New York Insurance Coverage Law Update

2013 Compilation

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ADDITIONAL AND NAMED INSUREDS/CO-INSURANCE

No Coverage For Construction Worker's Claim In Absence Of Agreement Naming Property Owner An Additional Insured

After the owner of a construction site was sued for injuries allegedly suffered at the site, the owner sought coverage as an additional insured under a policy that had been issued to a subcontractor's supplier. The insurer disclaimed, and the owner sued. The trial court denied the insurer's motion for summary judgment, and the appellate court reversed. The appellate court explained that, under the policy, there had to be an express written agreement between the subcontractor's supplier and the owner for the owner to be an additional insured. The appellate court rejected the owner's argument that the title of a policy provision made the owner an additional insured, found that no agreement existed between the owner and the subcontractor's supplier, and concluded that the insurer was entitled to summary judgment. [*AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc*., 102 A.D.3d 425 (1st Dep't 2013).]

Appellate Division Finds Additional Insured Coverage Under "Caused By" Endorsement

An insurance policy's additional insured endorsement stated that it applied to bodily injury "caused, in whole or in part, by" the named insured's acts or omissions or the acts or omissions of those acting on the named insured's behalf in the performance of the named insured's ongoing operations. After a coverage dispute arose between the named insured's insurer and the additional insured's insurer, the Appellate Division, First Department, decided that the phrase "caused by" did not materially differ from the phrase "arising out of" under the circumstances presented. The court held that because the underlying personal injury action arose out of an accident that occurred while the injured claimant was acting on behalf of the named insured in the performance of its ongoing operations, the "caused by" language in the additional insured endorsement was satisfied. Therefore, the court concluded, the named insured's insurer was obligated to reimburse the additional insured's insurer for the additional insured's defense and settlement costs in the underlying personal injury action. [*National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co*., 103 A.D.3d 473 (1st Dep't 2013).

No Coverage Where No Written Agreement To Name City As Additional Insured

Harleysville issued general liability insurance policies to Bruno Grgas, Inc. and to Coastal Sheet Metal Corp., providing additional insured coverage where the insured and the organization seeking additional insured coverage agreed in writing that the insured add the organization as an additional insured. The Appellate Division, First Department, held that the City of New York was not entitled to coverage as an additional insured for the underlying personal injury action because there was no written agreement between the City and either Bruno or Coastal. The court opined that the language in Bruno and Coastal's subcontracts, which incorporated by reference the terms of a prime contract that required additional insured coverage for the City, was "insufficient." [*City of New York v. Nova Cas. Co*., 104 A.D.3d 410 (1st Dep't 2013).]

CONDITIONS PRECEDENT/LATE NOTICE

Court Holds Insurer Was Prejudiced By Late Notice That Resulted In Lost Opportunity To Investigate

After the roof of a commercial building in New York City collapsed, the second floor and roof were demolished and removed as ordered by the City. Approximately 5½ months later, the insurer of the contractor that performed work on the roof was placed on notice by the insurer of the building owner, which filed a subrogation action against the contractor. The contractor's insurer disclaimed coverage and filed a declaratory judgment action, maintaining that it had no duty to defend or to indemnify the contractor because the insurer was prejudiced by the late notice. The court held that the insurer met its burden of proving prejudice under New York Insurance Law §3420(a)(5) (*i.e.*, that the untimely notice "materially impair[ed] the ability of the insurer to investigate or defend the claim"), noting that the late notice prevented the insurer from being able to independently investigate potential causes of the collapse.

The court rejected the insured's argument that others conducted an investigation and that the insurer should be required to show how the investigation may have been biased or incomplete. Because the insurer had the "right" to conduct its own investigation and the insured and the owner denied the insurer such opportunity, the court opined that it would be "unreasonable" to require the insurer to show how it would have been advantaged by its own investigation. The court concluded that "where the best physical evidence was available to only one side but not the other because of an unreasonable failure to provide notice, prejudice has been shown." [*Atlantic Cas. Ins. Co. v. Value Waterproofing, Inc*., 918 F. Supp. 2d 243 (S.D.N.Y. 2013).]

Delay In Notifying Homeowner's Insurer About Alleged Accident At Wal-Mart May Be Excused, Court Holds

About six months after her child allegedly injured a person in a Wal-Mart store, the child's mother allegedly contacted a lawyer and learned that her homeowner's policy might provide coverage. Her attorney allegedly notified her insurer, which disclaimed on the ground of late notice, and the mother sued. The court held that the mother had raised a triable issue of fact as to the existence of a reasonable excuse for the delay in notice. [*Albano-*

Plotkin v. Travelers Ins. Co., 101 A.D.3d 657 (2d Dep't 2012).]

Notice To Excess Insurer By Claimant Found Timely

The Appellate Division, Second Department, upheld a trial court's decision in a direct action filed by the injured claimant, requiring an excess insurer to pay the unpaid portion of a $4 million judgment that the claimant obtained against the excess insurer's insured. The court found that the claimant was "reasonably diligent" in attempting to ascertain the identity of the excess insurer and in providing notice just prior to the trial on damages in the underlying action. The court stressed that the insured's counsel in the underlying action did not identify the excess policy despite its discovery obligation to do so. [*Golebiewski v. National Union Fire Ins. Co. of Pittsburgh, P.A*., 101 A.D.3d 1074 (2d Dep't 2012).]

Mutual Insurance Association Need Not Show Prejudice To Disclaim, Second Circuit Rules

A crew member sued Weeks Marine, Inc., and obtained a judgment. Weeks was a member of American Club, a non-profit mutual insurance association. The association refused to indemnify Weeks, citing a failure to provide prompt notice of the crew member's claim, and Weeks sued. The Second Circuit affirmed the district court's decision in favor of the association, finding that New York's traditional "no prejudice" rule applied and that the association was not required to show prejudice to disclaim coverage. [*Weeks Marine, Inc. v. American Steamship Owners Mutual Protection and Indemnity Ass'n, Inc*., 511 Fed. Appx. 78 (2d Cir. 2013).]

