alleging that it served alcohol to Gilray while he was visibly intoxicated. The United States Court of Appeals for the Second Circuit ruled that a violation of the Dram Shop statutes qualified as an "occurrence" or accident under CTRC's commercial general liability insurance policy. The court reasoned that CTRC's intentional selling of alcohol to Gilray did not render the subsequent injuries expected or intended by CTRC. Commercial general liability insurance policies "cover injuries where an accident at issue is the unintended result of an intentional act," the Second Circuit concluded. [*Philadelphia Indem. Ins. Co. v. Central Terminal Restoration Corp.*, No. 17-1636-cv (2d Cir. Feb. 21, 2018).]



About the editor:

Alan Eagle, Esq., is a partner at Rivkin Radler LLP. He can be reached at: 516.357.3545 or alan.eagle@rivkin.com. Your comments are welcomed. Naturally, the particular facts and circumstances of each claim will determine the impact of the cases discussed in this Update.