New York Insurance Coverage Law Update

2014 Compilation

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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 2014 Compilation

TABLE OF CONTENTS

Page

New York Insurance Coverage Law Update 2014 Compilation

Page

ADDITIONAL AND NAMED INSUREDS/CO-INSURANCE

Prior Property Manager Was Not Entitled To Coverage Under Owner's Policy

A person allegedly injured at a building in June 2007 sued the company that was the property manager from September 2002 through August 2006. The manager tendered its defense to the insurer that had issued a policy to the building owner effective from June 1, 2007 to June 1, 2008. The policy covered any organization "acting as the [owner's] real estate manager" for bodily injury "during the policy period" that is caused by an "occurrence." The court found that the insurer had no duty to defend or to indemnify the manager, holding that the policy only covered the "entity acting as the owner's real estate manager during the policy's effective dates and for 'occurrences' which occur within those dates." [*ABM Mgmt. Corp. v. Harleysville Worcester Ins. Co.*, 112 A.D.3d 763 (2d Dep't 2013).]

Second Circuit Finds Policy Issued To Hospital Was Excess To Policy Issued To Nurse

A nurse who worked at the Westchester Medical Center ("WMC") settled a medical malpractice suit. The court ruled that the policy that WMC had obtained for itself and its staff was excess to the nurse's professional liability policy because the WMC policy specifically provided that it was excess to any policy provided to a nurse, whether such other insurance is stated to be "primary, contingent [or] excess," while the nurse's policy provided that "other insurance must pay first" without an "explicit statement about its position with respect to other excess policies." [*WCHCC (Bermuda) Ltd. v. Granite State Ins. Co.*, 564 F. App'x 615 (2d Cir. 2014).]

Subcontractor Was Not An Employee Entitled To Coverage Under Plumbing Company's Policy, Court Declares

A plumber working for a plumbing company sought coverage for an underlying tort action from the plumbing company's insurer. The court found that the plumber was not entitled to coverage under that policy because it only covered the company's "employees" and he was a subcontractor rather than an employee. The court observed that the company did not provide the plumber with health insurance or other employee benefits, and did not withhold taxes or pay social security or unemployment taxes on his behalf. Moreover, the court added, the plumber determined his own hourly rate, submitted invoices to the company, received a Form 1099-MISC for miscellaneous income as opposed to a W-2 wage statement, and had his own liability coverage. [*Dryden Mut. Ins. Co. v. Goessl*, 117 A.D.3d 1512 (4th Dep't 2014).]

"Other Insurance" Clause Bars Primary OCPL Insurer's Contribution Claims Against Contractor's Other Carriers

Erie Painting & Maintenance, Inc. contracted with the New York State Thruway Authority to perform painting work. An Erie employee alleged that he was injured while working on the project, and he sued the Authority. Arch Insurance Company, which had issued a New York Owners and Contractors Protective Liability ("OCPL") Policy to the Authority at Erie's request, settled the claim and sought contribution from the insurer that issued a commercial general liability insurance policy to Erie and from the insurer that issued a commercial automobile policy to Erie. The Authority was named as an additional insured on both of those policies. The court ruled against Arch, stressing that its OCPL policy's "other insurance" clause provided that Arch's insurance was "primary insurance" and will not seek contribution from any other insurance available to Erie unless the insurance is provided by a contractor other than the "designated contractor." Because Erie was the designated contractor, the court concluded that Arch could not seek contribution. [*Arch Ins. Co. v. Harleysville Worcester Ins. Co.*, 2014 WL 3377124 (S.D.N.Y. July 7, 2014).]

Insured's Indemnification Obligation Did Not Create Insurance Coverage Where None Otherwise Existed, Court Finds

Claimant sued Boulder Creek and BIT Investment for injuries she allegedly sustained when she fell outside premises owned by BIT and leased to Boulder Creek. Boulder Creek asserted a cross-claim against BIT for contractual indemnity under the lease and sought coverage for the underlying action under BIT's insurance policy from BIT's insurer. The court granted the insurer's motion for summary judgment, agreeing that Boulder Creek was not entitled to coverage as it did not qualify as an additional insured under the policy, which limited such coverage to an organization "on file with the company." The court also found that any provision in the lease obligating BIT to indemnify Boulder Creek did "not create insurance coverage for Boulder Creek" where none otherwise existed. The court rejected Boulder Creek's argument that it was entitled to coverage by virtue of the "insured contract" exception to the contractual liability exclusion in BIT's policy, finding that the exception merely contemplates coverage to the insured (BIT) if BIT is found liable for contractual indemnity, and "in no way triggers a contractual obligation on the part of the insurer to defend a stranger to the insurance contract, that is, Boulder Creek." [*Boulder Creek of Riverhead, LLC v. Travelers Property Cas. Co. of America,* No. 20545/2012 (Sup. Ct. Suffolk Co. July 21, 2014).]