New York Court Holds That Illinois Law Applies To Reinsurance Dispute And, Therefore, Reinsurer Did Not Have To Prove That It Had Been Prejudiced By Late Notice Of Claim

Decades after an insurer purchased nine certificates of facultative reinsurance, it notified the reinsurer of a claim, which the reinsurer denied. The insurer filed suit in a federal district court in New York. The court found that Illinois law applied to the certificates because they had been entered into in Illinois and the expected place of the reinsurer's performance was Illinois. The court then ruled that the reinsurer could refuse coverage under the certificates, concluding that the insurer's notice had been unreasonably late and that Illinois law did not require that the reinsurer prove that it had been prejudiced by the late notice of claim. [*AIU Ins. Co. v. TIG Ins. Co*., 934 F. Supp. 2d 594 (S.D.N.Y. 2013).]

Underlying Plaintiffs' Failure To Act Diligently To Ascertain Insurer's Identity Bars Their Claim

Underlying plaintiffs sued the owner of an apartment building where they were allegedly burned by hot water while bathing. The court upheld the late notice disclaimer of the building owner's insurer. Although the underlying plaintiffs' counsel requested that the owner notify its liability insurer, the court found that the insured never notified the insurer and the underlying plaintiffs did not act diligently in attempting to ascertain the identity of the owner's insurer. [*Castlepoint Ins. Co. v. Anlovi Corp*., 2013 N.Y. Misc. Lexis 1621 (Sup. Ct. N.Y. Co. April 16, 2013).]

Policy Was Delivered When Broker Received It From Insurer, Court Rules

A policy was "delivered" when a wholesale broker who was the agent of the insured received it from the insurer. Because that occurred before January 17, 2009, when the prejudice requirement set forth by N.Y. Ins. L. § 3420(a) became law, the untimely notice provided by the insured precluded recovery under the policy. [*B&A Demolition and Removal, Inc. v. Markel Ins. Co.*, 941 F. Supp. 2d 307 (E.D.N.Y. 2013).]

No Coverage For Tenant's Claim Where Property Owner Received Letter From Tenant's Attorney But Waited Until Sued – Nearly Two Years Later – To Notify Insurer

A property owner received a letter from her tenant's lawyer asserting that the tenant had been injured by mold in her apartment. Nearly two years later, the owner was sued, and she forwarded the complaint to her insurer. The insurer disclaimed on the ground that the owner had failed to provide notice of the occurrence as soon as practicable as required by her policy, which was issued before New York's late notice – prejudice statute became effective. The court upheld the disclaimer, rejecting the owner's contention that she had reasonably withheld the claim letter because she believed the mold issue had been resolved. [*Tower Ins. Co. of N.Y. v. 2165 Pacific Street, LLC*, 2013 NY Misc. Lexis 2709 (Sup. Ct. N.Y. Co. June 27, 2013).]

Court Finds That Insured's Late Notice Was Not Excused By A Reasonable Belief In Nonliability Because He Had Not Investigated Water Leak

After an insured sought coverage from his insurance company for a lawsuit alleging that a water and sewer leak from his building had damaged an adjoining property, the insurer moved for summary judgment, arguing that the insured had failed to provide timely notice of his claim. The insured responded that his late notice should be excused because he had a reasonable belief in his nonliability. The court granted the insurer's motion, determining that the insured's delay in providing notice was not reasonable given his "utter lack of investigation" as to the "cause of the water damage." The

court also decided that it was "not reasonable" for a "sophisticated owner of property" to rely upon his tenant to resolve the damage allegedly caused to the adjoining property. [*Castlepoint Ins. Co. v. Fried*, 2013 N.Y. Misc. Lexis 3474 (Sup. Ct. N.Y. Co. Aug. 6, 2013).]

Late Notice Dooms Coverage For Pollution Liability Claims Asserted Against City

The City of San Diego asked its insurer, Indian Harbor Insurance Company, to defend and to indemnify it against three pollution liability claims under a pollution and remediation legal liability policy with a New York choice-of-law provision. The insurance company disclaimed because the City had not given it notice of the claims "as soon as practicable." The court upheld the disclaimer and held that New York's common law no-prejudice rule applied because New York's late notice prejudice statute only applies to policies issued in New York on or after January 17, 2009, and the policy was issued in California. [*Indian Harbor Ins. Co. v. City of San Diego*, 2013 U.S. Dist. Lexis 137873 (S.D.N.Y. 2013).]

Late Notice Dooms Lawyer's Bid For Malpractice Coverage

A lawyer filed suit against the alleged owner of property on which the lawyer's client was injured. After the statute of limitations expired, the lawyer learned that he failed to sue the correct owner of the property, but the lawyer did not notify his malpractice insurer of a potential claim for about eight more months, after the client's case was dismissed. The court found that the lawyer failed to timely comply with his policy's "notice of circumstance" clause, precluding coverage for the ensuing malpractice action against the lawyer and his firm. [*Property & Cas. Ins. Co. of Hartford v. Levitsky*, 110 A.D.3d 503 (1st Dep't 2013).]

COVERAGE GRANT

Lead Paint Claims By Two Different Families Deemed One Occurrence

Children from two different families lived in the same apartment in a building in Rochester at different times, less than a year apart, and claimed that they had been exposed to lead paint. The trial court found that there were two occurrences under the building owner's insurance policy subject to two limits, and the insurer appealed. The Appellate Division, Fourth Department, reversed, finding that "the only reasonable interpretation" of the policy was that the two claims should be classified as a single occurrence because they resulted from "continuous or repeated exposure to the same general conditions." [*Newsmith v. Allstate Ins. Co.*, 103 A.D.3d 190 (4th Dep't 2013).]

