New York Insurance Coverage Law Update

2011 Summary

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ADDITIONAL AND NAMED INSUREDS/CO-INSURANCE

"Other Insurance" Clauses Lead Court Of Appeals To Rule That Primary Insurer Must Defend Insured Against Entirety Of Actions

Hermitage Insurance Company, Inc., which had issued a commercial general liability ("CGL") policy to Fieldston Property Owners Association, Inc., and Federal Insurance Company, which had issued an "Association Directors and Officers Liability" policy to Fieldston, both conceded at least the possibility that the two policies covered injurious falsehood claims asserted against Fieldston in two actions and that, based upon the "other insurance" clauses, Hermitage's policy was primary to Federal's policy. The insurers disagreed, however, as to whether Hermitage's primacy on the injurious falsehood claims triggered a primary duty to defend against the remaining causes of action for which Hermitage had disclaimed coverage. The New York Court of Appeals decided that, based upon the broad duty to defend, and upon the conceded possibility that Hermitage's CGL policy covered at least one cause of action in each of the two underlying complaints, Hermitage had a duty to provide a defense "to the entirety of both complaints" without contribution from Federal. [*Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257 (N.Y. 2011).]

Issue Of Which Insurer Must Pay No-Fault Benefits Subject To Mandatory Arbitration

After an insurer denied a claim for no-fault benefits on the ground that the benefits were payable by another insurer, the claimant brought suit. The Appellate Division, First Department, decided that the issue of which insurer was the primary insurer had to be submitted to arbitration because it was a dispute between insurers "as to their responsibility for the payment of first-party benefits." The First Department reasoned that "any controversy between insurers involving the responsibility or the obligation to pay first-party benefits . . . is not considered a coverage question and must be submitted to mandatory arbitration." [*M.N. Dental Diagnostics, P.C. v. Government Employees Ins. Co.*, 81 A.D.3d 541 (1st Dep't 2011).]

Neither Named Insured Nor Additional Insured Entitled To Defense Or Indemnity In Suit By Subcontractor's Employee

An insurance policy issued to AG Masonry Corp. contained an exclusion for bodily injury to any employee of any contractor hired by or for any insured arising out of and in the course of the employee's employment for that contractor. Fabian Builders, LLC, hired AG to perform work on a construction site, and AG named Fabian as an additional insured under its policy. A subcontractor's worker sued AG and Fabian for personal injuries he allegedly sustained while working on the project. The court found that the insurer had no obligation to defend or to indemnify AG or Fabian. It pointed out that the worker alleged that he had sustained bodily injuries in the course of his employment for an entity hired by Fabian or AG. According to the court, the "only possible interpretation" of these allegations was that the worker's claims fell "wholly within the employee exclusion." [*Campoverde v. Fabian Bldrs., LLC*, 83 A.D.3d 986 (2d Dep't 2011).]

Failure To Sign Construction Agreement And Work Authorization Dooms Additional Insured Status

After the Supreme Court, New York County, found that Hard Rock Café International, Inc., was not an additional insured under an insurance policy issued to Regions Facility Services, Inc., Hard Rock appealed. The Appellate Division, First Department, affirmed. The Court explained that the policy provided coverage to additional insureds when "you have agreed, in writing" that another entity should be added as an additional insured. The appellate court noted that the construction agreement that required that Hard Rock be named as an additional insured was not signed by either Regions or Hard Rock, and the work authorization was signed only by Regions even though it included a signature line for Hard Rock. Accordingly, the First Department concluded, Hard Rock was not entitled to additional insured status. [*Cusumano v. Extell Rock, LLC*, 86 A.D.3d 448 (1st Dep't 2011).]

Act of Requesting An Additional Insured Be Named Is "Critical And Material"

The Appellate Division, First Department, affirmed a trial court decision that an insurance policy did not afford additional insured coverage for claims asserted in an underlying personal injury action. In a concurring opinion, Justice Nelson S. Roman explained that an endorsement amended the policy to include, as insureds, persons or organizations "as on file with company." The act of requesting that an additional insured be named under the policy was "not a purely ministerial act whose failure should be excused," but was a "critical and material act." The failure to provide the insurer with notice of an additional insured deprived the insurer from exercising its right to deny coverage under the policy, Justice Roman concluded. [*GJF Constr. Inc. v. Sirius Am. Ins. Co.,* 2011 N.Y. App. Div. LEXIS 8466 (1st Dep't Nov. 29, 2011).]

CONDITIONS PRECEDENT/LATE NOTICE

Failure To Keep Address Current With The Secretary Of State Does Not Excuse Late Notice

A corporation was sued in a personal injury action, and its insurer disclaimed coverage based upon late notice. In upholding the disclaimer, the Appellate Division, First Department, opined that service of the summons with notice on the Secretary of State, as the corporation's designated agent, constituted receipt by the corporation. The court then found that the fact that the corporation had not subsequently received a copy of the summons, due to its failure to keep its address current with the Secretary of State, did not excuse its failure to comply with the notice requirements of its insurance policy. Accordingly, the court upheld the insurer's disclaimer. [*SP & S Assoc., LLC v. Insurance Co. of Greater N.Y.*, 80 A.D.3d 529 (1st Dep't 2011).]

Insureds' Delay In Notifying Insurer Dooms Coverage Claim

Building owners named in a personal injury action sought a defense and indemnity from their insurer. The court found that the building superintendent's knowledge of the alleged accident and injuries was imputable to the building owners and, therefore, they had knowledge of the occurrence about 76 days before they notified their insurer. As such, the court found, the notice to the insurer was untimely as a matter of law. The court also rejected the owners' contention that their failure to give timely notice should be excused because they had a good faith belief of non-liability, concluding that even if the building's property manager believed that the injured party would not assert a claim, that belief "was not reasonable" because the insureds "did not undertake any investigation of the incident, or make inquiry regarding the property manager's alleged belief that the injury was slight." [*Tower Ins. of N.Y. v. Amsterdam Apts., LLC*, 82 A.D.3d 465 (1st Dep't 2011).]