Contract Required Contractor To Obtain Liability Insurance On Property, Not To Name Owner As An Additional Insured

B.J. Muirhead agreed to provide maintenance services at a plant owned and operated by General Motors, and to obtain insurance for "liability arising from premises." After a Muirhead employee sued G.M. alleging that he had been injured by a dangerous condition at the plant, G.M. sued Muirhead for failing to obtain additional insured coverage protecting G.M. The court dismissed the complaint, finding that the agreement did not require that G.M. be named as an additional insured on Muirhead's policy. [*General Motors, LLC v. B.J. Muirhead Co., Inc.*, 2014 N.Y. Slip Op. 05720 (4th Dep't Aug. 8, 2014).]

CONDITIONS PRECEDENT/LATE NOTICE

Failure to Promptly Report Alleged Hit-and-Run Accident Dooms Driver's UIM Claim

A driver who alleged that he had been injured by a hit-and-run vehicle sought uninsured motorist ("UIM") benefits. The insurer disclaimed coverage and the driver demanded arbitration of his UIM claim. The Appellate Division, Second Department, permanently stayed the arbitration because the driver breached his policy by failing to report the alleged accident to the police or to the Commissioner of Motor Vehicles within 24 hours of the accident or as soon as reasonably possible thereafter. [*Matter of Government Employees Ins. Co. v. Bartlett*, 112 A.D.3d 826 (2d Dep't 2013).]

COVERAGE GRANT

No Coverage For Intentional Assault With A Metal Pipe, Even If Injuries Were Allegedly Unintended Or More Extensive Than Intended

The insured hit the claimant with a metal pipe, and a jury found that the insured engaged in an intentional assault. Contrary to his testimony before the trial court, the claimant argued that his injuries were not intended by the insured and were therefore a covered "occurrence," *i.e.,* an accident. The Appellate Division, First Department, rejected the argument, stressing that there is no coverage where "the harm to the victim was inherent in the nature of the act," and "the fact that the injuries may have been more extensive" than intended "does not negate the fact that this was an intentional assault." [*Empire Ins. Co. v. Miguel*, 114 A.D.3d 539 (1st Dep't 2014).]

No "Personal And Advertising Injury" Coverage For Alleged Violation Of Corporation's Right Of Privacy

A competitor sued the insured after it hired its employee. The insured sought coverage under the "personal and advertising injury" portions of its insurance policies, which covered the "[o]ral or written publication of material that violates a person's right of privacy." The insured contended that the misdeeds alleged in the underlying complaint broadly implicated the competitor's "right of privacy." The court rejected that argument, finding that the term "person" could not be construed to include a corporate entity. [*Sportsfield Specialties, Inc. v. Twin City Fire Ins. Co.*, 116 A.D.3d 1270 (3d Dep't 2014).]

Health Department Notification Deemed Prima Facie Evidence That Lead Paint Condition Had Been Abated Before Policy Period

An insured was sued for damages stemming from the claimant's alleged exposure to lead paint, and it sued its insurers. The court ruled that one insurer was entitled to summary judgment because a notification from the New York City Department of Mental Health and Hygiene was *prima facie* evidence that the lead paint condition had been abated before the insurer's policy period. [*Karen Manor Assoc. LLC v. Virginia Sur. Co., Inc.*, 116 A.D.3d 439 (1st Dep't 2014).]

"Occurrence" Does Not Include Faulty Construction That Only Damaged Insureds' Own Work, Court Explains

After a piece of the exterior wall on an office building under construction in New Jersey fell to the street, the building's owner sued the general contractor and the sub-contractor that had designed and was building the wall. The court ruled that the defendants' insurer was not obligated to cover the owner's claims because they did not amount to an "occurrence." It explained that, under both New York and New Jersey law, there was no occurrence where faulty construction only damaged the insureds' own work. The court rejected the defendants' argument that an amended definition of "occurrence" including an "accident, event or happening" encompassed faulty workmanship, concluding that the requirement of a "fortuitous loss" was a necessary element of a covered occurrence. [*Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Turner Constr. Co.*, 119 A.D.3d 103 (1st Dep't 2014).]

