New York Insurance Coverage Law Update

2012 Compilation

WWW.RIVKINRADLER.COM

RIVKIN RADLER LLP
ATTORNEYS AT LAW

Corporate & Commercial • Employment & Labor • Health Services • Insurance Coverage & Litigation
Intellectual Property • Litigation & Appeals • Product Liability & Toxic Tort • Professional Liability
Real Estate, Zoning & Land Use • Trusts, Estates & Taxation

926 RXR Plaza
Uniondale, NY 11556-0926
T 516.357.3000 F 516 357.3333

555 Madison Avenue
New York, NY 10022-3338
T 212.455.9555 F 212.687.9044

21 Main Street, Court Plaza South
West Wing, Suite 158
Hackensack, NJ 07601-7021
T 201.287.2460 F 201.489.0495

New York Insurance Coverage Law Update 2012 Compilation

TABLE OF CONTENTS

Page

ADDITIONAL AND NAMED INSUREDS/CO-INSURANCE 1

***1515 Broadway Fee Owner, LLC v. Seneca Ins. Co., Inc.*, 90 A.D.3d 436 (1st Dep't 2011) (Court Finds Additional Insured Coverage For Claim Allegedly Arising From Accident In Stairwell)**

***W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530 (1st Dep't 2012) (Insurer Must Defend General Contractor As "Additional Insured")**

***VBH Luxury, Inc. v. 940 Madison Assoc. LLC*, 18 N.Y.3d 899 (2012) (No Coverage For Landlord As Additional Insured, Court of Appeals Decides)**

***Matter of East 51st St. Crane Collapse Litig.*, 94 A.D.3d 420 (1st Dep't 2012) (In Crane Collapse Case, Insurance To Property Owner As Additional Insured Deemed Primary)**

***Castro v. Prana Assoc. Twenty One, LP*, 95 A.D.3d 693 (1st Dep't 2012) (Additional Insured's Notice Did Not Trigger Insurer's Duty To Disclaim As To Named Insured)**

***Total Concept Carpentry, Inc. v. Tower Ins. Co. of N.Y.*, 95 A.D.3d 411 (1st Dep't 2012) (No Coverage For Claims Against Additional Insured)**

***Utica Mut. Ins. Co. v. Government Employees Ins. Co.*, 98 A.D.3d 502 (2d Dep't 2012) (Umbrella Policy That Expressly Negates Contribution Found Excess To Umbrella Policy That Does Not)**

***City of New York v. Endurance American Ins. Co.*, 98 A.D.3d 900 (1st Dep't 2012) (City Covered As Additional Insured For Liability Arising Out Of Contractor's Ongoing Operations)**

CONDITIONS PRECEDENT/LATE NOTICE 2

***Aponte v. Government Empls. Ins. Co.*, 92 A.D.3d 476 (1st Dep't 2012) (Insured's Belief In Nonliability Found "Unreasonable As A Matter Of Law")**

***Konig v. Hermitage Ins. Co.*, 946 N.Y.S.2d 116 (2d Dep't 2012) (Court Rejects Suit Against Insurer To Recover Unsatisfied Judgment Against Insured Where Insured Failed to Provide Prompt Notice)**

***Kalthoff v. Arrowood Indem. Co.*, 95 A.D.3d 1413 (3d Dep't 2012) (Failure To Timely Notify Insurer Dooms Effort To Recover Default Judgment)**

***O'Garro v. State Farm Fire & Cas. Ins. Co.*, 96 A.D.3d 1027 (2d Dep't 2012) (Late Notice of Suit Dooms Coverage, Even Where Insurer Had Notice Of Accident)**

***Pfeffer v. Harleysville Group, Inc.*, 2012 U.S. App. Lexis 22749 (2d Cir. Nov. 6, 2012) (Second Circuit Finds No Coverage Where Insured Took More Than A Year To Notify His Insurer Of Damage To His Property)**

COVERAGE GRANT 3

***Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/02 (Sup. Ct. Co. Sept. 7, 2012) (Asbestos-Related Claims Not All Separate Occurrences)**

***Preferred Construction, Inc. v. Illinois National Ins. Co.*, 2012 U.S. App. Lexis 18395 (2d Cir. Aug. 30, 2012) (No Duty For Excess Insurer To Defend Where Underlying Policy Has Not Been Exhausted)**

***Mt. McKinley Ins. Co. v. Corning Inc.*, 96 A.D.3d 451 (Sup. Ct. N.Y. Co. Sept. 7, 2012) (Pro Rata Allocation Ordered For Asbestos Bodily Injury Claims)**

EXCLUSIONS 3

***Yangtze Realty, LLC v. Sirius Am. Ins. Co.*, 90 A.D.3d 744 (2d Dep't 2011) (Absence Of Prior Written Agreement Indemnifying and Holding Insureds Harmless Dooms Coverage Claim)**

Page

Farm Family Cas. Ins. Co. v. Habitat Revival, LLC, 91 A.D.3d 903 (2d Dep't 2012) (Exclusions Do Not Apply Where LLC Member Is Not An Employee)

International Chemical Corp. v. Nautilus Ins. Co., 2011 U.S. Dist. Lexis 150737 (W.D.N.Y. Jan. 6, 2012) (Intentional Conduct Dooms Advertising Injury Coverage Claim)

U.S. Specialty Ins. Co. v. Lebeau, Inc., 847 F.Supp.2d 500 (W.D.N.Y. 2012) (Auto Exclusion Bars Coverage For Auto Accident At Air Show)

Aquatectonics, Inc. v. The Hartford Cas. Ins. Co., 2012 U.S. Dist. Lexis 41185 (E.D.N.Y. 2012) (Court Rejects Insured's Argument That Subcontractor Exception To "Damage to Your Work" Exclusion Restored Coverage)

Herrnsdorf v. Bernard Janowitz Constr. Corp., 96 A.D.3d 1011 (2d Dep't 2012) ("Employee Injury" Exclusion Barred Coverage For Subcontractor's Employee's Suit Against General Contractor)

IBA Molecular North America, Inc. v. St. Paul Fire and Marine Ins. Co., 2012 U.S. Dist. Lexis 139615 (S.D.N.Y. Sept. 27, 2012) (Auto Exclusion Bars Coverage For Injuries Resulting From Employer's Auto Driven By Employee During Crime Spree)

Executive Risk Indem., Inc. v. Starwood Hotels & Resorts Worldwide, Inc., 98 A.D.3d 878 (1st Dep't 2012) ("Prior Pending Exclusion" In Professional Liability Policy Precludes Coverage)

AUTO/UNINSURED/UNDERINSURED MOTORIST 4

Matter of Elrac, Inc. v. Exum, 18 N.Y.3d 325 (2011) (Employee May Receive Uninsured Motorist Benefits From Self-Insured Employer Despite Workers' Compensation Law)

Matter of Allstate Ins. Co. v. LeGrand, 91 A.D.3d 502 (1st Dep't 2012) (Court Stays Arbitration Where Policy Did Not Cover Auto Accident In Mexico)

Matter of State Farm Mut. Auto. Ins. Co. (*Perez*), 94 A.D.3d 1314 (3d Dep't 2012) (Insured's Failure To Notify Insurer Of Arbitration Settlement Dooms SUM Claim)

Carlson v. American Int'l Group, Inc., 2012 U.S. Dist. Lexis 50442 (W.D.N.Y. 2012) (Federal Court Remands Auto Accident Insurance Coverage Case To State Court)

Lyons v. Lancer Ins. Co., 681 F.3d 50 (2d Cir. 2012) (Bus Company's Insurance Limited To Interstate Trips)

Day v. OneBeacon Ins., 96 A.D.3d 1678 (4th Dep't 2012) (Insured Loses SUM Coverage For Settling, Without Insurer's Permission)