Insureds' Good Faith Belief In Nonliability May Excuse Late Notice

After a subcontractor's employee allegedly was injured on the job, he sued the property owner and the construction project's general contractor. They argued that their late notice to their insurance company should be excused because they had a "reasonable, good faith belief in nonliability." They contended that the subcontractor had stated that its employee was fine and had returned to work, had provided proof prior to beginning work of its own liability and worker's compensation insurance, and had entered into a "hold-harmless" agreement with the general contractor. They added that they had not supervised or controlled the work done by the subcontractor's employees, and that their businesses were small and their principals lacked experience with construction site injuries. The court denied summary judgment because of an issue of fact as to their belief in their nonliability. [*25th Ave., LLC v. Delos Ins. Co.*, 84 A.D.3d 781 (2d Dep't 2011).]

Insured's Delay In Notifying Insurer About Alleged Dog Bite Dooms Coverage Claim

After the insured's dog allegedly bit a jogger on October 31, 2006, the insured saw blood on the jogger's hand. Within 48 hours, the Health Department requested the dog's vaccination records. More than six months later, the jogger sued the insured; the next day, the insured notified his insurer about the incident for the first time. The court found that the insured's notice was not timely, and that the insured did not have a reasonable or good faith belief in nonliability because he knew that his dog allegedly had bitten the jogger and that he might have been injured; that a complaint had been made about the incident (even if he may not have known the jogger's identity at that time); and that there was at least one substantiated incident involving his dog prior to that incident. [*Zimmerman v. Peerless Ins. Co.*, 85 A.D.3d 1021 (2d Dep't 2011).]

No Coverage Where Insured Took 42 Days To Notify Insurer

An insured who was notified of an occurrence on October 22, 2008 notified its insurer on December 2, 2008. The court found that the delay doomed the insured's coverage claim. Relying upon the Court of Appeals' 1957 decision in *Deso v. London & Lancashire Indem. Co. of America*, the court held that notice was late as a matter of law. [*QBE Ins. Corp. v. Illinois Union Ins. Co.*, 2011 N.Y. Misc. LEXIS 3287 (Sup. Ct. N.Y. Co. July 1, 2011).]

Insurer Prejudiced From Late Notice

An insurer was given notice five years after an auto accident involving its insured, two years after an action was filed against its insured, after destruction of the truck involved in the accident, and after summary judgment had been granted on the issue of liability (not damages) against its insured. The insurer disclaimed coverage based upon late notice. The court, noting that the insurer's policy required a showing of prejudice, found that the insurer had been prejudiced as a matter of law because it was "prevented from conducting its own investigation, attempting to locate [its insured] prior to the summary judgment motion, canvassing the area for witnesses and seeking reconstruction of the accident prior to the destruction of the . . . truck

[involved in the accident].” As such, the insurer had no duty to defend or to indemnify its insured in the underlying action. [*Budget Rent A Car System, Inc. v. St. Paul Travelers Group,* No. 09-1454 (Sup. Ct. Suffolk Co. Nov. 21, 2011).]

Late Notice After Default Judgment Prejudiced Insurer, Appellate Court Decides

An insurer disclaimed coverage on the ground that the insured had breached the insurance policy by failing to timely notify it of a lawsuit, resulting in prejudice to the insurer. The Appellate Division, Second Department, held that the insured's failure to provide notice until after the default judgment was entered against the insured prejudiced the insurer because the insurer lost its right to appear and interpose an answer, thus requiring it to shoulder the burden of moving to vacate the default. [*Vernet v. Eveready Ins. Co.*, 931 N.Y.S.2d 691 (2d Dep't 2011).]

Additional Insured's 13 Month Delay In Providing Notice Of Occurrence To Insurer Dooms Coverage Claim

An additional insured took 13 months to notify the insurer about the underlying occurrence. The court found the delay to be untimely as a matter of law. The court rejected the additional insured's argument that its timely notice of the underlying suit satisfied the additional insured's duty to provide timely notice of the occurrence. The court also ruled that the additional insured's obligation to provide timely notice of the occurrence was independent of the named insured's obligation because its interests were adverse to those of the named insured from the moment the amended complaint was served naming them both as defendants. [*City of New York v. Investors Ins. Co. of Am.,* 932 N.Y.S.2d 459 (1st Dep't 2011).]

COVERAGE GRANT

No Coverage Where Insured Knew Of Loss Before Policy Issued

The Appellate Division, Second Department, found that the insurer had demonstrated its entitlement to summary judgment as a matter of law by submitting evidence that the insured had become aware of the loss in the underlying action before the insurance policy had been issued. [*Abraham Natural Foods Corp. v. Mount Vernon Fire Ins. Co.*, 84 A.D.3d 1281 (2d Dep't 2011).]

Court Rules Acts Of Alleged Sexual Abuse Over Years Are Multiple Occurrences Implicating Multiple SIRs

A mother of a minor girl sued the Roman Catholic Diocese of Brooklyn, alleging that the Reverend James Smith had sexually abused the girl over a number of years. The Diocese then sued its insurer for reimbursement of defense costs and the settlement of the action. The court found that the sexual abuse allegedly occurred over a seven-year period, at different times and at multiple locations, and that the insurer therefore was entitled to judgment declaring that the alleged acts of sexual abuse in the underlying action constituted multiple occurrences; that the settlement amount was to be allocated over the seven triggered policy periods; and that the Diocese had to exhaust the $250,000 self-insured retention for each of the implicated policies. [*Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 87 A.D.3d 1057 (2d Dep't 2011).]