Court Rules State Attorney General's Letter And Federal Indictment Years Later Were Precluded Under D&O Policy

In November 2007, the Maryland Attorney General sent a letter to a vending machine sales company that requested that the company "cease all offers and sales of [its] business opportunity to Maryland residents." Nearly five years later, in October 2012, the company's president was indicted by a federal grand jury in connection with the company's sale of business opportunities. The insurer that had issued a D&O policy to the company for the 2010 to 2014 policy period declined to defend the president and he sued. The court found that the 2007 letter and the indictment arose from the same allegedly wrongful acts and amounted to one claim. Therefore, it concluded, the claim was

made prior to inception of the policy period and was not covered by the D&O policy. [*Weaver v. Axis Surplus Ins. Co.*, 2014 WL 5500667 (E.D.N.Y. Oct. 30, 2014).]

"Noncumulation Clause" Limits Insurer's Liability In Lead Paint Case, New York Court of Appeals Rules

The owner of a two-family house in upstate New York was sued by a family who lived in one of the apartments and by a family who subsequently moved into the same apartment, alleging that their children had been exposed to lead paint over several policy periods. The owner's insurer contended that, under the noncumulation clause in the policies it had issued to the owner, the families could recover no more than one policy limit. The noncumulation clause provided that "[r]egardless of the number of … injured persons, claims, claimants or policies involved," the insurer's total liability for one "accidental loss" is a single limit, and all bodily injury from continuous or repeated exposure to the same general conditions" is one "accidental loss." The New York Court of Appeals agreed with the insurer, finding that the injuries to the two families' children had resulted from their alleged exposure to the "same general conditions" and, therefore, were part of a single "accidental loss," subject to one policy limit. [*Nesmith v. Allstate Ins. Co.*, 2014 WL 6633553 (N.Y. Nov. 25, 2014).]

New York Federal Court Rejects Multiple Policy Limits In Lead Paint Case

A tenant sued an apartment building's owners, alleging that her son had been exposed to lead paint while living there over several policy periods. The parties settled for $809,000, and the owners' excess insurer argued that the three policies that covered the building during the time when the tenant and her son lived there should be applied, resulting in $900,000 of primary coverage. A New York federal district court rejected that argument, ruling that only a single $300,000 per occurrence limit applied. The policies contained a $300,000 per "occurrence" limit "regardless of the number of … claims made or persons injured," defined "occurrence" as an accident resulting in bodily injury "during the policy period," and provided that "all bodily injury from continuous or repeated exposure to substantially the same general harmful conditions" shall be considered one "occurrence." The court found that the tenant's son had suffered an injury from exposure to lead paint that "created a single occurrence," and the policies limited coverage to the per "occurrence" limit on the policy in place when that injury-in-fact had occurred, "even when the exposure is ongoing." The court concluded that the policy language "makes the exact date of the injury immaterial" because the "policies ensure that only one injury-in-fact occurred." [*Hanover Ins. Co. v. Vermont Mutual Ins. Co.*, 2014 WL 6387061 (N.D.N.Y. Nov. 14, 2014).]

DUTY TO DEFEND/INDEMNIFY

New York Court of Appeals Vacates *K2*, Rejecting "Automatic Indemnity" Where Insurer Breaches Duty to Defend

In *K2 Investment Group, LLC v. American Guarantee & Liability Ins. Co.*, the insurer breached its duty to defend, and a default judgment was entered against its insured. The New York Court of Appeals has vacated its controversial June 2013 decision in which it held that an insurer that breaches its duty to defend "must indemnify its insured for the resulting judgment, even if policy exclusions would otherwise have negated the duty to indemnify." The Court acknowledged that it had failed to take account of its controlling precedent in *Servidone Const. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419 (1985), in which it held that an insurer's breach of the broad duty to defend "does not create coverage" as "there can be no duty to indemnify unless there is first a covered loss." In *Servidone,* the Court of Appeals explained that the duty to defend is broader than the duty to indemnify because the duty to defend is generally triggered if the allegations of the complaint against the insured reflect a "possibility" of coverage whereas the duty to indemnify or pay is determined "not from the pleadings but from the actual facts." In vacating *K2*, the Court of Appeals has made clear that *Servidone* will continue to remain the law in New York.