"Advertising Injury" Allegations Gave Rise To Primary CGL Insurer's Duty To Defend

Sebastian International sued Quality King Distributors alleging that it had illegally diverted, decoded and sold Sebastian products to pharmacies; distributed and sold counterfeit Sebastian products; and distributed and sold materials that infringed upon Sebastian's copyrights and trademarks. Sebastian also alleged that Quality King sold diverted Sebastian products to consumers over the internet. Quality King's umbrella insurer, National Union, sought a declaration that it was not obligated to defend and indemnify Quality King. The court granted National Union's motion for summary judgment, finding that Quality King first had to look to its primary commercial general liability policies issued by Continental Casualty Company, that provided coverage for advertising injury arising out of the "use of another's advertising idea in your advertisement" or from the infringement of "another's copyright, trade dress or slogan," before it could seek coverage under National Union's umbrella policy, and that the Continental Casualty policy had not yet been exhausted. [*Continental Cas. Co. v. Quality King Distribs., Inc.*, 2013 N.Y. Misc. Lexis 1045 (Sup. Ct. N.Y. Co. Mar. 1, 2013).]

Damage To Insured's Work Is Not An "Occurrence," Court Rules

After Rosewood Home Builders built a house for Wilfred Burgett, Burgett sued Rosewood and obtained an award of damages stemming from the faulty construction of the house. Rosewood's insurer asserted that Burgett's damages were not covered by the policy it had issued to Rosewood. A federal district court in New York agreed with the insurer, finding that the property damage to the house was not caused by an "occurrence," because it was damage to the insured's work product, not a third person or property. [*Rosewood Home Builders, LLC v. National Fire & Marine Ins. Co.*, 2013 U.S. Dist. Lexis 45374 (N.D.N.Y. 2013).]

Alleged Sexual Abuse By Priest Over Several Years At Multiple Locations Constituted Multiple Occurrences

The New York Court of Appeals has held that incidents of alleged sexual abuse of a minor by a priest that allegedly spanned several years and several policy periods, and that allegedly took place in different locations, constituted multiple occurrences. It also ruled that any potential liability should be apportioned among the various insurance policies, *pro rata*. [*Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 21 N.Y.3d 139 (2013).]

Excess Coverage Triggered When Payments Reached Attachment Point, Not When Liability Accrued, Second Circuit Holds

Former directors and officers of Commodore International Limited argued that two excess insurers' coverage obligations were triggered once the total amount of their defense and/or indemnity *obligations* exceeded the limits of any underlying insurance policies. The court

rejected that argument and ruled that the plain language of the excess insurance policies required the "payment of losses" - not merely the accrual of liability - to trigger the excess coverage. [*Ali v. Federal Ins. Co*., 719 F.3d 83 (2d Cir. 2013).]

No Coverage For Known Property Damage

There was no coverage under a general liability policy for certain underlying actions where, "[p]rior to the policy period," the insured knew about the alleged property damage to neighboring buildings caused by construction work performed on the insured's Manhattan garage. [*S.T.A. Parking Corp. v. Lancer Ins. Co*., 110 A.D.3d 512 (1st Dep't 2013).]

EXCLUSIONS

Verdict In Negligence Suit Did Not Preclude Application Of Intended Bodily Injury Exclusion In Coverage Case

After his car was struck by a vehicle driven by Edmund Schwartz, Walter Dreyer allegedly intentionally drove his vehicle into Schwartz. Schwartz sued Dreyer, asserting negligence and intentional tort causes of action. Only the negligence claim was submitted to the jury, and a judgment was entered against Dreyer. Dreyer argued that his insurer was obligated to indemnify him. The court found that the insurer had raised a triable issue of fact as to whether the claim fell within the exclusion for "intentional" bodily injury and that the jury's negligence verdict did not preclude application of the exclusion. [*Dreyer v. New York Central Mut. Fire Ins. Co*., 106 A.D.3d 685 (2d Dep't 2013).]

Exclusion Barred Coverage For Claims In Contractor's Personal Injury Action

Joseph J. Mondone Jr. was injured while working as an electrical contractor at a residential construction project, and he sued another contractor on the project. The court held that Essex Insurance Company was not required to defend or to indemnify the other contractor because of an exclusion for injury sustained by "any contractor, self-employed contractor, and/or subcontractor, or any employee, leased worker, temporary worker or volunteer help of same." The court explained that because the items in the exclusion were listed in the disjunctive, if any one of them applied (as it did), the exclusion was triggered. [*Essex Ins. Co. v. Mondone*, 106 A.D.3d 1045 (2d Dep't 2013).]

Policy's Employee Exclusion Barred Coverage In Construction Case

After a contractor's employee sued to recover for personal injuries sustained while working on a construction project, the owner and property manager tendered their defense to the contractor's insurer. The court upheld the insurer's disclaimer, reasoning that the policy excluded coverage for damages arising out of bodily injury sustained by an employee of "any insured" in the course of employment. The court also found that the additional exclusions in the blanket additional insured endorsement did not alter the policy's exclusions. [*Soho Plaza Corp. v. Birnbaum*, 108 A.D.3d 518 (2d Dep't 2013).]