EXCLUSIONS

Work Product Exclusions Bar Coverage For Suit Against General Contractor

A contractor was sued for “substantial defects in the design and construction” of two condominiums. The insurer that had issued general liability insurance policies to the contractor maintained that it had no duty to defend against allegations of construction defects arising from the contractor's work product or the work of subcontractors operating on its behalf, and the Appellate Division, Second Department agreed. The court explained that, “CGL policies like the one in this case are not intended to provide indemnification to contractors for claims that their work product is defective.” Thus, it concluded, because the complaint sought relief for conduct that fell “solely and exclusively under the work product exclusions of the CGL policies,” and the damages did “not arise from an occurrence resulting in damage to property” distinct from the work product of the contractor or its subcontractors, the insurer was not obligated to defend or to indemnify the contractor in the underlying action. [*Exeter Bldg. Corp. v. Scottsdale Ins. Co.*, 2010 N.Y. Slip Op. 09361 (2d Dep't Dec. 17, 2010).]

Prior Knowledge Exclusion Dooms Coverage Claim By CPA

The Supreme Court, New York County, ruled that an insurer that had issued a professional liability insurance policy to an accounting firm did not have an obligation to defend it against a liability claim asserted in federal court. After the firm appealed, the Appellate Division, First Department, found that the firm, prior to the policy's effective date, “had subjective knowledge of numerous facts pertaining to a fraudulent scheme undertaken by their clients.” It then affirmed the trial court's decision that the prior knowledge exclusion, which

precluded coverage for "any Interrelated Acts or Omissions" which, before the effective date of the policy, the firm "believed or had a basis to believe might result in a 'Claim,'" applied in this case. [*CPA Mut. Ins. Co. of Am. Risk Retention Group v. Weiss & Co*., 80 A.D.3d 431 (1st Dep't 2011)]..

Employer's Liability Exclusion Bars Coverage For Claim Against Property Owner By Asbestos Abatement Contractor's Employee

A property owner sought coverage as an additional insured under a commercial general liability policy issued to an asbestos abatement contractor after an employee of the contractor brought suit against the property owner, alleging that he had fallen on the property owner's greasy floor. The policy excluded coverage for bodily injury to an employee of any insured arising during the course of employment, but the exclusion did not apply to liability assumed by the insured contractor under an "insured contract," i.e., a contract under which the insured assumed the tort liability of another because of bodily injury caused by the insured's negligence. Although there was an indemnity agreement between the owner and contractor, the court noted that the complaint provided no basis for inferring that the presence of the grease resulted from the insured's negligence. Accordingly, the court concluded that the property owner's liability to the employee, if any, did not arise out of an "insured contract," and the exclusion applied. [*Arthur Kill Power, LLC v. American Cas. Safety Ins. Co.*, 80 A.D.3d 502 (1st Dep't 2011)

Cross Liability Exclusion Bars Coverage For Insured's Employee's Alleged Injuries

After Metropolitan Metals Corporation obtained an insurance policy from Burlington Insurance naming 385 Third Ave. Assoc., L.P. as an additional insured, one of Metropolitan's employees allegedly was injured while working at the property. The Appellate Division, First Department, held that 385 Third Avenue was not entitled to additional insured coverage because the cross liability exclusion barred coverage for an "employee of any insured." The court rejected the argument that a separate employer's liability exclusion in the policy created an ambiguity because exclusions are to be "read *seriatim*" and cannot be "regarded as inconsistent." [*385 Third Ave. Assoc., L.P. v. Metropolitan Metals Corp*., 81 A.D.3d 475 (1st Dep't 2011)

Cabana Rented For Over 20 Summers Is Not "Insured Premises" Under Homeowner's Policy

A homeowner contended that her homeowner's policy covered a claim brought by a guest who fell at a cabana rented by the homeowner because the cabana qualified as the "insured premises," which included "premises [she] occasionally rented." The court pointed out that the homeowner had been renting the same cabana every summer for over 20 years and had decorated it and stored items in it during the winter. This type of systematic rental spanning decades could not be characterized as "occasional," the court ruled. Accordingly, the court concluded that the insurer was not obligated to defend or to indemnify the homeowner in the personal injury action. [*Raner v. Security Mutual Ins. Co*., 30 Misc.3d 1237A (Sup. Ct. N.Y. Co. 2011).]

Exclusion Did Not Bar Coverage For Third Party's Alleged Injuries In ATV Accident On Insured's Property

After the operator of an all terrain vehicle allegedly sustained personal injuries on property owned by Grande Stone Quarry, LLC, the property owner's general liability insurer disclaimed coverage to the property owner based upon an exclusion for bodily injury "arising out of, caused by or contributed to . . . by ownership, non-ownership, maintenance, use or entrustment to others of any 'auto' . . . " The Supreme Court, Greene County, ruled that the insurer had no duty to defend or indemnify, but the Appellate Division, Third Department, reversed. The Third Department rejected the insurer's contention that this exclusion precluded coverage for the use of an auto by anyone, not just by an insured on the policy. The Third Department acknowledged that the First Department appeared to have accepted the insurer's interpretation, but the Third Department concluded that it was "not clear that the insured would realize that protection had been extinguished for claims resulting from third parties using such vehicles." [*Essex Ins. Co. v. Grande Stone Quarry, LLC*, 82 A.D.3d 1326 (3d Dep't 2011).]

Exclusion Did Not Bar Coverage For Wrongful Death Claim By Noninsured Father Following Daughter's Death

A girl drowned at her grandparents' home, where she lived. The girl's father, who did not live with the grandparents, obtained a wrongful death judgment and filed a direct action against the grandparents' homeowner's insurer. The Court of Appeals explained that the wrongful death claim was based upon the father's "own loss" and was not derivative of any claim of his insured daughter. Therefore, the Court

concluded, the policy's exclusion for bodily injury to an insured where an insured would receive "any benefit" under the policy did not bar coverage for the wrongful death claim. [*Cragg v. Allstate Indem. Corp*., 17 N.Y.3d 118 (Ct. App. 2011).]