Osuna v. Government Employees Ins. Co., 2012 U.S. Dist. Lexis 98622 (E.D.N.Y. July 16, 2012) (Court Rejects Challenge To Supplemental Spousal Coverage Law)

Matter of Government Employees Ins. Co. v. Phillip, 98 A.D.3d 616 (2d Dep't 2012) (Auto Policy Not Canceled Where Insurer Failed To File Notice Of Cancellation Within 30 Days)

A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co., 953 N.Y.S.2d 219 (2d Dep't 2012) (No-Fault Insurer Precluded From Disclaiming on Independent Contractor Defense Because Not Timely Raised)

Cividanes v. City of New York, 2012 N.Y. Lexis 3559 (Ct. App. Nov. 29, 2012) (Alleged Injury As Woman Exited Bus Did Not Arise Out Of Its "Use Or Operation," NY Court Of Appeals Rules)

Flushing Traditional Acupuncture, P.C. v. Infinity Group, 2012 N.Y. Misc. Lexis 5336 (App. Term, 2d Dep't Nov. 26, 2012 (New York's Minimum Limits Applied Where Insurer Failed To Show It Was Not An Authorized New York Insurer)

FIRST PARTY PROPERTY 5

Zises v. New York Cent. Mut. Fire Ins. Co., 34 Misc. 3d 1208(A) (Sup. Ct. Dutchess Co. Jan. 10, 2012) (No Coverage For Fire At Rented Home)

Amery Realty Co., Inc. v. Finger Lakes Fire & Cas. Co., 96 A.D.3d 1214 (3d Dep't 2012) (Damaged Laundromat Equipment Not Insured As Part Of The Building)

Platek v. Town of Hamburg, 97 A.D.3d 1118 (4th Dep't 2012) (Exception to Water Loss Exclusion Is Ambiguous, Court Finds)

Page

Mallory v. Allstate Ins. Co., 19 N.Y.3d 978 (2012) (Insurer's Failure To Comply With Regulation Establishing Time Limits To Accept Or Reject Property Claims Does Not Preclude It From Relying Upon Exclusion To Disclaim Coverage)

All Star Wellness Med., P.C. v. Praetorian Ins. Co., 36 Misc.3d 146A (App. Term 2d Dep't 2012) (Assignor's Failure To Appear For IME Precludes Provider's Recovery of First-Party No-Fault Benefits)

Dean v. Tower Ins. Co. of N.Y., 19 N.Y.3d 704 (2012) ("Residence Premises" Raises Question Of Fact Under Circumstances)

United States Dredging Corp. v. Lexington Ins. Co., 99 A.D.3d 695 (2d Dep't 2012) (Pier Damaged By Wear And Tear, Not Wind, Dooming Coverage Claim)

Wilner v. Allstate Ins. Co., 99 A.D.3d 700 (2d Dep't 2012) ("Earth Movement" Exclusion Bars Coverage For Loss from "Landslide" and "Mudflow")

Azzato v. Allstate Ins. Co., 99 A.D.3d 643 (2d Dep't 2012) (Spouse Had No Insurable Interest In Property 50% Owned By Her Husband)

BAD FAITH/EXTRA-CONTRACTUAL 7

Ural v. Encompass Ins. Co. of Am., 97 A.D.3d 658 (2d Dep't 2012) (Appellate Court Reinstates Claims Against Homeowner's Insure)

Vescon Constr., Inc. v. Gerelli Ins. Agency, Inc., 97 A.D.3d 658 (2d Dep't 2012) (Court Rejects GBL §349 Claim Against Insurer In Construction Case)

MISCELLANEOUS 7

380 Kings Highway, LLC v. Fidelity Natl. Tit. Ins. Co., 33 Misc. 3d 1233(A) (Sup. Ct. Kings Co. Dec. 13, 2011) (Title Insurer Must Indemnify Property Owner For Its Payment Of "Emergency Repair Lien")

J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 91 A.D.3d 226 (1st Dep't 2011) (Disgorgement Payment To Settle SEC Charges Is Not An Insurable Loss, Court Confirms)

George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA, 92 A.D.3d 104 (1st Dep't 2012) (Insurer Precluded From Delaying Disclaimer On Valid Ground While Investigating Other Grounds)

Federal Ins. Co. v. International Bus. Machs. Corp., 18 N.Y.3d 642 (2012) (No Coverage Where Insured Was Not Acting As ERISA Fiduciary, Court Of Appeals Rules)

Maimonides Med. Ctr. v. First United Am. Life Ins. Co., 35 Misc.3d 570 (Sup. Ct. Kings Co. 2012) (Court Finds Private Right of Action For Hospital Under "Prompt Pay Law")

Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co., 18 N.Y.3d 765 (2012) (Statute of Limitations Begins to Run When Insurer Could Seek Payment of Adjusted Premiums, Not When It Later Issued Invoices)

Gomez v. Fidelity Nat'l Tit. Ins. Co. of N.Y., 34 Misc. 3d 1233(A) (Sup. Ct. Queens Co. Mar. 1, 2012) (Actual Loss, But Not Consequential Damages, Covered By Title Insurance Policy)

Tower Ins. Co. of N.Y. v. Khan, 93 A.D.3d 618 (1st Dep't 2012) (No Coverage For Personal Injury Suit Where Home Was Not Insured's Primary Residence)

Matter of AIU Ins. Co. v. Veras, 94 A.D.3d 642 (1st Dep't 2012) (Delay In Disclaiming Was "Unreasonable" Even Though Insurer Had Not Been Notified Of Accident For Nearly 4 Years)

State of New York, ex rel. Seiden v. Utica First Ins. Co., 96 A.D.3d 67 (1st Dep't 2012) (Court Rejects False Claims Act Suit Against Insurer That Sold "Artisan" Policies To Contractors)

DaimlerChrysler Ins. Co. v. Jenneman, 95 A.D.3d 928 (2d Dep't 2012) (Insurer Entitled To Common Law Indemnification From Driver After Her Manslaughter Conviction)

FC Bruckner Assoc., L.P. v. Fireman's Fund Ins. Co., 95 A.D.3d 556 (1st Dep't 2012) (Ohio, Not New York, Law Governs Timely Disclaimer Issue)

Page

***Admiral Ins. Co. v. Joy Contrs., Inc.*, 19 N.Y.3d 448 (2012) (Insurer Can Rely On Named Insured's Alleged Misrepresentations To Reform Or Rescind Policy with Respect To Additional Insureds)**

***Arrowood Indem. Co. v. Atlantic Mut. Ins. Co.*, 96 A.D.3d 693 (1st Dep't 2012) (Asset Purchaser Coverage Found Under Seller's Policies For Potential Pre-Sale Liabilities)**

***Dupree v. Scottsdale Ins. Co.*, 96 A.D.3d 546 (1st Dep't 2012) (Court Affirms TRO Requiring Insurer To Pay Insured's Defense Costs In Criminal Action)**

***Saul v. Fidelity Natl. Tit. Ins. Co.*, 36 Misc.3d 1217A (N.Y. Civ. Ct. 2012) (Court Affirms TRO Requiring Insurer To Pay Insured's Defense Costs In Criminal Action)**

***Certain Underwriters at Lloyd's v. BDO Seidman LLP*, 36 Misc.3d 1222A (Sup. Ct. N.Y. Co. 2012) (Punitive Damages Portion of Jury Verdict Not Covered By Professional Indemnity Policies)**

***Willets Point Chiropractic P.C. v. Allstate Ins.*, 36 Misc.3d 1235A (N.Y. Civ. Ct. Richmond Co. 2012) (Court Finds Chiropractors Prohibited From Performing "Manipulation Under Anesthesia")**