Wrongful Death Claims Barred By Policy Exclusion For Liability For Bodily Injuries Sustained By Insured

Randall and Margaret Courtney died when their farm tractor, operated by Mr. Courtney, flipped over in a wooded area on their property. The administrators of Ms. Courtney's estate sued the administrator of Mr. Courtney's estate, who tendered the defense to the Courtneys' homeowners insurer. The insurer disclaimed, maintaining that the policy excluded coverage for liability for bodily injuries sustained by a named insured, Ms. Courtney. The administrators of her estate countered that the exclusion did not apply to their wrongful death claim, which constituted an independent injury directly sustained by the decedent's distributees. The court rejected that argument. It ruled that the wrongful death claim was barred by the policy's exclusion for liability for bodily injuries sustained by an insured, reasoning that the wrongful death claim stemmed solely from the bodily injury to an insured, which the policy defined to include death. [*Matter of Estate of Courtney v. Dryden Mut. Ins. Co*., 41 Misc.3d 721 (Sup. Ct. Cortland Co. Sept. 24, 2013).]

Lead Exclusion Added To Landlord's Policy At Renewal Deemed Enforceable

The owner of a home who was sued by a tenant for bodily injury allegedly sustained as a result of lead poisoning sought coverage under his landlord's insurance policy. The insurer maintained that a lead exclusion added to the policy after it initially had been written excluded coverage for the tenant's claims. The court agreed with the insurer, finding that the exclusion had been properly added to the policy and that the insured had been notified of the amendment. [*Preferred Mut. Ins. Co. v. Donnelly*, 111 A.D.3d 1242 (4th Dep't 2013).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Pedestrian Bit By Dog In Parked Car May Recover Underinsured Motorist Benefits

A dog in a car parked in a "No Parking" zone reached out of the rear window, which had been partially left open, and bit a woman walking to her car. The woman sought underinsured motorist benefits from her automobile insurer, which argued that the incident did not arise out of the use of an underinsured vehicle. The court disagreed with the insurer and ruled that the benefits were available. [*Allstate Ins. Co. v. Reyes*, 38 Misc.2d 478 (Sup. Ct. Dutchess Co. Dec. 10, 2012).]

Court, Not Arbitrator, Must Decide Whether Accident Involved An Uninsured Motorist

After Alexander Aizin was involved in a motor vehicle accident, he sought arbitration of his claim against his automobile insurer for uninsured motorist benefits. The insurer moved for a stay of arbitration, arguing that, based upon the police accident report, Aizin was not involved in a motor vehicle accident involving an uninsured motorist because both of the other vehicles had insurance coverage. Aizin contended that there had been a fourth vehicle involved in the accident that had struck his vehicle and left the scene. The court ruled that the issue of whether there was physical contact with Aizin's vehicle by a hit-and-run vehicle was to be determined by the court, not an arbitrator, and it ordered a hearing on that issue. [*Matter of Allstate Ins. Co. v. Aizin*, 102 A.D.3d 679 (2d Dep't 2013).]

Insured's Failure To Appear At EUOs Dooms Provider's Suit For Assigned First-Party No-Fault Benefits

After a healthcare provider sued an insurer to recover assigned first-party no-fault benefits, the insurer moved to dismiss on the ground that its insured had not appeared at scheduled examinations under oath ("EUOs"). The trial court ruled for the insurer and the provider appealed. The appellate court affirmed, finding that the insurer had demonstrated that its insured had failed to appear at the duly scheduled EUOs and, therefore, had failed to satisfy a condition precedent to coverage. [*Flatlands Med., P.C. v. State Farm Mut. Auto. Ins. Co*., 38 Misc.3d 133(A) (App. Term 2d Dep't January 14, 2013).]

Insured's Settlement Without Insurer's Consent Dooms Her Claim For Uninsured Motorist Benefits

An individual who alleged that she had been injured when a car hit her while she was riding a bicycle settled with the driver and the driver's insurer and filed a claim for underinsured motorist ("UM") benefits with her own insurer. The insurer disclaimed coverage, maintaining that the insured had violated the policy by failing to obtain its consent prior to settling the underlying personal injury action, and that its rights had been impaired and prejudiced as a result. The court ruled in favor of the insurer, holding that the insured was precluded from asserting a claim for UM benefits under the policy. [*Matter of Travelers Home & Mar. Ins. Co. v. Kanner*, 103 A.D.3d 736 (2d Dep't 2013).]

Failure To Produce Witness At EUO Dooms Coverage, Even If Notice Improperly Requested Specific Person

Utica Mutual Insurance Company denied claims for no-fault benefits submitted by New Century Medical Diagnostics, P.C., based upon New Century's failure to appear at its scheduled examination under oath ("EUO"). New Century sued, contending that the EUO notices were defective because they sought the production of a specific individual. The court ruled in favor of Utica, explaining that even if New Century could not be required to produce a specific person at an EUO, its failure to produce any person permitted Utica to deny its claims. [*New Century Med. Diagnostics, P.C. v. Utica Mut. Ins. Co*., 40 Misc.3d 788 (N.Y. Civ. Ct. N.Y. Co. 2013).]

Appellate Court Upholds Jury Decision Finding Health Care Provider's Fraudulent Incorporation

The Appellate Term, Second Department, upheld a jury verdict finding that a health care provider was ineligible to recover $18 million in no-fault insurance benefits because it was fraudulently incorporated. The appellate court found "ample evidence" that the provider failed to comply with New York State's requirement that professional corporations be owned and controlled solely by licensed professionals, explaining that the insurance carriers had demonstrated that non-physicians had control over the hiring of office employees, management of the offices, and administration of the billing; manipulated the provider's financial accounts; and permitted excessive charges for various rentals. [*Andrew Carothers, M.D., P.C. v. Progressive Ins. Co*., 2013 N.Y. Misc. Lexis 2883 (App. Term 2d Dep't July 5, 2013).