Assault And Battery Exclusion Bars Coverage Where Security Guard Allegedly Threw Glass At Plaintiff's Face

After a fight broke out at the "Beauty Bar" in Manhattan, a woman sued Jinx-Proof Inc., contending that she had been injured when a security guard threw a glass at her face. Jinx-Proof's commercial general liability insurer asserted that there was no coverage for the woman's intentional tort and negligence claims because of the policy's assault and battery exclusion. A declaratory judgment action ensued, and the court granted summary judgment to the insurer. The court explained that the pleadings demonstrated that the underlying incident fell within the assault and battery exclusion, which applied if no cause of action would exist but for the alleged assault and battery. [*QBE Ins. Corp. v. Jinx-Proof Inc*., 2011 N.Y. Misc. LEXIS 4085 (Sup. Ct. N.Y. Co. Aug. 15, 2011).]

Absentee Homeowner Is Not Entitled To Defense Or Indemnity

A construction worker allegedly was injured while working at a house owned by the insured. The homeowner's insurer dis-claimed coverage, asserting that the policy required that the insured live on the property to be covered but that she never resided there. Specifically, the policy excluded coverage for personal injuries arising out of premises that were not an "insured location," which was defined as the dwelling "where you [the policyholder] reside and which is shown as the 'residence premises' in the Declarations." The court found that the insured had intended to move to the property after it was renovated. It then ruled that because the insured was an "absentee owner," the insurer was not obligated to defend or to indemnify the insured in connection with the worker's claims. [*Tower Ins. Co. of N.Y. v. Khan*, 2011 N.Y. Misc. LEXIS 4105) (Sup. Ct. N.Y. Co. Aug. 12, 2011).]

Independent Contractors Exclusion Bars Coverage For Suit By Employee of Subcontractor

A contractor insured under a commercial general liability policy hired a sub-contractor to perform spackling at a construction site. After one of the subcontractor's employees allegedly was injured and brought suit, the contractor's insurer maintained that it had no obligation to defend or indemnify the insured contractor based upon the policy's Independent Contractors Exclusion. The court found that the insured contractor did not control or supervise the work of the subcontractor's employee, and ruled that the subcontractor was an independent con-tractor. The subcontractor's employee, therefore, fell "squarely within the terms of the Independent Contractors Exclusion." The court then granted summary judgment in favor of the insurer against the insured contractor. [*Tower Ins. Co. of N.Y. v. Citywide Interior Contrs., Inc*., 2011 N.Y. Misc. LEXIS 4563 (Sup. Ct. N.Y. Co. Sept. 21, 2011).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Court Rejects Claim That Non-Original Equipment Manufacturer Parts Are "Universally Inferior"

Owners of vehicles damaged in auto accidents contended in a class action lawsuit against their insurer that the estimates by their insurer's claims adjusters were too low because the adjusters used prices for non-original equipment manufacturer ("OEM") crash parts rather than for OEM crash parts. The owners argued that the non-OEM parts were "universally inferior" and that they were entitled to recover the difference in value between the OEM and non-OEM parts.

The court dismissed the class action, explaining that New York law explicitly permits and regulates the use of non-OEM crash parts in repair estimates. The court rejected the plaintiffs' contention that the state regulation of the use of these non-OEM parts was mooted "by the parts' universal inferiority." [*Patchen v. Government Employers Ins. Co*., 759 F.Supp.2d 241 (E.D.N.Y. 2011).]

Insurer May Retroactively Deny No-Fault Claims For Failure To Appear For IMEs

After the Supreme Court, New York County, determined that an insurer could deny claims on the basis of the failure of the health provider's assignors to appear for independent medical examinations ("IMEs") requested by the insurer, even though the insurer initially had denied the claims on the ground of lack of medical necessity, the provider appealed. The Appellate Court, First Department, affirmed, explaining that the failure to appear for IMEs requested by an insurer "when, and as often as, [it] may reasonably require" was a breach of a condition precedent to coverage under the no-fault policy. Accordingly, it concluded, when the assignors failed to appear for the requested IMEs, the insurer had the right to deny all claims retroactively to the date of loss. [*Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dep't 2011).]

Assignor's Failure To Appear At IME Dooms Provider's Claim For No-Fault Benefits

A health care provider that had been assigned first-party no-fault benefits sued the insurance company for payment. The insurer moved for summary judgment, asserting that the provider's assignor had failed to appear for an independent medical examination ("IME"). The court explained that although Insurance Department regulations stated that a no-fault insurer had to base its request for an examination under oath upon "the application of objective standards . . . supporting the use of such examination," the regulations did not impose that standard on a request for an IME. The court concluded that because the appearance of the assignor at an IME was a condition precedent to the insurer's liability on the policy, the insurer's motion for summary judgment had to be granted. [*All County, LLC v. Unitrin Advantage Ins. Co.*, 31 Misc.3d 134A (App. Term 2d Dep't 2011).]

Insurers Need Not Cover Accident That Resulted When Passenger Steered Car

After a one-car collision, James Blazina was convicted of criminal mischief in the fourth degree for steering a car owned and driven by Megan Lindhurst when he had "no right to do so nor any reasonable ground to believe that he . . . ha[d] such right." In the declaratory judgment action that later followed, the Appellate Division, Fourth Department, found that neither Blazina's insurer nor Lindhurst's insurer had to provide coverage for the collision. The court reasoned that the criminal proceeding "conclusively resolved" that Blazina had neither "reasonable belief" that he was entitled to use the vehicle, as required for coverage under Lindhurst's policy, nor "express or implied permission" to use the vehicle, as required for coverage under Blazina's policy. [*Progressive Northeastern Ins. Co. v. Farmers New Century Ins. Co.*, 83 A.D.3d 1519 (4th Dep't 2011).]