***Cliffside Park Imaging v. Preferred Mut. Ins. Co.*, 36 Misc.3d 155A (App. Term 1st Dep't, 2012) (No Coverage Where Named Insured Had Falsely Listed A New York Address On Application But Lived In New Jersey)**

***Colonial Oil Industries, Inc. v. Indian Harbor Ins. Co.*, 2012 U.S.Dist. Lexis 130122 (S.D.N.Y. Sept. 10, 2012) (No Coverage Under Pollution Policy Where Pollutant Had Not Escaped Confinement)**

***Five Boro Psychological & Licensed Master Social Work Servs., PLLC v. GEICO Gen. Ins. Co.*, 954 N.Y.S.2d 433 (N.Y. Civ. Ct. Kings Co. 2012) (Healthcare Provider's Assertion That EUO Requests Were Unreasonable Was Untimely)**

***Friedman v. Progressive Direct Ins. Co.*, 953 N.Y.S.2d 293 (2d Dep't 2012) (Plaintiffs Only Entitled to $25,000 Limits For Unsatisfied Judgment)**

***Hermitage Ins. Co. v. LaFleur*, 953 N.Y.S.2d 209 (1st Dep't 2012) (No Coverage Where Application Described Building As A Two-Family Dwelling – But It Had Three Apartments)**

***State Farm Fire & Cas. Co. v. Raabe*, 954 N.Y.S.2d 173 (2d Dep't 2012) (Insurer Not Required To Timely Disclaim Where Plaintiff Alleged Injuries From Intentional Acts)**

New York Insurance Coverage Law Update 2012 Compilation

ADDITIONAL AND NAMED INSUREDS/CO-INSURANCE

Court Finds Additional Insured Coverage For Claim Allegedly Arising From Accident In Stairwell

The plaintiff in a personal injury action alleged that an accident had occurred in a stairwell of a leased building in which he was employed. The Appellate Division, First Department, held that the landlord and managing agent were entitled to a defense as additional insureds under the policy procured by the tenant, the employer of the plaintiff. The court found that the claim arose out of the "maintenance or use" of the leased property within the meaning of the additional insured clause, reasoning that the "accident occurred in the course of an activity necessarily incidental to the operation" of the leased space and "in a part of the premises that was used for access in and out of the leased space when the freight elevator was not in service." [*1515 Broadway Fee Owner, LLC v. Seneca Ins. Co., Inc.*, 90 A.D.3d 436 (1st Dep't 2011).]

Insurer Must Defend General Contractor As "Additional Insured"

A general contractor contended that it was entitled to defense and indemnification as an additional insured under its subcontractor's commercial general liability insurance policy in connection with an underlying personal injury action brought by an employee of the subcontractor. The policy provided that the general contractor was covered "only with respect to liability caused by [the subcontractor's] ongoing operations performed for [the general contractor]," and that the policy did "not apply to liability caused by the sole negligence of the [additional insured]." Finding that this language did not require negligence of the subcontractor, the court ruled that the insurer was obligated to defend the general contractor in the underlying action. [*W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530 (1st Dep't 2012).]

No Coverage For Landlord As Additional Insured, Court of Appeals Decides

A landlord was an additional insured under a commercial general liability policy issued to a tenant "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the tenant]." The New York Court of Appeals ruled that although the landlord may be entitled to a defense in an action commenced against it by a third party for an injury suffered on the leased premises, the policy did not provide coverage for liability to the named insured (tenant) for damage to property owned, rented, or occupied by the named insured. Thus, the Court decided, the insurer was not obligated to defend the landlord in the underlying action brought by the tenant. [*VBH Luxury, Inc. v. 940 Madison Assoc. LLC*, 18 N.Y.3d 899 (2012).]

In Crane Collapse Case, Insurance To Property Owner As Additional Insured Deemed Primary

After a crane collapsed at a construction site in Manhattan, the property owner, the construction manager, and the subcontractor (whose employee had been operating the crane) were sued. The property owner had its own primary insurance policy, but also was an additional insured under the primary insurance policies issued to the construction manager and subcontractor. The Court held that, pursuant to the "other insurance" provisions of the policies, the property owner's additional insured coverage was primary to its own coverage. The Court explained that the priority of coverage was not changed by the "Additional Insured" endorsement in the construction manager's policy, which provided that "such insurance as is afforded by this policy for the benefit of [the owner] shall be primary insurance as respects any claim, loss or liability arising out of [the construction manager's] operations, and any other insurance maintained by [the owner] shall be excess and non-contributory with the insurance provided hereunder." The Court reasoned that the term "insurance maintained by" referred to insurance actually obtained by the property owner rather than afforded it as an additional insured. [*Matter of East 51st St. Crane Collapse Litig.*, 94 A.D.3d 420 (1st Dep't 2012).]

Additional Insured's Notice Did Not Trigger Insurer's Duty To Disclaim As To Named Insured

After Prana Associates filed a third-party action and obtained a judgment against Four Star, it sought to recover the judgment from Four Star's insurer, which disclaimed coverage to Four Star based upon late notice. The court found that Prana's earlier notice of the main underlying action to the insurer requesting coverage as an additional insured did not trigger the insurer's obligation to timely disclaim as to Four Star, the named insured, and that insurer promptly disclaimed coverage because of Four Star's failure to provide timely notice of Prana's third-party action in any event. [*Castro v. Prana Assoc. Twenty One, LP*, 95 A.D.3d 693 (1st Dep't 2012).]

No Coverage For Claims Against Additional Insured

After the trial court ruled that an insurer breached its obligation to defend and to indemnify an additional insured contractor in an underlying personal injury action, the Appellate Division, First Department, reversed. The appellate court explained that the insurer had properly disclaimed coverage based upon the Employer's Liability exclusion in the policy, adding that although the exclusion did not apply to liability the insured assumed under an "insured contract," the Contractual Liability Limitation endorsement deleted any reference in the definition of "insured contract" to a "contract or agreement pertaining to your business . . . under which you assume the tort liability of

another party . . . .” Moreover, “even though [the additional insured] could be found actively negligent,” the appellate court observed that the Additional Insured endorsement precluded coverage for the “acts or omissions” of the additional insured. [*Total Concept Carpentry, Inc. v. Tower Ins. Co. of N.Y.*, 95 A.D.3d 411 (1st Dep’t 2012).]

Umbrella Policy That Expressly Negates Contribution Found Excess To Umbrella Policy That Does Not

An umbrella policy issued by Utica Mutual Insurance Company provided that it was “excess over, and shall not contribute with, any of the other insurance, whether primary, excess, contingent or on any other basis.” Another umbrella policy provided that it was “excess over any insurance,” but without reference to contribution. The Second Department found that the Utica policy was excess to the other policy because it expressly negated contribution while the other policy did not. [*Utica Mut. Ins. Co. v. Government Employees Ins. Co*., 98 A.D.3d 502 (2d Dep’t 2012).]

City Covered As Additional Insured For Liability Arising Out Of Contractor’s Ongoing Operations

A pedestrian sued New York City and a City contractor for injuries that allegedly arose out of their negligence in maintaining “traffic and pedestrian control devices” at an intersection. The commercial general liability insurance policy obtained by the contractor covered the City as an additional insured for liability arising out of the contractor’s ongoing operations. The court held that the insurer had a duty to defend the City, rejecting the insurer’s contention that the record established that the contractor’s operations at the intersection had been completed and thus were no longer ongoing at the time of the accident. [*City of New York v. Endurance American Ins. Co*., 98 A.D.3d 900 (1st Dep’t 2012).]