Relative's Policy Did Not Provide SUM Benefits For Claimant Where Policy Did Not Cover Claimant's Car

Maria Avelar was in a car accident in her own car and filed a claim for supplementary uninsured/underinsured ("SUM") motorist benefits under a policy issued by GEICO to a relative with whom Ms. Avelar lived. Although Ms. Avelar was an "insured" under the policy, her car was not covered. The court held that Ms. Avelar could not obtain SUM benefits because the policy excluded compensation for bodily injuries sustained by an insured while occupying a motor vehicle he or she owned that was not covered under the policy. [*Matter of Government Employees Ins. Co. v. Avelar*, 108 A.D.3d 672 (2d Dep't 2013).

Court Says Default Declaration Judgment Against Provider Bars Subsequent Suit Against Insurer To Recover Assigned No-Fault Benefits

A medical provider sued an insurer to recover assigned first-party no-fault benefits for injuries its assignor allegedly sustained in a motor vehicle accident. The insurer previously brought a declaratory judgment action against the provider and its assignor with respect to this accident and others, and a default declaratory judgment was entered in the insurer's favor. The insurer moved for summary judgment in the provider's action, and the court granted the motion, finding that the default declaratory judgment against the provider should be given *res judicata* effect. [*Eagle Surgical Supply, Inc. v. AIG*

Indem. Ins. Co., 40 Misc.3d 139(A) (App. Term 2d Dep't Aug. 21, 2013).]

No Coverage For Actions Filed After Camp Counselor's Off-Site Accident

A camp counselor and five campers that the counselor was driving in her car to a site outside the camp were involved in an accident and killed. The camp's insurer sought a judgment declaring that it had no duty to defend or to indemnify any person or entity in the resulting lawsuits. The court granted the insurer's motion for summary judgment on several grounds. First, the court found that the policy's auto exclusion precluded coverage because the underlying actions alleged bodily injury arising out of the use of any auto owned or operated by "any insured". The court explained that the counselor was an insured as defined by the camp's policy because the underlying complaints alleged that she was an "employee," and that the negligent supervision and entrustment claims against the camp necessarily fell with the scope of the exclusion. Second, the court held that the policy's transportation exclusion precluded coverage, rejecting the camp's argument that another exclusion in the policy rendered it ambiguous. The court stressed that "[e]xclusions in policies of insurance must be read *seriatim,* not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another." Finally, the court upheld the policy's limitation of coverage to bodily injury "arising out of … [t]he ownership, maintenance or use of the premises shown in the schedule and operations necessary or incidental to those premises," reasoning that the "plain language of the premises limitation clearly limits coverage to the camp's premises," thereby precluding any duty to defend or to indemnify any person or entity in connection with claims arising out of the off-site accident. [*Tudor Ins. Co. v. Golovunin*, 2013 U.S. Dist. Lexis 140186 (E.D.N.Y. 2013).]

Court Rejects Insured's Efforts To Vacate Arbitrator's Award

A person injured in an automobile accident was awarded a $25,000 default judgment against the owner and driver of an uninsured vehicle. In turn, the injured person obtained and then sought to vacate a $10,000 arbitration award she obtained under a policy providing $25,000 in supplementary uninsured motorist ("SUM") coverage. The Appellate Division, Second Department held that the trial court erred in vacating the award on the ground that it was contradicted by the SUM endorsement because judicial review of arbitration awards is "extremely limited," and there was nothing to indicate that the award "violated strong public policy, was irrational, or clearly exceeded" the arbitrator's power. [*Matter of Aftor v. Geico Ins. Co.*, 110 A.D.3d 1062 (2d Dep't 2013).]

Insured's Failure To Prove Physical Contact With Unidentified Hit-And-Run Vehicle Dooms SUM Claim

A bicycle rider alleged that he was injured in a hit-and-run accident involving an unidentified car in a parking lot and sought supplementary uninsured/underinsured motorist benefits under his own automobile insurance policy. The trial court ruled in favor of the insured, but the Appellate Division, Second Department, reversed. The appellate court decided that the insured had not demonstrated that his alleged loss had been caused by physical contact with an unidentified hit-and-run vehicle, noting that he had told the hospital that he had flown off his bicycle and had landed on a parked vehicle. [*Matter of Progressive Specialty Ins. Co. v. Lubeck*, 111 A.D.3d 947 (2d Dep't 2013).]

FIRST PARTY PROPERTY

Second Circuit Asks New York Court Of Appeals To Decide: What Is "Vandalism"?

The U.S. Court of Appeals for the Second Circuit has certified the following question to the New York Court of Appeals: "For purposes of construing a property insurance policy covering acts of vandalism, may malicious damage be found to result from an act not directed specifically at the covered property? If so, what state of mind is required?" [*Georgitsi Realty, LLC v. Penn-Star Ins. Co.*, 702 F.3d 152 (2d Cir. 2012).]

Mortgagees No Longer Have Insurable Interest In Property After Satisfaction Of Mortgage

The plaintiffs retained a purchase money mortgage after they sold property to Irving Development Corp. Irving obtained insurance for the property, naming the plaintiffs as mortgagees. Irving defaulted on the mortgage and executed a deed in lieu of foreclosure transferring the property to a company owned by plaintiffs, and the plaintiffs executed a release. The plaintiffs asserted that they then discovered that the property had suffered water damage. The court ruled that as a result of the satisfaction of the mortgage debt, the plaintiffs lacked any insurable interest in the property and could not recover under the policy's mortgagee loss payable clause. [*Burke v. State Farm Fire & Cas. Co.*, 105 A.D.3d 794 (2d Dep't 2013).]