Even though the insurer in *K2* breached the duty to defend, the Court held that it could rely upon policy exclusions to defeat any indemnity obligation. The Court recognized that an insurer will still have an incentive to defend where appropriate, including because its insured may default, and the insurer may not relitigate facts established against the insured in the underlying action. As such, the Court opined that it "continues to be sound advice" for an insurer to "seek a declaratory judgment concerning the duty to defend or indemnify" where "coverage may be arguable." Indeed, the insurer in *K2* was unable to challenge the amount of the default judgment against its insured. However, the facts necessary to resolve the policy exclusions were not resolved in the underlying action. The insurer's breach of the duty to defend did not result in a loss of the exclusions or "automatic indemnity" for the judgment. Instead, the Court concluded that there were questions of fact as to the application of the exclusions and, therefore, the claimants were not entitled to summary judgment as to indemnity. [*K2 Investment Group, LLC v. American Guarantee & Liability Ins. Co.*, 22 N.Y.3d 578 (2014).]

Court Finds No Duty To Defend Based Upon "Auto Business" Exclusion After Looking At Judicial Admissions Outside Underlying Complaint

Sam's Tires & Automotive, Inc., sent Clarence Riffle to deliver tires in a truck owned by its president, Jerry Rosato. Riffle struck a motorcycle operated by Kyle Wagner, who sued. Rosato's personal auto insurer, Travelers, defended Rosato, but disclaimed coverage to Riffle and Sam's Tires based upon the policy's "auto business" exclusion. The exclusion pre-cluded coverage for vehicles used in an "auto business," except for Rosato and his employees. Erie Insurance defended Riffle and Rosato under a business auto policy issued to Sam's Tires. The parties settled. Erie filed a DJ seeking a declaration that Travelers breached its obligation to defend and indemnify Riffle, and Travelers counter-claimed to enforce Rosato's

judgment against Riffle and Sam's Tires in the underlying action.

The court granted summary judgment in favor of Travelers. The court first rejected Erie's argument that Travelers' disclaimer was ineffective because it lacked the specificity required by New York Insurance Law § 3420(d), holding that the disclaimer "clearly invoked" the "auto business" exclusion. Then, the court held that Travelers had no duty to defend or to indemnify Riffle in the underlying action. The court observed that a court may look to limited material outside the "four corners" of the underlying complaint to determine whether a duty to defend exists, including "judicial admissions in pleadings and other submissions." Although the underlying complaint alleged that Riffle was employed by Rosato and/or Sam's Tires, this "ambiguity was clarified by the responsive pleadings, when Sam's Tires, Riffle and Rosato all admitted that Riffle was acting only on behalf of Sam's Tires at the time of the accident." Finally, the court held that Erie must pay to Travelers the judgment obtained by Rosato against Riffle and Sam's Tires in the underlying action and that the anti-subrogation doctrine was not a bar as Erie had argued. [*Erie Ins. Co. v. Travelers Property Cas. Co. of America,* 2014 WL 1341924 (N.D.N.Y. Apr. 4, 2014).]

Court Adopts *Pro Rata* Time On the Risk Allocation To Determine Parties' Indemnification Obligations

Keyspan Gas East Corporation asked a court to rule that Century Indemnity Company was obligated to indemnify it for environmental clean-up costs at two former manufactured gas plants. The court agreed with Century that it should apply a *pro rata* time on the risk allocation to determine Century's indemnification obligations. It ruled that the formula required the total costs for each site to be multiplied by "a fraction that has as its denominator the number of years in which injury-in-fact [property damage] was occurring and insurance was available, and as its numerator the number of years within that period when the insurance was in effect." The court added that for those periods where Keyspan had not purchased insurance when it was available, Keyspan would be allocated its *pro rata* share. The court also ruled that Keyspan was "self-insured" and had to bear the *pro rata* share of costs for the period between 1971 and 1982 when New York law required a pollution exclusion in liability policies to "assure that corporate polluters bear the full burden" of their actions. *[Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.,* 2014 N.Y. Slip Op. 24306 (Sup. Ct. N.Y. Co. Oct. 17, 2014).]