CONDITIONS PRECEDENT/LATE NOTICE

Insured’s Belief In Nonliability Found “Unreasonable As A Matter Of Law”

After the insured waited 13 months before notifying his insurer of an incident with a letter carrier, the insurer denied coverage. The insured sued, asserting that he had a reasonable excuse for failing to give timely notice because he had acted in self-defense and did not think the letter carrier “would have the audacity to sue him.” The Appellate Division, First Department, found that the insured’s purported belief in nonliability was unreasonable as a matter of law, “given that the police arrested him, not the letter carrier, for the incident and that he was indicted in federal court for assaulting the letter carrier.” [*Aponte v. Government Empls. Ins. Co*., 92 A.D.3d 476 (1st Dep’t 2012).]

Court Rejects Suit Against Insurer To Recover Unsatisfied Judgment Against Insured Where Insured Failed to Provide Prompt Notice

An injured woman obtained a default judgment against a building owner and sued the owner’s insurer to recover the amount of the unsatisfied judgment. The court found that the insurer was entitled to summary judgment because the injured claimant failed to exercise her independent right to notify the insurer and the insured’s notice was late based upon an affidavit from the insurer’s litigation specialist who stated that the insured had failed to provide notice of the underlying action to the insurer until more than four months after the Secretary of State had been served with process. [*Konig v. Hermitage Ins. Co*., 946 N.Y.S.2d 116 (2d Dep’t 2012).]

Failure To Timely Notify Insurer Dooms Effort To Recover Default Judgment

The insured did not notify its liability insurer when the claimant slipped and fell on the insured’s property in July 1999, or when she was sued in 2001, or when the insured declared bankruptcy and entered into a stipulation allowing the claimant to sue the insurer in May 2004. After the claimant placed the insurer on notice in October 2004, the insurer disclaimed coverage to the insured and copied the claimant. The claimant obtained a default judgment against the insured, was awarded over $800,000, and sought to recover that amount from the insurer. The court held that there was no coverage based upon late notice, and rejected the claimant’s arguments that the disclaimer failed to apprise her that the insurer considered her notice untimely and that her delayed notice was reasonable because of the “mistaken belief” that the insured’s bankruptcy had prevented her from suing the insurer. [*Kalthoff v. Arrowood Indem. Co*., 95 A.D.3d 1413 (3d Dep’t 2012).]

Late Notice of Suit Dooms Coverage, Even Where Insurer Had Notice Of Accident

A person involved in an automobile accident obtained a default judgment against the insured. The court upheld the insurer’s disclaimer, explaining that although the insurer had notice soon after the accident, it had no notice of the filing of the lawsuit against the insured until after the judgment. [*O’Garro v. State Farm Fire & Cas. Ins. Co*., 96 A.D.3d 1027 (2d Dep’t 2012).]

Second Circuit Finds No Coverage Where Insured Took More Than A Year To Notify His Insurer Of Damage To His Property

A property owner who delayed notifying his insurer for over a year after discovering damage to his property failed to comply with the policy’s notice requirement. The court further held that the insured’s belief

that a neighbor was responsible for the damage and uncertainty about whether the damage was covered did not excuse the insured's delay. The insurer, therefore, was entitled to deny coverage for the damage. [*Pfeffer v. Harleysville Group, Inc.*, 2012 U.S. App. LEXIS 22749 (2d Cir. Nov. 6, 2012).]

COVERAGE GRANT

Asbestos-Related Claims Not All Separate Occurrences

Corning sought coverage for thousands of claims arising from the distribution and/or manufacture of two asbestos-containing products. The court said the insurers failed to make out a prima facie case that each of the thousands of claims constituted a separate occurrence. The court reasoned that claims arising from exposure to an asbestos condition at a common location, at approximately the same time, may be found to have arisen from the same occurrence. [*Mt. McKinley Ins. Co. v. Corning Inc*., No. 602454/02 (Sup. Ct. Co. Sept. 7, 2012).]

No Duty For Excess Insurer To Defend Where Underlying Policy Has Not Been Exhausted

After a subcontractor's employee was allegedly injured in a construction accident and sued the general contractor, the subcontractor's primary insurer defended the general contractor. In turn, the general contractor filed a third-party action against the subcontractor for any amount the employee obtained in excess of the primary limits. A federal district court held that the subcontractor's excess insurer had no obligation to defend the subcontractor. The Second Circuit agreed, explaining that the language of the excess policy was "clear" that the underlying primary insurance must be exhausted before the excess policy would provide a defense. [*Preferred Construction, Inc. v. Illinois National Ins. Co*., 2012 U.S. App. Lexis 18395 (2d Cir. Aug. 30, 2012).]

Pro Rata Allocation Ordered For Asbestos Bodily Injury Claims

In a declaratory judgment action for insurance coverage for bodily injury claims resulting from exposure to asbestos, the court decided that there should be pro rata allocation of defense and indemnity costs across all primary, umbrella and excess general liability policies issued to Corning Inc. from 1962 through 1985, with allocation determined based upon time on the risk. [*Mt. McKinley Ins. Co. v. Corning Inc*., No. 602454/02 (Sup. Ct. N.Y. Co. Sept. 7, 2012).]

EXCLUSIONS

Absence Of Prior Written Agreement Indemnifying and Holding Insureds Harmless Dooms Coverage Claim

An insurer maintained that its insureds were not entitled to a defense and indemnity in a property damage action because of an exclusion for property damage arising out of work performed on behalf of an insured by a subcontractor where no prior written agreement existed indemnifying and holding harmless the insured in the event of a loss. The Appellate Division, Second Department, agreed that the insureds' written agreement with their contractor did not contain the required indemnity and hold harmless language. [*Yangtze Realty, LLC v. Sirius Am. Ins. Co*., 90 A.D.3d 744 (2d Dep't 2011).]

Exclusions Do Not Apply Where LLC Member Is Not An Employee

John Bardes, the sole member of a limited liability company, allegedly was injured when he was struck by a truck owned by the LLC and operated by an LLC employee. The insurer that had issued the LLC a business auto policy denied coverage based on the employee indemnification and fellow employee exclusions, and Barnes sued. The court found that the LLC had employees who received wages and W-2 forms, but Bardes did not receive wages, W-2 forms, or 1099 forms and, therefore, the employee indemnification and fellow employee exclusions did not apply. Therefore, the court concluded that the insurer was obligated to defend and indemnify the LLC in Bardes' action. [*Farm Family Cas. Ins. Co. v. Habitat Revival, LLC*, 91 A.D.3d 903 (2d Dep't 2012).]

Intentional Conduct Dooms Advertising Injury Coverage Claim

The insured asserted that it was being sued for inflicting advertising injury on another company, but the court found that the insured was being sued "exclusively for intentional conduct," which was not covered. Explaining that all of the causes of action alleged against the insured – tortious interference with contract, tortious interference with prospective economic advantage, and conspiracy – required intentional conduct, the court concluded that the insurer had no duty to defend the insured. [*International Chemical Corp. v. Nautilus Ins. Co*., 2011 U.S. Dist. LEXIS 150737 (W.D.N.Y. Jan. 6, 2012).]

Auto Exclusion Bars Coverage For Auto Accident At Air Show

After a person was seriously injured in an automobile accident during an air show at a park, the county that owned the park was sued. The insurer that had issued a policy to the show's organizer naming the county as an additional insured denied coverage due to the policy's auto exclusion. A federal district court upheld the disclaimer, finding that the auto exclusion was "clear and unambiguous," and that the insurer was not obligated to defend or indemnify the county in the underlying personal injury action. [*U.S. Specialty Ins. Co. v. Lebeau, Inc.,* 847 F.Supp.2d 500 (W.D.N.Y. 2012).]