Claim Barred By Rain And "Back Up Or Overflow" Exclusions

The Consulate General of Lebanon claimed that its Manhattan property suffered water damage from rain because debris became lodged in the drain system at the premises. The court found that the policy's rain exclusion precluded property coverage because the rain did not enter through a covered loss to the "roof or walls". The court also applied the exclusion for "water

that backs up or overflows from a sewer, drain or sump," finding that the damage was caused by an overflow resulting from a blockage in the plumbing system. [*Consulate General of Lebanon v. Hermitage Ins. Co.*, 2013 WL 1874361 (Sup. Ct. N.Y. Co. April 30, 2013).

No Coverage Where Insured Failed To Establish That Terrace's Decay Was "Hidden"

The owner of an apartment building sought coverage for a terrace that collapsed. The owner's multi-peril policy covered direct physical loss caused by "hidden decay." The court held that coverage was unavailable because signs of decay had been "plainly visible." [*6 Montague LLC v. New Hampshire Ins. Co.*, 2013 N.Y. Misc. Lexis 3379 (Sup. Ct. N.Y. Co. July 30, 2013).]

Water Exclusion Endorsement Precluded Coverage For Damage To Building

After an underground water supply line to a commercial building ruptured and the water washed away soil adjacent to the building, a section of the building's concrete block foundation wall fell inward, permitting water, mud, and debris to enter the basement. The court found that coverage for the loss was excluded by the policy's "Water Exclusion Endorsement." [*Harleysville Ins. Co. of N.Y. v Potamianos Props., LLC*, 108 A.D.3d 110 (4th Dep't 2013).]

Second Circuit Asks New York Court Of Appeals to Decide If Fire Insurance Policy's Apportionment-Of-Loss Clause Is Enforceable

The Second Circuit Court of Appeals has certified a question to the New York Court of Appeals, requesting that it determine whether an apportionment-of-loss clause in a fire insurance policy that reduces the insurance carrier's total liability to a percentage of a covered loss is enforceable under New York law. [*Quaker Hills, LLC v. Pacific Indemn. Co.*, 728 F.3d 171 (2d Cir. 2013).]

Appellate Court Finds No Coverage For Post-Fire Asbestos Remediation Costs

After a fire damaged a building owned by Conley & Tibbitts Properties, LLC, a survey found asbestos, which New York required Conley to remediate. Conley's insurer denied coverage for the asbestos removal, and Conley sued. The court upheld the disclaimer, reasoning that the policy excluded coverage for increased costs caused by the enforcement of a state code, notwithstanding any "other concurrent or subsequent contributing cause or event." [*Conley & Tibbitts Props., LLC v. Leatherstocking Coop. Ins. Co.*, 109 A.D.3d 1198 (4th Dep't 2013).]

New York's Top Court Answers Two Certified Questions About "Vandalism"

The walls and foundation of the insured's building allegedly cracked as a result of the acts of an allegedly irresponsible excavator working on neighboring property. In response to two questions certified by the Second Circuit, the New York Court of Appeals ruled that (1) a property insurance policy covering direct physical loss or damage from "vandalism," *i.e.*, "willful and malicious damage," may be triggered by acts not directed specifically at the covered property, and (2) to obtain such coverage, the insured must show the perpetrator acted with malice, which the Court defined as such a conscious and deliberate disregard of the interests of others that the conduct in question may be called "willful or wanton." [*Georgitsi Realty, LLC v. Penn-Star Ins. Co.*, 21 N.Y.3d 606 (2013).]

WAIVER/ESTOPPEL/3420(d)

Insurer Rebuts Presumption That It Received A Copy of Default Judgment Against Its Insured

The plaintiff sued Allstate Insurance Company in a direct action to satisfy a default judgment he obtained against Allstate's insured in a personal injury action. The plaintiff alleged that the day after the judgment, his attorney mailed a copy to Allstate and that Allstate's disclaimer was untimely. The trial court denied the plaintiff's motion for summary judgment, and he appealed. The appellate court affirmed. It found that Allstate had rebutted the presumption that it had received a copy of the default judgment by submitting an affidavit by its claims examiner detailing Allstate's mail-handling and record-keeping procedures and denying that Allstate received a copy of the judgment or any notice of the underlying action until it was served with process in the direct action. [*Brito v. Allstate Ins. Co.*, 102 A.D.3d 477 (1st Dep't 2013).]

Section 3420(d) Deemed Inapplicable To Insurer's Claim For Past Defense Costs

A garage employee parking a vehicle allegedly ran over someone who sued the garage and its employee. The garage's insurer placed the vehicle owner's insurer on notice, and the vehicle owner's insurer disclaimed 15 months later based upon various exclusions. The Appellate Division, First Department, held that the disclaimer was untimely and, thus, ineffective as to the garage and its employee's claim for defense and indemnity. However, the disclaimer was upheld as to the garage insurer's claim for past defense costs. [*Greater N.Y. Mut. Ins. Co. v. Chubb Indem. Ins. Co.*, 105 A.D.3d 523 (1st Dep't 2013).]

Insurer's Disclaimer 21 Days After Learning Of Ground For Disclaimer Was Timely

Martin Enoe was sued and tendered the defense to his insurer, Quincy Mutual Fire Insurance Company. Twenty-one days after Quincy was notified by its investigator that Enoe did not live in the same residence as the plaintiffs in the underlying action, it issued a disclaimer. The court found the disclaimer was timely as a matter of law, explaining that Quincy's receipt of the information from its investigator was

necessary for it to determine whether Enoe was entitled to coverage under an exception to the lead-paint exclusion in his insurance policy. [*Quincy Mut. Fire Ins. Co. v. Enoe*, 107 A.D.3d 775 (2d Cir. 2013).]