Patient's Failure To Attend IMEs Dooms Provider's No Fault Claim Against Insurer

A healthcare provider that had accepted an assignment of its patient's claims against the patient's no fault insurance company has had its lawsuit against the insurer dismissed. The court explained that the insurer had established that it had timely mailed requests that the patient attend independent medical examinations ("IMEs") but that the patient had failed to appear. Because an assignor's appearance at an IME "is a condition precedent to the insurer's liability on the policy," the insurer had properly denied the healthcare provider's claim, the court concluded. [*All Borough Group Med. Supply, Inc. v. Utica Mut. Ins. Co.*, 31 Misc.3d 146A (2d Dep't 2011).]

Tort Case Yielding More Than $100,000 SUM Coverage Limit Bars Insured's SUM Claim

A pedestrian struck by a motor vehicle notified her automobile insurer of her intent to pursue a claim under her supplementary uninsured/underinsured motorist coverage. The Appellate Division, Second Department, held that because the pedestrian had received in excess of her SUM limit "from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured," no further recovery was possible. [*Matter of Liberty Mut. Ins. Co. v. Walker*, 84 A.D.3d 960 (2d Dep't 2011).]

Affidavit of Insurer's Investigator Suggesting Accident Was Staged Blocks Provider's Summary Judgment Motion

A provider sought to recover assigned first-party no-fault benefits for supplies it provided to its assignor. The insurer argued that there was no coverage because the accident was staged, but the trial court entered judgment in the provider's favor. The Appellate Term ruled that an affidavit of the insurer's investigator was "sufficient to demonstrate a founded belief that the alleged injuries did not arise out of an insured incident." The provider's summary judgment motion, therefore, should have been denied. [*Jesa Med. Supply, Inc. v. Republic W. Ins. Co.*, 31 Misc.3d 151A (App. Term 2d Dep't 2011).]

Volunteer Firefighter Hurt Driving To Emergency Is Not Entitled To SUM Benefits Under Department's CGL Policy

A volunteer firefighter driving to an emergency was injured when his car was struck by another vehicle. He settled with the vehicle's owners and sought supplemental underinsured motorist ("SUM") coverage under the fire department's liability policy. The Appellate Division, Second Department, found that the firefighter was not an "insured" as defined by the SUM endorsement that stated: "You, as the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse." The court explained that "You" referred to the fire department, which cannot have a spouse or relative. The firefighter also was not covered as a person in a vehicle insured for SUM benefits under the policy, because his car was not an insured auto. [*Matter of American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157 (2d Dep't 2011).]

Default Judgment Against No-Fault Provider Dooms Its Action Against Insurer

After an insurer brought an action in the Supreme Court, Nassau County against a health care provider and obtained a default judgment, the provider sued the insurer in New York Civil Court to recover no-fault benefits for services it allegedly had rendered. The Civil Court dismissed the provider's action on the ground of *res judicata*. [*Altercare Acupuncture, P.C. v Utica Mut. Ins. Co.*, 32 Misc.3d 1239A (N.Y. Civ. Ct. Kings Co. 2011).]

Assignors' Failure To Attend Scheduled IMEs Dooms Provider's Suit For No-Fault Benefits

After a health care provider sued an insurer to recover no-fault benefits, the insurer moved to dismiss on the ground that the plaintiff's assignors had failed to appear for an independent medical examination (IME). The court determined that the insurer had sufficiently established that the IME notices had been timely sent to the plaintiff's assignors, that they had failed to appear for the IMEs, and that denial of claim forms had been timely mailed in accordance with the insurer's standard office practices and procedures. Explaining that an assignor's appearance at an IME was a condition precedent to the insurer's liability, the court concluded that the insurer was entitled to summary judgment. [*Shoreline Healing Acupuncture Group, P.C. v. American Tr. Ins. Co.*, 32 Misc.3d 137A (App. Term 2d Dep't 2011).]

No Uninsured/Underinsured Motorist Coverage Where Box Fell Off Truck, Injuring Motorcyclist

A cardboard box fell off an unidentified truck, injuring people on a motorcycle, who then sought uninsured-underinsured motorist coverage. The court found that the box was not an "integral part" of the pickup truck and, therefore, the motorcycle's collision with the box did not constitute the type of "physical contact" needed to impose UM coverage. [*Matter of State Farm Mut. Auto. Ins. Co. v. Beddini*, 88 A.D.3d 519 (1st Dep't 2011).]

Arbitration Proceeding To Which Healthcare Provider Was Not A Party Did Not Bar It From Suing No-Fault Insurer

When a healthcare provider sued an insurer to recover assigned first-party no-fault benefits, the insurer argued that the provider was precluded from litigating its entitlement to benefits because a prior claim by another provider involving the provider's assignor arising out of the same accident had already been denied in an arbitration proceeding. A divided Appellate Term rejected the insurer's argument, explaining that because there was no showing of privity between the two providers, suit against the insurer was not barred. [*Jamaica Med. Supply, Inc. v. N.Y. Central Mut. Fire Ins. Co.*, 2011 N.Y. Misc. LEXIS 4870 (App. Term 2d Dep't Oct. 11, 2011)

Auto Policy Not Implicated Even If Oil That Allegedly Leaked Into Basement Had Been Transported In Covered Vehicle

A person allegedly slipped on oil in a boiler room one day after the insured's oil delivery truck had delivered oil to the building. The court ruled that the automobile policy issued to the insured did not provide coverage for the underlying personal injury action, concluding that the argument that the automobile policy was implicated simply because the oil was transported in a covered vehicle was "unpersuasive." [*Progressive Northeastern Ins. Co. v. Penn-Star Ins. Co.,* 2011 N.Y. App. Div. LEXIS 8054 (1st Dep't 2011).]