Court Rejects Insured's Argument That Subcontractor Exception To "Damage to Your Work" Exclusion Restored Coverage

An insured contractor sought coverage for a lawsuit that alleged that it was liable for defects in a swimming pool, arguing that other jurisdictions would apply the Subcontractor Exception to the "Damage to Your Work" exclusion in this case and that New York courts should do so, too. The United States District Court for the Eastern District of New York observed that there was no covered "occurrence" under existing New York law and found "no authority" from within New York that supported the contractor's position. Concluding that this was not a case where an insured's work on one component of a project caused damage to property beyond its own work product – the contractor's work product was the entire pool – the court granted judgment to the insurer. [*Aquatectonics, Inc. v. The Hartford Cas. Ins. Co*., 2012 U.S. Dist. LEXIS 41185 (E.D.N.Y. 2012).]

"Employee Injury" Exclusion Barred Coverage For Subcontractor's Employee's Suit Against General Contractor

A general contractor who was sued by a subcontractor's employee was not entitled to coverage under the subcontractor's policy, which excluded coverage for lawsuits arising out of injuries to employees of "any insureds." [*Herrnsdorf v. Bernard Janowitz Constr. Corp*., 96 A.D.3d 1011 (2d Dep't 2012).]

Auto Exclusion Bars Coverage For Injuries Resulting From Employer's Auto Driven By Employee During Crime Spree

After an employee who used a company car during a crime spree injured a police officer, a jury found that the company was negligent in hiring the employee and entrusting a vehicle to him. The company sought coverage for the damages awarded to the officer under its commercial general liability policy, but the court ruled that coverage was barred by the policy's auto exclusion. The court rejected the argument that "negligent hiring" was a "non auto" theory of liability to which the exclusion did not apply, and noted that the exclusion excluded claims resulting from "entrustment" of an automobile. [*IBA Molecular North America, Inc. v. St. Paul Fire and Marine Ins. Co*., 2012 U.S. Dist. LEXIS 139615 (S.D.N.Y. Sept. 27, 2012).]

"Prior Pending Exclusion" In Professional Liability Policy Precludes Coverage

The Appellate Division, First Department, held that a professional liability policy's "prior pending" exclusion applied to a letter to the insured complaining that the insured had caused delays and cost overruns by failing to meet its responsibilities in implementing a hotel's design, and demanding $18,294,500 in damages. Because the demand letter was "pending" when the policy incepted, the exclusion precluded coverage for the litigation that followed the letter. [*Executive Risk Indem., Inc. v. Starwood Hotels & Resorts Worldwide, Inc*., 98 A.D.3d 878 (1st Dep't 2012).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Employee May Receive Uninsured Motorist Benefits From Self-Insured Employer Despite Workers' Compensation Law

An employee of a self-insured employer was injured in an accident while driving the employer's car. The person driving the other car did not have liability insurance, and the employee sought uninsured motorist benefits from his employer. The employer contended that the employee was barred from recovering those benefits because he was entitled to workers' compensation benefits. The New York Court of Appeals rejected the employer's argument, deciding that the employee's action to recover uninsured motorist benefits was not limited by the workers' compensation benefits just because he "happened to be driving the car of a self-insurer." [*Matter of Elrac, Inc. v. Exum*, 18 N.Y.3d 325 (2011).]

Court Stays Arbitration Where Policy Did Not Cover Auto Accident In Mexico

An automobile accident occurred while the insured was driving a rental car in Mexico. The Appellate Division, First Department, ruled that the insurer's motion to stay arbitration should have been granted even though it was filed after the statutory 20-day period because the insured's automobile insurance policy did not provide benefits for accidents that occurred in Mexico and thus the parties had never agreed to arbitrate the insured's claim. [*Matter of Allstate Ins. Co. v. LeGrand*, 91 A.D.3d 502 (1st Dep't 2012).]

Insured's Failure To Notify Insurer Of Arbitration Settlement Dooms SUM Claim

After the insured was involved in a car accident, he settled an arbitration with the alleged tortfeasor and then sought supplementary uninsured/underinsured coverage under his auto policy. The insurer denied the claim, asserting that it had not received written notice of the insured's intention to settle or a request for its consent to settle. The Court upheld the insurer's disclaimer, explaining that the insured's failure to provide notice as required by the SUM policy impermissibly impaired the insurer's subrogation rights. [*Matter of State Farm Mut. Auto. Ins. Co.* (*Perez*), 94 A.D.3d 1314 (3d Dep't 2012).]

Federal Court Remands Auto Accident Insurance Coverage Case To State Court

After an auto accident insurance coverage case filed in a New York state court was removed to federal court, the plaintiff moved to remand the case to state court. The federal court acknowledged that the

case involved the MCS-90 form, an endorsement in personal injury liability insurance policies that all commercial motor carriers are required to include by the federal Motor Carrier Act of 1980. The federal court found, however, that the case predominately was a state claim for breach of contract, and that the MCS-90 endorsement was a defense to the claim. Because federal issues arising as a defense or anticipated defense do not confer federal question jurisdiction, it remanded the case to state court. [*Carlson v. American Int'l Group, Inc*., 2012 U.S. Dist. Lexis 50442 (W.D.N.Y. 2012).]

Bus Company's Insurance Limited To Interstate Trips

The court held that there was no coverage for a personal injury action arising from a bus accident because the accident occurred on a trip that was wholly intrastate and, therefore, the MCS-90B interstate endorsement did not apply. [*Lyons v. Lancer Ins. Co*., 681 F.3d 50 (2d Cir. 2012).]

Insured Loses SUM Coverage For Settling, Without Insurer's Permission

An insured injured in an automobile accident settled with the other motorist and car manufacturer without her insurer's permission. The court held that the insured thereby vitiated her right to supplementary underinsured motorist coverage. [*Day v. OneBeacon Ins*., 96 A.D.3d 1678 (4th Dep't 2012).]

Court Rejects Challenge To Supplemental Spousal Coverage Law

After the insured's spouse was injured in the insured's car and threatened to sue the insured, the insured's insurer disclaimed coverage because he had not purchased the supplemental spousal coverage required under New York Insurance Law §3420 to cover alleged negligence to a spouse. The insured contended that the law was an unconstitutional "bill of attainder" that punished married people. The court rejected that argument, finding that the law was enacted to protect insurance carriers against lawsuits through collusive actions between married people and was not intended as "punishment." [*Osuna v. Government Employees Ins. Co*., 2012 U.S. Dist. LEXIS 98622 (E.D.N.Y. July 16, 2012).]

Auto Policy Not Canceled Where Insurer Failed To File Notice Of Cancellation Within 30 Days

After a vehicle was involved in an accident, the insurer claimed that it had previously cancelled the owner's policy. The court found the policy had not been properly cancelled because the insurer failed to file a notice of cancellation with the Commissioner of Motor Vehicles within 30 days. [*Matter of Government Employees Ins. Co. v. Phillip*, 98 A.D.3d 616 (2d Dep't 2012).]

No-Fault Insurer Precluded From Disclaiming on Independent Contractor Defense Because Not Timely Raised

A medical provider, as assignee under a no-fault insurance policy, submitted a bill to the insurer that stated that services had been rendered by an independent contractor. The Appellate Division, Second Department, concluded as a matter of first impression that New York's insurance regulations preclude a medical provider from billing for and receiving first-party no-fault benefits where it identified the treating provider as an independent contractor. However, the court also ruled that the insurer in this case was precluded from relying upon this defense because it was not timely asserted as required by the No-Fault Law. According to the court, the insurer's reason for denying the claim "should have been apparent to it from the face of the claim form." [*A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co*., 953 N.Y.S.2d 219 (2d Dep't 2012).]