EXCLUSIONS

Second Circuit Upholds Disclaimer That Incorrectly Quoted Assault-and-Battery Exclusion

After an insured was sued, his insurer sought a declaration that it was not obligated to defend or indemnify him. The court upheld the insurer's disclaimer, finding that the policy's assault-and-battery exclusion barred coverage because the action against the insured would not have arisen "but for" the alleged assault. The court also decided that the insurer's disclaimer was sufficient even though it may have quoted an earlier version of the exclusion, reasoning that the disclaimer gave "sufficient notice of the particular language" on which the insurer relied to disclaim coverage. [*Atlantic Casualty Ins. Co. v. Coffey*, 548 F. App'x 661 (2d Cir. 2013).]

"Dishonest Acts Exclusion" Does Not Bar Coverage Of Insured's Settlement Of Administrative Proceedings, Court Rules

Without admitting or denying fault, Bear Stearns reached monetary settlements of Securities and Exchange Commission and New York Stock Exchange administrative proceedings and related private litigation predicated upon allegations that Bear Stearns had facilitated its customers' deceptive market timing and late trading activities. Bear Stearns sought coverage for the settlement costs under its professional liability insurance policies. The insurers contended that the policies' dishonest acts exclusion barred coverage, but the court disagreed. The court concluded that the settlements did not constitute a "judgment or other final adjudication" in the underlying proceedings establishing that Bear Stearns was "guilty" of the excluded conduct, as necessary for the exclusion to apply. [*J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 42 Misc. 3d 1230(A) (Sup. Ct. N.Y. Co. Feb. 28, 2014).]

"Roofing Operations" Exclusion Barred Coverage Even Though Worker Alleged He Was Injured While Working On Only Part Of Roof

A worker who alleged that he was injured while working on a roof sued the contractor. The contractor's insurer denied coverage based upon the policy's "roofing operations" exclusion. The worker and contractor argued that the exclusion did not apply because the worker was only replacing a portion of the roof. The court ruled in favor of the insurer, finding nothing that limited the exclusion to projects involving the replacement or re-covering of an entire roof. [*Utica First Ins. Co. v. Mumpus Restorations, Inc.,* 115 A.D.3d 938 (2d Dep't 2014).]

"Employer's Liability" Exclusion Bars Coverage For Additional Insureds For Suit By Insured's Employee

A trade contractor on a construction project in Brooklyn was insured under a policy that added other parties to the project as additional insureds. An employee of the contractor was allegedly injured and sued the additional insureds. The court found that the policy's Employer's Liability exclusion that excluded coverage for bodily injury to "an employee of any insured" operated to exclude coverage for the additional insureds for damages arising out of bodily injury sustained by the insured's employee in the course of his employment. [*Bayport Constr. Corp. v. BHS Ins. Agency*, 117 A.D.3d 660 (2d Dep't 2014).]

Court Finds Lead Exclusion Not Ambiguous Or Void As Against Public Policy, But Finds Question Of Fact As To Application Because Insurer Did Not Show Insured Had Notice Of It

An insurance company sought a declaration that it was not obligated to defend and to indemnify a property owner in an action alleging injuries based upon exposure to lead paint at his property. The court rejected the argument that the lead exclusion was void as against public policy and ambiguous. However, it held that the insurer was not entitled to a judgment declaring that it had no obligation to defend its insured, finding a question of fact as to whether the insured had notice of the exclusion. The court observed that the insurer did not violate any legal obligation by destroying its policy records after six years. However, the court ruled that the insurer failed to meet its burden of proving that the exclusion was mailed to the insured and that the insured raised an issue of fact as to whether the policy included the lead exclusion by submitting evidence that "at least some policies at the time did not contain the exclusion." [*North Country Ins. Co. v. Raspante*, 117 A.D.3d 1518 (4th Dep't 2014).]

Policy Excludes Coverage For Claims Against Village Officials Arising From Alleged "Taking"

After property owners sued officials of the Village of Muttontown for allegedly violating their constitutional rights in connection with a "taking" of their real property, the Village's insurance company asked a court to declare that it had no duty to defend or to indemnify the defendants. The court agreed with the insurer, finding that the claims against the defendants all arose out of a "taking," which was excluded from coverage by the policy's "clear and unambiguous language." [*Scottsdale Indem. Co. v. Beckerman*, 120 A.D.3d 1215 (2d Dep't 2014).]