Insurer That Defended Under A Disclaimer Is Not Estopped From Asserting Additional Grounds For Non-Coverage

Angel Williams sued Emery G. Bulluck, Jr., for negligence. Bulluck's insurer disclaimed coverage but provided a defense. Williams and Bulluck settled and then sued the insurer. Following depositions, the insurer sought to amend its answer to add affirmative defenses not raised in the disclaimer. The Appellate Division, Fourth Department, held that the insurer was not estopped from asserting the additional grounds, explaining that Bulluck could not prove that he detrimentally relied upon coverage because the insurer had provided a defense and expressly reserved its right to assert further grounds for non-coverage in its disclaimer. [*Williams v. New York Cent. Mut. Fire Ins. Co.*, 108 A.D.3d 1112 (4th Dep't 2013).]

Appellate Court Finds Issues Of Fact As To Insurer's Delay In Issuing A Disclaimer

A trial court ruled that an insurer was obligated to defend and indemnify a contractor for an underlying personal injury action, deciding that the insurer's disclaimer was untimely. The appellate court held that the trial court properly found the late notice disclaimer ineffective, but concluded that there were issues of fact with respect to the timeliness of the insurer's disclaimer based upon an exclusion in the policy. The court opined that a trier of fact had to determine whether the insurer reasonably delayed issuing its disclaimer during its investigation into the applicability of the exclusion. [*Quality Bldg. Contr., Inc. v. Delos Ins. Co.*, 110 A.D.3d 505 (1st Dep't 2013).]

Court Rules Reservation Of Rights Did Not Satisfy Insurer's Timely Disclaimer Obligation

In 2006, the insurer reserved rights as to the insured's claim for coverage for an accident, but the insurer did not disclaim until 2009, one year after its insured was sued and the insurer was provided with a copy of the complaint. The insurer maintained that its duty to disclaim was not triggered until it received the complaint. The Appellate Division, First Department, held that the disclaimer was late, stating that the insured had an obligation to disclaim as soon as reasonably possible after it had "sufficient knowledge of facts entitling it to disclaim" and that, even assuming the duty to disclaim was not triggered until it received the complaint, the insurer failed to explain why it did not disclaim until one year later. The court rejected the insurer's contention that its reservation of rights letter was sufficient as it "failed the essential purpose of a disclaimer: to timely and clearly inform the insured of where the insurer stands on the issue of coverage for the action, and why, so that the insured can promptly consider appropriate alternatives." [*Hartford Underwriting Ins. Co. v. Greenman-Pederson, Inc.*, 111 A.D.3d 562 (1st Dep't 2013).]

BAD FAITH/EXTRA-CONTRACTUAL

Court Dismisses Insured's GBL § 349 Claim Against Its Insurer In Absence Of Allegations Of "Consumer-Oriented" Misconduct

After the Colgate-Palmolive Company was sued for injuries allegedly arising out of exposure to asbestos in its talc products, its insurance company disclaimed and brought a declaratory judgment action. Colgate-Palmolive asserted a counterclaim against the insurer under New York General Business Law § 349, which generally prohibits "[d]eceptive acts or practices" in consumer-oriented transactions. The court dismissed the claim, reasoning that it did "not present the type of consumer-oriented misconduct the statute was enacted to prevent." [*OneBeacon America Ins. Co. v. Colgate-Palmolive Co.*, 2013 N.Y. Misc. Lexis 5151 (Sup.Ct. N.Y. Co. Nov. 1, 2013).]

MISCELLANEOUS

Fraud Vitiates Coverage Under Art Policy, Court Rules

Renaissance Art Investors, LLC, argued that a fraud exclusion in art policies issued by AXA Art Insurance Corporation did not bar coverage for its claim despite allegations that one of its principals had engaged in fraud because it believed that it was purchasing "all-risk comprehensive coverage that included coverage for fraud. The court disagreed, stressing that, as a matter of law, insurance coverage, even under an all-risk policy, extends only to fortuitous losses. [*Renaissance Art Invs., LLC v. AXA Art Ins. Corp.*, 102 A.D.3d 604 (1st Dep't 2013).

Court Finds Issue Of Fact As To Reasonableness Of Allocating Asbestos Settlement To Reinsurer

An insurance company settled asbestos claims against its insured and sought reimbursement from its reinsurer. The New York Court of Appeals held that the cedent insurer's allocation of a settlement for reinsurance purposes is binding upon a reinsurer if reasonable, but that "consistency with the allocation used in settling the underlying claim does not by itself establish reasonableness." In this case, the Court ruled there was an issue of fact as to the reasonableness of the allocation. [*United States Fidelity & Guaranty Company v. American Re-Insurance Co.*, 20 N.Y.3d 407 (2013).]

Whether Life Insurance Beneficiaries Forfeited Proceeds By Murdering Insured To Be Determined At Trial

After two insurers were sued for the proceeds of two life insurance policies, they asserted that the policies had been

obtained based upon a scheme to murder the deceased and/or that the deceased made false representations in applying for the policies. The court found that the issue of whether the primary beneficiaries had murdered the deceased and thus had forfeited their rights to the insurance proceeds had to be determined at trial. [*Ganelina v. Public Adm'r, N.Y. Co.*, 39 Misc.3d 952 (Sup. Ct. N.Y. Co. Mar. 28, 2013).]

Claims Against Lawyer Were Not All Related For Purposes Of His Malpractice Policy

A lawyer was sued for malpractice by clients who alleged that they were defrauded by financial advisors to whom they had been referred by the lawyer. The court found "substantial differences" between the alleged victims, including the amounts of their claims and the fact that the financial advisor who allegedly committed the fraud was not the same in each case, and ruled that they were not the "same and/or related" for purposes of triggering the lawyer's "claims-made" professional liability policy. [*American Guar. & Liab. Ins. Co. v. Chicago Ins. Co.*, 105 A.D.3d 655 (1st Dep't 2013).]