Alleged Injury As Woman Exited Bus Did Not Arise Out Of Its "Use Or Operation," NY Court Of Appeals Rules

The Court of Appeals has held that a woman who allegedly injured her ankle as she exited a New York City bus and stepped into a hole could not recover no-fault benefits because her alleged injury did not arise out of the "use or operation" of the bus. [*Cividanes v. City of New York*, 2012 N.Y. Lexis 3559 (Ct. App. Nov. 29, 2012).]

New York's Minimum Limits Applied Where Insurer Failed To Show It Was Not An Authorized New York Insurer

A trial court granted judgment to a healthcare provider in its action against an insurer to recover benefits under an automobile insurance policy that was issued in Pennsylvania and had a $5,000 limit. The insurer appealed, arguing that the plaintiff's assignor had exhausted the benefits available under the policy. The appellate court explained that an insurance company authorized to transact business in New York had to meet the state's financial security requirements, including minimum coverage limits of $25,000/$50,000. Because the insurer had provided no information as to whether it was an authorized or unauthorized insurer in New York, the appellate court affirmed. [*Flushing Traditional Acupuncture, P.C. v. Infinity Group*, 2012 N.Y. Misc. Lexis 5336 (App. Term, 2d Dep't Nov. 26, 2012).]

FIRST PARTY PROPERTY

No Coverage For Fire At Rented Home

A homeowner who insured his home while he was living there later rented the house to a couple. The house was damaged in a fire and the homeowner submitted a claim. The court explained that the policy was intended and written to provide coverage to the insured where he lived. Because the insured had vacated the house years before the loss occurred, except for

continuing to use the attic for storage, he did not reside there and the insurance policy did not apply, the court decided. [*Zises v. New York Cent. Mut. Fire Ins. Co*., 34 Misc. 3d 1208(A) (Sup. Ct. Dutchess Co. Jan. 10, 2012).]

Damaged Laundromat Equipment Not Insured As Part Of The Building

Laundromat equipment damaged in a building fire was not insured as part of the building even though it was hard-wired into the building's utility systems. The court reasoned that the equipment was property used by the insured, which owned the Laundromat and the building, solely in the Laundromat's business. [*Amery Realty Co., Inc. v. Finger Lakes Fire & Cas. Co*., 96 A.D.3d 1214 (3d Dep't 2012).]

Exception to Water Loss Exclusion Is Ambiguous, Court Finds

An abutting water main ruptured and flooded the insureds' home. The insureds contended that an exception to the water loss exclusion applied because their claimed loss was caused by an "explosion" of the water main. Their insurer argued that the exception applied to a secondary loss following an "explosion … resulting from" an initial loss to the insureds' property. The court found that both interpretations were reasonable under the circumstances. Therefore, it concluded, the exception was ambiguous and should be construed in favor of the insureds. [*Platek v. Town of Hamburg*, 97 A.D.3d 1118 (4th Dep't 2012).]

Insurer's Failure To Comply With Regulation Establishing Time Limits To Accept Or Reject Property Claims Does Not Preclude It From Relying Upon Exclusion To Disclaim Coverage

After a homeowner sued her insurer for compensation under her homeowner's insurance policy for fire damage, the insurer raised affirmative defenses to coverage. The New York Court of Appeals affirmed the Appellate Division's decision that an insurer's failure to comply with an Insurance Department regulation that establishes times limits for insurers to accept or reject property claims did not preclude the insurer from relying upon a policy exclusion to disclaim coverage. [*Mallory v. Allstate Ins. Co*., 19 N.Y.3d 978 (2012).]

Assignor's Failure To Appear For IME Precludes Provider's Recovery of First-Party No-Fault Benefits

A health care provider sued to recover assigned first-party no-fault benefits, and the insurer moved for summary judgment. The motion was denied, but was reversed on appeal. The appellate court found that the provider's assignor had not appeared for a duly scheduled independent medical examination, thus failing to satisfy a condition precedent to coverage. [*All Star Wellness Med., P.C. v. Praetorian Ins. Co*., 36 Misc.3d 146A (App. Term 2d Dep't 2012).]

"Residence Premises" Raises Question Of Fact Under Circumstances

Insureds purchased a home and began renovating it before moving in. The home was destroyed by fire and the insurer disclaimed coverage because the home was unoccupied and did not quality as a "residence premises." New York's highest court, the Court of Appeals, ruled that there was an issue of fact as to whether one of the insured's "daily" presence in the house to make renovations, and his intent to eventually move in with his family, was sufficient to satisfy the policy's "residence premises" requirements. As such, the Court concluded that the insurer should not have been awarded summary judgment. [*Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704 (2012).]

Pier Damaged By Wear And Tear, Not Wind, Dooming Coverage Claim

After an insurer disclaimed coverage for a collapsed pier and damaged crane, the insured/owner sued. The court found that although the insured had theorized that a windstorm caused the crane to move and shift, thereby undermining the structural integrity of the pier and resulting in its collapse, the evidence demonstrated that the pier had been structurally compromised by years of wear and tear and that it had exhibited extreme levels of deterioration prior to the accident. The court concluded that because wear and tear, deterioration, and collapse were explicitly excluded from coverage, the insured's evidence did not establish coverage under the policy. [*United States Dredging Corp. v. Lexington Ins. Co*., 99 A.D.3d 695 (2d Dep't 2012).

"Earth Movement" Exclusion Bars Coverage For Loss from "Landslide" and "Mudflow"

The insured claimed that her property sustained extensive damage when, during a rain storm, a mudslide caused a retaining wall on her property to collapse. The court ruled that there was no coverage because of the "plain language" of the policy excluded coverage for losses due to "[e]arth movement of any type, including, but not limited to ... landslide [and] mudflow." [*Wilner v. Allstate Ins. Co*., 99 A.D.3d 700 (2d Dep't 2012).]

Spouse Had No Insurable Interest In Property 50% Owned By Her Husband

After a fire damaged a dwelling purchased by Raymond Azzato and a nonparty as tenants-in-common, Azzato's wife, a coinsured with him under a landlord's package insurance policy, filed a claim. The court ruled that she had no insurable interest in the

property, pointing out that her name did not appear on the deed or the supplemental fire claim form and that she had not alleged that she earned any income from the property, resided in it, or had any legal or equitable right to do so. The court rejected her contention that she had an insurable interest because she contributed to the purchase of her husband's share of the property, helped to maintain it after it was purchased, and furnished portions of it with her own property. [*Azzato v. Allstate Ins. Co*., 99 A.D.3d 643 (2d Dep't 2012).]

BAD FAITH/EXTRA-CONTRACTUAL

Appellate Court Reinstates Claims Against Homeowner's Insurer

A homeowner sued his insurer for damage from a burst water pipe. The appellate court affirmed the trial court's decision to dismiss the homeowner's claims for intentional and negligent infliction of emotional distress, finding that the insurer's alleged conduct "did not so transcend the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." The appellate court, however, ruled that the trial court should not have dismissed the homeowner's claim under General Business Law § 349 for unfair practices including what the homeowner alleged was a general practice of inordinately delaying settlement of claims by similarly situated policyholders. The appellate court reasoned that the complaint, as amplified by the affidavit and submitted documentation, stated a cognizable cause of action. The appellate court also ruled that the trial court should have compelled the insurer to provide a privilege log with respect to documents contained in the homeowner's claim file for an *in camera* review of allegedly privileged documents. [*Ural v. Encompass Ins. Co. of Am*., 97 A.D.3d 658 (2d Dep't 2012).]