FIRST PARTY PROPERTY

Losses From Madoff's Ponzi Scheme Not Covered Under Homeowners Policy

After allegedly losing millions of dollars in Bernard Madoff's Ponzi scheme, Sharon Lissauer brought suit against Fireman's Fund Insurance Company to recover that money under her homeowners policy. In its decision dismissing the complaint, the U.S. District Court for the Southern District of New York explained that the plaintiff's claim depended upon whether she had alleged "direct physical loss" to her property. It then decided that the plaintiff's investment losses "were not a 'direct physical loss,'" even if they involved personal property. Rather, the court ruled, the investment losses were the consequences of the plaintiff's "unfortunate but unmistakably voluntary transfers of money to Madoff and his theft of the funds." [*Lissauer v. Fireman's Fund Ins. Companies*, 09 Civ. 10073 (LAK) (S.D.N.Y. Dec. 20, 2010).]

Tarp Was Not "Roof" For Homeowner's Policy's "Windstorm Or Hail" Provision, Court Finds

Homeowners alleged that a rainstorm damaged their home's contents. The court explained that the "windstorm or hail" provision of the homeowner's policy provided that damage to personal property caused by rain was not covered unless the rain entered the home as a result of wind or hail causing an opening in the roof. Because the tarps that had been placed over the openings in the first floor ceiling during construction did not come within the definition of "roof" as used in that provision, the court rejected the homeowners' coverage claim. [*Lobell v. Graphic Arts Mut. Ins.*

Co., 83 A.D.3d 911 (App. Div. 2d Dep't 2011).]

No Coverage Where Insureds Failed To Submit Proof Of Loss Within 60 Days Following Demand Letter

Insureds allegedly received their insurer's demand for proof of loss on March 6, 2009 (via regular first class mail) and on March 9, 2009 (via certified mail). They submitted proof of loss to the insurer on May 8, 2009 – more than 60 days from their alleged receipt of the first letter but fewer than 60 days from their admitted receipt of the second letter. The court denied the insureds' motion to dismiss because a 60-day proof of loss period in a policy "should be measured from the date the insured first receives the demand letter." The court also rejected the insureds' contention that any delay was *de minimis* and excusable, concluding that their failure to comply with the demand for proof of loss within 60 days was "an absolute defense to an action on the policy." [*Stopani v. Allegany Co-op Ins. Co.*, 83 A.D.3d 1446 (4th Dep't July 6, 2011).]

Insured May Not Recover Attorneys' Fees From Insurer In Property Damage Case

An insurer sued its insured for a declaration of no coverage, and the court ruled that the insurer was obligated to cover damage to the insured's building. The court also awarded the insured $41,000 in attorneys' fees. The insurer appealed, and the Appellate Division, Second Department, reversed the award of attorneys' fees. The Second Department reasoned that an insured may recover attorneys' fees only where an insurer with a duty to defend places its insured in a "defensive posture." However, the policy at issue provided first-party property coverage, not liability coverage with a duty to defend. Consequently, the insured was not entitled to attorneys' fees. [*Insurance Co. of Greater N.Y. v. Clermont Armory, LLC*, 84 A.D.3d 1168 (2d Dep't 2011).]

No Coverage Where Building Insured As Two-Family Dwelling Had Three Apartments

An insurance company that issued an insurance policy to owners of a building asserted that they were not entitled to defense or indemnity for a personal injury action because the owners represented that the building was a two-family dwelling but the building actually contained a third apartment in the basement. The owners argued that the certificate of occupancy listed the building as a two-family dwelling and that in any event it did not matter even if it had another unit. The court found that the insurer had established that it would have charged a higher premium if it had known that there were three apartments in the building. It then concluded that the misrepresentation was material as a matter of law, and it granted the insurer's motion for summary judgment. [*Hermitage Ins. Co. v. Lafleur*, 2011 N.Y. Misc. LEXIS 3353 (Sup. Ct. N.Y. Co. July 6, 2011).]

Federal Court Voids Apportionment Of Loss Clause In Fire Insurance Policy

After the insured sued for the full $14,388,000 policy limit under a fire insurance policy, the insurer moved to dismiss the complaint to the extent the insured sought recovery above the insurer's 38 percent apportioned share of the loss under the policy. The insured countered that the policy's apportionment of loss clause was void as a matter of law. The court voided the apportionment of loss clause in the policy, concluding that it had no real purpose other than to make a $5,467,440 policy appear to be a $14,388,000 policy. The court rejected the insurer's contention that the apportionment of loss clause was analogous to a valid co-insurance clause under New York law, finding it "fundamentally different" from a co-insurance clause. It stated that a co-insurance clause involved a partial loss, not a total loss, and that unlike a co-insurance clause, which was designed to encourage homeowners to properly value their property, the apportionment of loss clause had no such purpose. [*Quaker Hills, LLC v. Pacific Indemnity Co.*, 2011 U.S. Dist. LEXIS 92633 (S.D.N.Y. Aug. 15, 2011).]

BAD FAITH/EXTRA-CONTRACTUAL

Insurer Found Liable for Bad Faith; Court Awards Plaintiff $2.25 Million

After a person injured in a three car automobile accident in Manhattan obtained a $2.25 million judgment against a taxi driver and was assigned the
taxi driver's claim against his insurer, the injured person sued the insurer, arguing that it had acted in bad faith by failing to settle the action within the $200,000 policy limits. The court found that the insurer was estopped from denying that the taxi driver was not its insured, noting that the insurer had defended the taxi driver for nine years. It also decided that the insurer's "pattern of behavior" had demonstrated a "conscious or knowing indifference to the rights of its insured." The court granted judgment against the insurer and in favor of the injured person for $2.25 million, plus interest. [*Taveras v. American Tr. Ins. Co.*, 33 Misc.3d 1210A (Sup. Ct. Kings Co. 2011).]