Third-Party Contribution Claim Was Not Excluded As Bodily Injury To Family Member

Vincent Turchio's wife was injured when their boat collided with a bridge owned by New York City, and she sued the city for negligently lighting the bridge. The city filed a third-party complaint against Mr. Turchio, seeking contribution for his allegedly negligent operation of the boat. Mr. Turchio's marine insurer disclaimed coverage based upon an exclusion for bodily injury to a family member. The court ruled that the city's contribution claim was "legally distinct" from a direct claim by Turchio for bodily injury to his wife and was not excluded under the policy. [*Turchio v. Foremost Ins. Co.*, 2014 WL 5343819 (E.D.N.Y. Oct. 20, 2014).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Failure To Promptly Report Alleged Hit-And-Run Accident Dooms Driver's UIM Claim

A driver who alleged that he had been injured by a hit-and-run vehicle sought uninsured motorist ("UIM") benefits. The insurer disclaimed coverage and the driver demanded arbitration of his UIM claim. The Appellate Division, Second Department, permanently stayed the arbitration because the driver breached his policy by failing to report the alleged accident to the police or to the Commissioner of Motor Vehicles within 24 hours of the accident or as soon as reasonably possible thereafter. [*Matter of Government Employees Ins. Co. v. Bartlett*, 112 A.D.3d 826 (2d Dep't 2013).]

Court Rejects MVAIC's Defense Where It Did Not Send Letters Scheduling IMEs Within 30 Days After Receiving Health Care Provider's Claim

A health care provider sued the Motor Vehicle Accident Indemnification Corporation ("MVAIC") to recover assigned first-party no-fault benefits. The trial court ruled in favor of the provider and the appellate court affirmed. MVAIC's letters scheduling independent medical examinations ("IMEs") of the provider's assignor were mailed more than 30 days after MVAIC received the provider's claim. Accordingly, the court ruled that MVAIC was precluded from raising the defense that the failure to appear for the IMEs constituted a failure to comply with a condition precedent to coverage. [*Bay Ls Med. Supplies, Inc. v. MVAIC*, 42 Misc. 3d 150(A) (App. Term 2d Dep't Mar. 11, 2014).]

Insurer Can Rely Upon Peer Review Report To Deny No-Fault Medical Benefits Based Upon Lack Of Medical Necessity

A healthcare provider argued that an automobile insurance company could not lawfully rely upon medical peer reviews as a basis to deny claims for MRI studies, even if the peer reviews indicated that the underlying healthcare services were medically useless or illusory. The trial court dismissed the provider's complaint, holding that "an insurer can rely upon a peer review report to support a denial of no-fault medical benefits based on lack of medical necessity." [*New York Diagnostic Medical Care, P.C. v. GEICO Casualty Ins. Co*., No. 650766/2013 (Sup. Ct. N.Y. Co. April 11, 2014).]

Bite From Dog In Parked Car Did Not Trigger Auto Coverage, Court Decides

The insured's niece alleged that she had been injured when a dog sitting in the insured's parked car bit her as she walked by. The court found that there was no coverage under the insured's auto policy because the niece's alleged injuries had not arisen out of the "ownership, maintenance or use" of the insured's automobile. The court reasoned that the vehicle itself had not produced the injury and that the accident had not arisen out of the inherent nature of the vehicle; rather, the vehicle had been "merely the situs of the accident," which was insufficient to trigger coverage under the policy. [*Allstate*

Ins. Co. v. Staib, 118 A.D.3d 625 (1st Dep't 2014).]

Driver's Policy With $300,000 SUM Limits Was Triggered Where Alleged Tortfeasor's Policy Had Per Person Limits of $100,000

A passenger injured in a two-car accident obtained the $100,000 per person limits from the other, offending car's insurer and then demanded arbitration for supplementary underinsured motorist ("SUM") coverage under the policy covering the car in which he was a passenger, which had SUM limits of $300,000 per person and $300,000 per accident. The SUM insurer moved to stay arbitration, arguing that because both policies provided aggregate liability limits of $300,000 per accident, the driver of the offending car (the alleged tortfeasor) was not an underinsured motorist. The court ruled against the insurer, reasoning that the SUM coverage was triggered because the per-person bodily injury liability limits of the alleged tortfeasor's policy were less than the per-person limits of the SUM coverage. [*Matter of Government Empls. Ins. Co. v. Lee*, 120 A.D.3d 497 (2d Dep't 2014).]