Court Rejects GBL §349 Claim Against Insurer In Construction Case

After a subcontractor's employee who allegedly was injured in the course of his employment sued the general contractor, the general contractor sued the subcontractor. The subcontractor's insurer disclaimed coverage, citing the exclusion for bodily injury to an employee of an insured, and the subcontractor sued the insurer for violating General Business Law § 349. The trial court dismissed the complaint and the appellate court affirmed, finding that the case at most involved a private contract dispute over policy coverage and the processing of the subcontractor's claim, and not conduct affecting the consuming public at large. [*Vescon Constr., Inc. v. Gerelli Ins. Agency, Inc*., 97 A.D.3d 658 (2d Dep't 2012).]

MISCELLANEOUS

Title Insurer Must Indemnify Property Owner For Its Payment Of "Emergency Repair Lien"

A property owner contended that because the services, labor and materials constituting an emergency repair lien under New York City law had been furnished prior to the date of its title insurance policy, the title insurer had a duty to indemnify it for its payment of the lien. The title insurer countered that such a lien was expressly excluded from coverage in the policy. The court concluded that to the extent this exclusion was inconsistent with a New York endorsement that added as an additional covered risk any statutory lien for services, labor, or materials "furnished prior to the date hereof," the endorsement controlled, and the lien therefore was covered by the policy. [*380 Kings Highway, LLC v. Fidelity Natl. Tit. Ins. Co*., 33 Misc. 3d 1233(A) (Sup. Ct. Kings Co. Dec. 13, 2011).]

Disgorgement Payment To Settle SEC Charges Is Not An Insurable Loss, Court Confirms

After agreeing to disgorge $160 million to settle Securities and Exchange Commission charges of willfully facilitating illegal mutual fund trading practices, the insured claimed that the payment constituted an insurable loss under its professional liability insurance policies. The Appellate Department, First Department, ruled that the payment was not an insurable loss. It explained that under New York law, the risk of being directed to return improperly acquired funds is not insurable; thus, disgorgement of ill-gotten gains or restitutionary damages does not constitute an insurable loss. The First Department concluded that, read as a whole, the insured's offer of settlement, the SEC order, and related documents were not reasonably susceptible to any interpretation other than that the insured had "knowingly and intentionally facilitated illegal late trading for preferred customers," and that the relief provisions of the SEC's order "required disgorgement of funds gained through that illegal activity." [*J.P. Morgan Sec. Inc. v. Vigilant Ins. Co*., 91 A.D.3d 226 (1st Dep't 2011).]

Insurer Precluded From Delaying Disclaimer On Valid Ground While Investigating Other Grounds

An insurer that had sufficient information to disclaim coverage on the ground of late notice issued a disclaimer on that ground nearly four months later. The Appellate Division, First Department, ruled that the disclaimer was ineffective pursuant to New York Insurance Law § 3420(d), reversing the rule it announced in 2004 that "[a]n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer." The court concluded that an insurer is precluded from delaying issuance of a disclaimer on a ground that it knows to be valid while investigating other possible grounds for disclaiming. [*George Campbell*

Painting v. National Union Fire Ins. Co. of Pittsburgh, PA, 92 A.D.3d 104 (1st Dep't 2012).]

No Coverage Where Insured Was Not Acting As ERISA Fiduciary, Court Of Appeals Rules

After IBM settled a class action alleging that certain amendments to its benefit plans violated provisions of ERISA pertaining to age discrimination, it sought reimbursement from its excess insurer which had disclaimed coverage. The New York Court of Appeals explained that the policy limited coverage to a "Wrongful Act," including violations of ERISA by an insured acting in its capacity as an ERISA fiduciary. The Court found, however, that IBM had not been acting as an ERISA fiduciary when it took the actions that gave rise to the allegations in the underlying suit. Because the policy was "sufficiently clear on its face," the Court declined to speculate about the excess insurer's choice to subsequently revise its own policy, and held that it was entitled to a judgment that it was not required to indemnify IBM. [*Federal Ins. Co. v. International Bus. Machs. Corp.*, 18 N.Y.3d 642 (2012).]

Court Finds Private Right of Action For Hospital Under "Prompt Pay Law"

A not-for-profit hospital sued a Medigap insurer under the New York "Prompt Pay Law" for payment of services it had rendered to six patients. The insurer contended that the law contained no express or implied private right of action and that the plaintiff's demands for that relief should be dismissed. The court refused to dismiss the complaint, finding an "express legislative intent" to confer a private right of action upon patients and their providers to seek payment directly from an insurer. [*Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 35 Misc.3d 570 (Sup. Ct. Kings Co. 2012).]

Statute of Limitations Begins to Run When Insurer Could Seek Payment of Adjusted Premiums, Not When It Later Issued Invoices

Hahn Automotive Warehouse, Inc. obtained insurance policies that required regular adjustments of premiums based on actual claims experience. An insurer discovered in 2005 that it had not billed Hahn for years of adjusted premiums and sued. The New York Court of Appeals ruled that the statute of limitations applicable to the insurer's breach of contract claim began to run when it had the right to demand payment from Hahn, not when it later issued invoices. Thus, the Court concluded, debts for which the insurer could have demanded payment more than six years before filing its suit were time-barred. [*Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 18 N.Y.3d 765 (2012).]

Actual Loss, But Not Consequential Damages, Covered By Title Insurance Policy

After a property owner discovered a defect in his title that allegedly prevented him from adding new stories to an existing building, he sought the full limit of the policy – $175,000 – from his title insurer. He argued that the title insurer had to pay the difference between the expected value of the property with the addition (less the cost of construction) and the value of the property with the title defect. The insurer argued that it owed the difference between the value of the property without the title defect ($609,000) and the value of the property with the title defect at the time the insured discovered it ($603,000), or $6,000. The court agreed with the insurer, explaining that the insured only was entitled to be reimbursed for his actual loss, up to the limit of the policy, and that the policy did not provide for a recovery of consequential damages. [*Gomez v. Fidelity Nat'l Tit. Ins. Co. of N.Y.*, 34 Misc. 3d 1233(A) (Sup. Ct. Queens Co. Mar. 1, 2012).]

No Coverage For Personal Injury Suit Where Home Was Not Insured's Primary Residence

A property owner named as a defendant in a personal injury suit sought coverage from her homeowners insurer. The court found that the insurer had no duty to defend or to indemnify the insured where the policy was issued for a one or two family primary residence and the insured had represented in her application that she would use the property as her primary residence, but did not. [*Tower Ins. Co. of N.Y. v. Khan*, 93 A.D.3d 618 (1st Dep't 2012).]

Delay In Disclaiming Was "Unreasonable" Even Though Insurer Had Not Been Notified Of Accident For Nearly 4 Years

An insurer learned about an accident involving a vehicle it insured almost four years after the accident had occurred, when the claimant who had obtained a judgment against the insured served the insurer with the judgment. The insurer completed its internal investigation and prepared disclaimer letters within two weeks, but waited another 15 days before sending them out. The Court found this "unreasonable," declaring that the insurer could not delay issuing a disclaimer on a known ground while investigating other possible grounds for disclaiming. Accordingly, it ruled that the insurer had to provide coverage for the underlying judgment. [*Matter of AIU Ins. Co. v. Veras*, 94 A.D.3d 642 (1st Dep't 2012).]

Court Rejects False Claims Act Suit Against Insurer That Sold "Artisan" Policies To Contractors

The plaintiffs sued an insurer under the New York False Claims Act, asserting that the insurer had marketed "artisan" policies to small contractors as a means of satisfying New York City's general contractor licensing requirements. The Court dismissed the lawsuit, finding that the policies did not contain anything false or misleading and concluding that selling

and describing the policies as "commercial general liability" policies was insufficient to demonstrate liability under the Act. [*State of New York, ex rel. Seiden v. Utica First Ins. Co*., 96 A.D.3d 67 (1st Dep't 2012).]