Homeowners' § 349 Claim Is Dismissed Where Dispute With Insurer Was "Wholly Private"

After a fire, the homeowners submitted a claim to their insurer. One year later,

the insurer denied the claim on the grounds that the homeowners had failed to cooperate with its investigation and that they had set the fire or caused it to be set. The homeowners sued the insurer, arguing that it had violated N.Y. General Business Law § 349. The court granted the insurer's motion to dismiss that claim, finding that the parties' dispute was "wholly private" and therefore did not implicate § 349. [*Laskowski v. Liberty Mut. Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 120778 (N.D.N.Y. Oct. 19, 2011).]

MISCELLANEOUS

No Duty To Indemnify With Respect To Treble Damages Awarded Against Attorney Under Judiciary Law § 487

The plaintiffs in a legal malpractice action against an attorney were awarded $226,000 in compensatory damages, which the court trebled pursuant to Judiciary Law § 487. The plaintiffs then brought suit against the attorney's professional liability insurance carrier, contending that the carrier was liable for the full amount of the award. The Appellate Division, Fourth Department, ruled that the carrier was not required to indemnify the attorney for the award of treble damages because the award was punitive in nature and "New York public policy precludes insurance indemnification for punitive damage awards." The court concluded that the policy covered compensatory damages only. [*McCabe v. St. Paul Fire & Mar. Ins. Co.*, 2010 N.Y. Slip Op. 09633 (4th Dep't Dec. 30, 2010).]

Title Insurer Found Obligated To Reimburse Homeowner For Diminution Of Home's Market Value

After learning there was an issue as to whether property to be purchased included an easement on adjoining property to permit vehicle access, the purchaser obtained a rider to her title policy insuring "against loss or damage not exceeding the market value of the premises at the time of loss." After a judicial determination that the easement was limited solely to use as a pedestrian right-of-way, the purchaser, now owner of the affected home, filed a claim under her title insurance policy. The court ruled that the title insurer was obligated to reimburse the homeowner for the diminution of the market value of her home from the date of purchase until the date the easement action was resolved, not exceeding the market value of the property as of that later date. [*Appleby v. Chicago Tit. Ins. Co.*, 80 A.D.3d 546 (2d Dep't 2011).]

Court of Appeals Annualizes $30 Million Limit of Three-Year Excess Policy But Refuses To Find Additional Year Of Policy Limit Because Of Two-Month Extension

Union Carbide Corporation contended that the six insurance companies that provided it with $30 million of "fifth excess layer" coverage owed it $90 million – $30 million for each year of the three-year policy period. Union Carbide argued that the policy followed form to a policy that annualized the aggregate limit. The insurers countered that $30 million was the maximum that could be paid under the policy because the follow form clause was expressly made subject to their policy's declarations, which spoke of an "aggregate," not an "annual aggregate," limit of liability. The New York Court of Appeals ruled in favor of Union Carbide on this issue, rejecting the insurers' contention that their policy unambiguously forbade "annualization." The Court, however, ruled against Union Carbide as to its claim for coverage under another policy, finding that Union Carbide did not meet its burden on summary judgment of establishing that a two-month extension of the policy created an additional year of policy limit. [*Union Carbide Corp. v. Affiliated FM Ins. Co.*, 16 N.Y.3d 419 (N.Y. 2011).]

Allegations Of Negligent Hiring And Supervision Of Attorney Who Purportedly Made Sexual Advances To Client Found To Fall Within Professional Liability Insurance Policy's Errors And Omissions Coverage

Allegations that a law firm had negligently hired and supervised an attorney who purportedly made sexual advances to a client fell within the errors and omissions coverage of the firm's professional liability insurance policy, the Appellate Division, First Department, has decided. The First Department added that although the allegations may not fit within the policy definition of "Personal Injury," they did come within its definition of "Wrongful Act." [*Gladstein & Isaac v. Philadelphia Indem. Ins. Co.*, 82 A.D.3d 468 (1st Dep't 2011).]

Insurer That Continued To Accept Premiums May Not Rescind Life Insurance Policy Based Upon False Representations In Application

After American General Life Insurance Company issued a life insurance policy to the Hana Family Trust on the life of Hana Salamon on the basis of an application she completed and executed, it sent her a letter purportedly rescinding the policy "due to material misrepresentations in your application for life insurance coverage." A federal district court judge found, however, that the insurer had waived its right to rescind the policy because it had "sufficient information" that there were misrepresentations in the application but it "continued to accept payments after discovering those misrepresentations." Rejecting the contention that the insurer's acceptance and retention of premiums should be excused because it was inadvertent, the court concluded that the insurer's attempt to both accept premium

payments and reserve the right to rescind a contract was "unenforceable." [*American General Life Ins. Co. v. Salamon*, 2011 U.S. Dist. LEXIS 27118 (E.D.N.Y. Mar. 16, 2011).]

Plaintiff Holding Unsatisfied Judgment Against Insured Only May Recover $25,000 From Insurer

The plaintiff brought an action against an insurer to recover the amount of an unsatisfied judgment against the insured. The court limited the plaintiff's recovery to $25,000, explaining that the plaintiff was not entitled to recover against the insurer accrued prejudgment interest awarded as part of the underlying judgment, as the terms of the insurance policy (which met Insurance Department rules) limited the insurer's liability to $25,000, including prejudgment interest. The court added that the plaintiff was not entitled to recover interest that had accrued since the entry of the underlying judgment because the policy conditioned the insurer's obligation to pay on it having defended against the underlying action, which it had not done. [*Alejandro v. Liberty Mut. Ins. Co*., 84 A.D.3d 1132 (2d Dep't 2011).]