New York's Highest Court Holds That Liability Insurer That Breached Duty To Defend Must Indemnify Insured For Judgment, Even If Policy Exclusions Would Have Negated Duty To Indemnify

The New York Court of Appeals has ruled that, when a liability insurer has breached its duty to defend, it "must indemnify its insured for the resulting judgment, even if policy exclusions would otherwise have negated the duty to indemnify." The Court said that it adopted this rule to "give insurers an incentive to defend the cases they are bound by law to defend," and suggested that an insurer may be "well advised" to file a declaratory judgment action where "coverage may be arguable." The Court, however, affirmed the dismissal of claims against the insurer for alleged bad faith failure to settle within policy limits, explaining that an insurer's rejection of a settlement offer for less than the full amount of its policy "does not by itself establish the insurer's bad faith, even when the insured later suffers a judgment greater than the policy limit." Instead, a "bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted." [*K2 Inv. Group, LLC v. American Guar. & Liab. Ins. Co.*, 21 N.Y.3d 384 (2013).]

Collateral Estoppel Did Not Bar State's Environmental Suit Against Property Owner's Insurer

The New York Department of Environmental Conservation ordered a property owner to clean up petroleum discharges from its underground storage tanks. The company sued its insurer for coverage, and the court ruled in favor of the insurer. The State then sued the insurer under Navigation Law § 190, seeking reimbursement of expenses it incurred in cleaning up the property. The court found that the complaint was not barred by collateral estoppel because the State was not "in privity" with the property owner, and § 190 gave the State the right to commence a direct action against the insurer which was independent of its right to indemnification against the property owner. [*State of New York v. Zurich Am. Ins. Co.*, 106 A.D.3d 1222 (3d Dep't 2013).]

N.Y. Court Of Appeals Reinstates Bear Stearns' Complaint For Indemnification Of "Disgorgement Payment"

After Bear Stearns settled "late trading" and "market timing" charges with the Securities and Exchange Commission, it sought indemnification from its professional liability and excess insurers for what the SEC had characterized as a "disgorgement payment." Bear Stearns alleged that a substantial portion of the payment represented illicit profits obtained by its customers rather than gains enjoyed by Bear Stearns. The Appellate Division held that coverage was barred as a matter of public policy because Bear Stearns' settlement was "specifically linked" to Bear Stearns' improperly acquired funds, as opposed to profits that flowed to its customers. The New York Court of Appeals reversed and reinstated the complaint, ruling that on the "limited record," it could not say that the public policy bar for intentionally harmful conduct applied to preclude Bear Stearns' claims for coverage. The Court reasoned that, "at this early juncture" of the litigation, the documentary evidence did not "decisively repudiate" Bear Stearns' contention that the payment amount had been calculated in large measure on the profits of others. [*J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324 (2013).]

New York's Highest Court Grants Reargument In Controversial K2 Case

The New York Court of Appeals has agreed to hear reargument of the controversial decision in which it held that "when a liability insurer has breached its duty to defend its insured, the insurer may not later rely on policy exclusions to escape its duty to indemnify the insured for a judgment against him." The Court of Appeals rarely hears reargument. In the application to reargue, the moving parties stressed the inconsistency between that ruling and an older one in which the Court permitted an insurer to raise exclusions as a defense to indemnity even though the insurer had breached the duty to defend. Reargument is not expected to take place until early 2014. [*K2 Inv. Group, LLC v. American Guar. & Liab. Ins. Co.*, 21 N.Y.3d 384 (2013).]

Finding That Texas Law Applied Under New York's Choice Of Law Rules, Court Dismisses Action Against Insurers

Lapolla Industries filed an action in a federal district court in New York seeking a declaration that its insurers were obligated to defend and indemnify it in connection with a personal injury action pending in that court. The insurers contended that Texas law applied and that their policies did not cover the action against Lapolla under Texas law. The court first observed that no single state was the location of the insured risk because the risks insured by the policies were worldwide and Lapolla had been sued in New York and in other jurisdictions. The court then ruled that Texas law governed, stressing that Lapolla's domicile was in Texas, and noting that the policies were issued there and referred specifically to Texas law. Under Texas law, it concluded, there was no coverage for the suit against Lapolla in New York. [*Lapolla Industries, Inc. v. Aspen Specialty Ins. Co.*, 2013 U.S. Dist. Lexis 71854 (E.D.N.Y. 2013).]

Computer System Fraud Rider Covers Hacking Damage, Not Alleged False Claims By Authorized Users

The Appellate Division, First Department found that the "unambiguous plain meaning" of a computer systems fraud rider, covering loss from a fraudulent "entry of electronic data" or "change of electronic data" within the insured's proprietary computer system, applied to wrongful acts in the manipulation of the computer system, *i.e.*, hacking. Thus, the rider did not provide coverage for allegedly fraudulent content in claims by *bona fide* doctors and others authorized to use the system for reimbursement for services allegedly not provided. [*Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 110 A.D.3d 434 (1st Dep't 2013).]

Jewelry Store's Policy Was Properly Cancelled For Its Failure To Pay A Monthly Premium Under A Premium Financing Agreement

The court found that the insurer properly cancelled a jewelry store's policy before the loss in accordance with the request of the premium finance company because the store had failed to pay a monthly premium. The court rejected the jewelry store's contention that the insurer should have "called upon" the premium finance company to see that the policy had remained in effect by drawing down the necessary sums for premiums, concluding that the premium finance agreement imposed no express requirement on the insurer to take such action. [*Honeymoon Diamonds v. International Jewelers Underwriters Agency Ltd.*, 111 A.D.3d 460 (1st Dep't 2013).]

2013 New York Insurance Coverage Law Compilation
is published by

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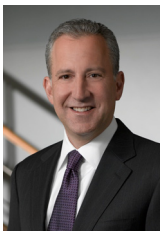

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