Insurer Entitled To Common Law Indemnification From Driver After Her Manslaughter Conviction

The driver of a leased car struck and killed a pedestrian, and was convicted of manslaughter in the second degree. The lessor's insurer paid $100,000 to the pedestrian's estate and sought to recover that amount from the driver, arguing that it had become subrogated to the lessor's right to common law indemnification. The court found that collateral estoppel applied to the conviction, and that, as the lessor's subrogee, the insurer was entitled to indemnification from the driver. [*DaimlerChrysler Ins. Co. v. Jenneman*, 95 A.D.3d 928 (2d Dep't 2012).]

Ohio, Not New York, Law Governs Timely Disclaimer Issue

Rejecting the insureds' contention that New York's timely disclaimer requirement applied because they had their places of business in New York and the accident occurred in New York, the court held that Ohio law governed. Ohio was the domicile of the insureds' parent to which the insurer had issued the policy. [*FC Bruckner Assoc., L.P. v. Fireman's Fund Ins. Co*., 95 A.D.3d 556 (1st Dep't 2012).]

Insurer Can Rely On Named Insured's Alleged Misrepresentations To Reform Or Rescind Policy with Respect To Additional Insureds

A tower crane collapsed during construction of a luxury high-rise condominium in Manhattan. New York's highest court held that the insurer could rely upon alleged misrepresentations by the named insured contractor in its underwriting submission to reform or rescind the policy with respect to the additional insureds. [*Admiral Ins. Co. v. Joy Contrs., Inc*., 19 N.Y.3d 448 (2012).]

Asset Purchaser Coverage Found Under Seller's Policies For Potential Pre-Sale Liabilities

The Appellate Division, First Department, has found that insurance policies transferred to corporations that purchased virtually all of the insured's assets covered potential liabilities that arose before the transfer, even though lawsuits were filed against the purchasers after the sale. The court found that the insurers' lack of consent to the policies' transfer was "unimportant" because the risk did not increase. [*Arrowood Indem. Co. v. Atlantic Mut. Ins. Co*., 96 A.D.3d 693 (1st Dep't 2012).]

Court Affirms TRO Requiring Insurer To Pay Insured's Defense Costs In Criminal Action

The Appellate Division, First Department, has affirmed a temporary restraining order directing an insurer to pay the insured's defense costs in a criminal action under a directors and officers liability policy. The court said that absent a final adjudication that the policy excluded the insured's alleged wrongdoing, the insurer had to pay the defense costs under the policy, subject to recoupment. [*Dupree v. Scottsdale Ins. Co*., 96 A.D.3d 546 (1st Dep't 2012).]

Title Insurance Encompassed UCC-1 Fixture Filing

A title insurer argued that a home heating oil company's UCC-1 fixture filing against a home's prior owner was not covered by the new owner's policy because fixtures were personal property. The court ruled against the insurer, concluding that fixtures are a part of real property and that a fixture lien constituted a lien or encumbrance on a real property's title. [*Saul v. Fidelity Natl. Tit. Ins. Co*., 36 Misc.3d 1217A (N.Y. Civ. Ct. 2012).]

Punitive Damages Portion of Jury Verdict Not Covered By Professional Indemnity Policies

A Florida jury ordered an accounting firm to pay compensatory damages and $55 million in punitive damages. A New York court found that applicable New York law precluded insurance indemnification for punitive damages, whether based on intentional actions or actions that amounted to gross negligence, recklessness, or wantonness, and that the New York rule applied even where the punitive damages were awarded in another state. [*Certain Underwriters at Lloyd's v. BDO Seidman LLP*, 36 Misc.3d 1222A (Sup. Ct. N.Y. Co. 2012).]

Court Finds Chiropractors Prohibited From Performing "Manipulation Under Anesthesia"

Chiropractors sued an insurer seeking to be compensated for rendering "manipulation under anesthesia" (MUA) services, which the insurer had refused to pay. The court upheld the insurer's decision, concluding that New York law does not permit chiropractors to perform MUA. [*Willets Point Chiropractic P.C. v. Allstate Ins*., 36 Misc.3d 1235A (N.Y. Civ. Ct. Richmond Co. 2012).]

No Coverage Where Named Insured Had Falsely Listed A New York Address On Application But Lived In New Jersey

The named insured and his wife resided in an apartment in Cliffside Park, New Jersey, which address they listed on their tax returns. The court found that the named insured had "fraudulently obtained insurance coverage" by falsely listing a Pearl River, New York house owned by his father as his residence on the insurance application. Accordingly, the court dismissed the insured's no-fault first-party benefit claim filed against the insurer.

[*Cliffside Park Imaging v. Preferred Mut. Ins. Co.*, 36 Misc.3d 155A (App. Term 1st Dep't, 2012).]

No Coverage Under Pollution Policy Where Pollutant Had Not Escape Confinement

A petrochemical company claimed that it had purchased contaminated fuel oil that it sold and distributed. The company sought coverage under a Pollution and Remediation Legal Liability Insurance Policy. The court rejected the company's claim, finding that "the only plausible reading" of the policy was that it provided coverage if a pollutant was discharged into land, structures, the atmosphere, or water, but not when, as here, the pollutant remained contained in vessels where it was intended to be kept. [*Colonial Oil Industries, Inc. v. Indian Harbor Ins. Co.*, 2012 U.S.Dist. Lexis 130122 (S.D.N.Y. Sept. 10, 2012).]

Healthcare Provider's Assertion That EUO Requests Were Unreasonable Was Untimely

An insurer sued by a healthcare provider asserted that the provider's assignor had failed to appear for two scheduled examinations under oath ("EUOs"). The court granted summary judgment to the insurer, finding that the provider's argument that there was no reasonable basis for the EUO requests was barred because the provider had not timely objected to their reasonableness. [*Five Boro Psychological & Licensed Master Social Work Servs., PLLC v. GEICO Gen. Ins. Co.*, 954 N.Y.S.2d 433 (N.Y. Civ. Ct. Kings Co. 2012).]

Plaintiffs Only Entitled to $25,000 Limits For Unsatisfied Judgment

The plaintiffs sued an insurer to recover a $175,000 judgment obtained against its insured. In support of their motion for summary judgment, plaintiffs submitted a claim representative's letter that indicated that the policy had "limits [of] 25,000/50,000." The court ruled that this failed to demonstrate that they were entitled to the full amount of the unsatisfied judgment. [*Friedman v. Progressive Direct Ins. Co.*, 953 N.Y.S.2d 293 (2d Dep't 2012).]

No Coverage Where Application Described Building As A Two-Family Dwelling – But It Had Three Apartments

Insureds who described their property as a two-family dwelling in their application for liability insurance, even though it contained three apartments, were not entitled to coverage in a personal injury action against them because of the misrepresentation. The court rejected the insureds' argument that there was no misrepresentation because the property was a legal two-family dwelling. [*Hermitage Ins. Co. v. LaFleur*, 953 N.Y.S.2d 209 (1st Dep't 2012).]

Insurer Not Required To Timely Disclaim Where Plaintiff Alleged Injuries From Intentional Acts

Where a plaintiff in a personal injury action alleged injuries from intentional acts, there was no coverage under the policy, and the insurer was not required to issue a timely written disclaimer with respect to the personal injury action under New York Insurance Law §3420(d). [*State Farm Fire & Cas. Co. v. Raabe*, 954 N.Y.S.2d 173 (2d Dep't 2012).]

2012 New York Insurance Coverage Law Compilation
is published by

RIVKIN RADLER
ATTORNEYS AT LAW

This publication is purely informational and not intended to serve as legal advice. Your feedback is welcomed.

Rivkin Radler LLP
926 RXR Plaza, Uniondale NY 11556
www.rivkinradler.com

This publication is provided for informational purposes only and is not intended to serve as legal advice. For more information, please contact Alan Eagle, Esq. 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 Summary.