Law Firm Entitled To Defense In Bank's Action Stemming From Counterfeit Check Given By Impostor Client

A law firm was contacted by someone purporting to be the CEO of a Taiwanese corporation seeking legal assistance in collecting debts in North America. After the individual sent the firm a signed retainer agreement, the firm received a $384,700 check from a purported debtor of the corporation. The firm deposited the check and, at the request of the purported CEO, instructed the bank to wire the value of the check, minus a legal fee, to a third party in South Korea, who allegedly was one of the corporation's suppliers. After the funds were transferred, the bank notified the firm that the check was counterfeit. The bank sued the firm, which sought a defense from its professional liability insurer. The court explained that the policy required that the firm "render Legal Services for others." The Appellate Division, Third Department, concluded that the claim for damages related to the overdraft were "based on" the firm's acts in rendering legal services to others, and that the insurer therefore had a duty to defend the firm in the bank's action. [*Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v. American Guar. & Liab. Ins. Co.*, 85 A.D.3d 1291 (3d Dep't Mar. 16, 2011).]

Insurer May Rescind Policy Ab Initio Where Homeowner Misrepresented Whether He Owned A Dog

When a homeowner applied for a homeowners' insurance policy, he responded "no" to a question on the application that asked whether he had "any animals or exotic pets," even though he owned a dog. The dog – a German Shepherd/Pit Bull mix – subsequently bit a visitor and the homeowner submitted a claim to the insurer. Thereafter, the insurer learned that the homeowner had owned the dog when he completed the application, and the insurer sought a court order that the policy was void ab initio because the homeowner had misrepresented a material fact on his application. The court first found no ambiguity in the application question, noting that the homeowner had admitted that he understood that the term "any animals" included pet dogs. The court concluded that the insurer was justified in rescinding the policy. [*Security Mut. Ins. Co. v. Perkins*, 86 A.D.3d 702 (3d Dep't 2011).]

Coverage Found Under D&O Policies For Investigations Even In The Absence Of Subpoenas

Following investigations into alleged accounting misstatements by MBIA, Inc., and related litigation, MBIA sought coverage under two directors and officers insurance policies which provided coverage for "Securities Claims", defined to include a "formal or informal investigative order or similar document". The U.S. Court of Appeals for the Second Circuit decided that the investigations by the New York Attorney General and the Securities and Exchange Commission constituted covered "Securities Claims". The Second Circuit rejected the insurers' argument that there was no coverage for investigations conducted by way of an oral request rather than by a subpoena or another formal process, noting that the authorities believed that MBIA would fully comply on a voluntary basis. [*MBIA, Inc. v. Federal Ins. Co*., 652 F.3d 152 (2d Cir. 2011).]

Homeowner Had No Standing To Bring Direct Action Against Contractor's Insurer

Contending that her home had been damaged after a contractor removed the roof, the homeowner sued the insurer that had issued the contractor a third-party general liability insurance policy. The insurer argued that the suit was an improper direct action and should be dismissed. The court agreed. The court explained that because the homeowner had not obtained a judgment against the contractor as required by New York Insurance Law §3420(b)(1), she could not maintain a direct action against the insurer to cover her claim against the contractor. Moreover, the court continued, the homeowner was not an intended third-party beneficiary under the contractor's policy but was, at most, only an "incidental beneficiary" under

the policy. In any event, the court concluded, all of the homeowner's claims were barred by the policy exclusion for roofing operations. [*Josma v. Interboro Ins. Co.*, 2011 N.Y. Misc. LEXIS 4693 (Sup. Ct. Nassau Co. Sept. 27, 2011).]

No Liability Coverage For Failure To Meet Statutory Obligation To Obtain Workers' Compensation Insurance

An insurer argued that it had no duty to defend or to indemnify its insured under a farm owner's liability policy with respect to a workers' compensation award issued against the insured farm owner in connection with the death of a farm worker. The court agreed, pointing out that the policy limited coverage to suits against the insured for damages because of bodily injury. However, the workers' compensation claim made on behalf of the decedent established that his estate had elected to forego the recovery of damages through a civil action and instead had sought to pursue a claim for workers' compensation insurance benefits that the farm owner should have obtained for him. The court found that the farm owner's liability arose from its failure to meet its statutory obligation to obtain workers' compensation insurance, rather than from the bodily injury sustained by the decedent. The court ruled that there was no coverage for such liability under the farm policy. [*Farm Family Cas. Ins. Co. v. Brady Farms, Inc.*, 87 A.D.3d 1324 (4th Dep't Sept. 27, 2011).]

Insurer Estopped From Denying Excess Coverage

The general contractor and owner of a construction site sought coverage under an excess insurance policy issued to their subcontractor with respect to an underlying personal injury action. The excess insurer acknowledged coverage and participated in the defense. After partial summary judgment was awarded in favor of the plaintiffs in the underlying action, the excess insurer disclaimed coverage, asserting that its policy follows form to the primary policy, which did not provide additional insured coverage, and that the certificate of insurance that named the general contractor and owner as additional insureds was false. The court found that there was no evidence that the general contractor or owner had acted in bad faith, and that nothing had prevented the insurer from obtaining a copy of the primary policy during the three years following the tender. It then ruled that the excess insurer was estopped from denying excess coverage. [*Yoda, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*, 88 A.D.3d 506 (1st Dep't 2011).]

No Coverage Where Homeowner Misrepresented That House Was Owner-Occupied

A homeowner was sued and sought coverage under his homeowner's insurance policy. The court agreed that there was no coverage because the insured misrepresented in his application that he resided in the home. Moreover, the insurer would not have issued the policy had the insured been truthful because dwellings that were not owner-occupied were deemed an unacceptable risk under the insurer's underwriting guidelines. [*Interboro Ins. Co. v. Fatmir*, 89 A.D.3d 993 (2d Dep't 2011).]

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