No-Fault Insurer Did Not Have To Specify Reason For EUO, Appellate Court Rules

A health care provider sued an insurance company to recover assigned first-party no-fault benefits. The trial court found that the insurer had timely and properly denied the claim on the ground that the plaintiff had failed to appear for scheduled examinations under oath ("EUOs"). The plaintiff appealed, arguing that the insurer lacked justification for its EUO requests. Observing that an appearance at an EUO was "a condition precedent to the insurer's liability on the policy," the appellate court concluded that the insurer did not have to specify a reason for an EUO. [*Flow Chiropractic, P.C. v. Travelers Home & Mar. Ins. Co.*, 44 Misc. 3d 132(A) (App. Term 2d Dep't July 7, 2014).]

Employee Barred From Receiving SUM Benefits Under Employer's Auto Policy

In a matter of first impression in New York, the Appellate Division, Fourth Department, ruled that an employee, who was injured in a motor vehicle accident while in the course of her employment and was barred by the workers' compensation law from suing her co-employee based upon negligence, was not entitled to supplementary uninsured or underinsured motorist ("SUM") benefits under her employer's automobile liability insurance policy. The court reasoned that the employee could not receive SUM benefits because she was not "legally entitled to recover damages" from the vehicle's owner or operator. [*Hauber-Malota v. Philadelphia Ins. Cos*., 121 A.D.3d 327 (4th Dep't 2014).]

SUM Benefits Triggered In $300,000/$300,000 Policy Where Other Driver's Policy's Limits Were $100,000/$300,000

The insured alleged that he was injured in an accident caused by the driver of another car who was insured by a "split limit" policy providing a bodily injury liability limit of $100,000 per person and $300,000 per accident. Because those limits were less than the $300,000/$300,000 limits available to the insured, the court ruled that the supplementary uninsured/ underinsured motorist ("SUM") provision of the insured's policy was triggered. [*Government Empls. Ins. Co. v. Lee,* 120 A.D.3d 497 (2d Dep't 2014).]

Bicycle Rider's Alleged Injuries From Open Taxi Door Arose Out Of "Use Of A Motor Vehicle," Court Decides

The plaintiff alleged that she was injured while riding her bicycle when she was struck by an opened, rear passenger-side door of a taxi, which left the scene of the accident. The plaintiff sued the Motor Vehicle Accident Indemnification Corporation, which argued that the plaintiff's "hit and run" complaint should be dismissed. The court denied the motion, finding that the opening and closing of the passenger door was "part of the use of a taxi" and that injuries caused by the door making contact with the plaintiff arose "out of the . . . use of a motor vehicle." [*Samarskaya v. Motor Veh. Accident Indemnification Corp*., 2014 N.Y. Slip Op. 32453(U) (Sup Ct. N.Y. Co. Sep. 18, 2014).]

Mechanic Injured While Driving Customer's Loaner Car Could Recover SUM Benefits

A mechanic injured while driving a customer's loaner car back to the dealer sought supplementary uninsured/ underinsured motorist ("SUM") benefits from the customer's insurer. The court rejected the insurer's contention that the mechanic was not entitled to SUM coverage, finding that the loaner car was a "temporary substitute car" covered under the customer's policy. [*Matter of State Farm Mut. Auto. Ins. Co. v. O'Brien*, 120 A.D.3d 1252 (2d Dep't 2014).]

Court Decides That Used Car Was Insured As A "Replacement" Auto, Even Though It Had Not Been Registered

Andrew Porter sold his insured truck and put the license plates on a used car he acquired to commute to work. Before he received the title to the used car, and before he notified his insurer, he was in an accident. He was sued and sought coverage under the policy he had obtained for the truck. The court found that Porter had "absolute possession and control" of the used car, including all of the keys. It then concluded that the used car "fell within the meaning of replacement auto newly acquired by Porter at the time of the accident" and, accordingly, was covered under his existing policy. [*Nationwide Ins. Co. of Am. v. Porter*, 121 A.D.3d 1208 (3d Dep't 2014).]

Healthcare Provider Need Not Submit Claims For No-Fault Benefits After Insurer Denied Coverage, Trial Court Says

A healthcare provider sued an insurer for no-fault benefits that it had been assigned

by a patient who allegedly had been injured in an automobile accident. The insurer asserted that because the provider had not submitted a bill for those benefits, its suit had to be dismissed. The provider countered that it did not have to send bills because the insurer, following a medical review, had previously denied no-fault benefits for the patient. The New York trial court ruled that the provider was excused from filing claims for no-fault benefits after the insurer's disclaimer. [*Greater Forest Hills Physical Therapy, PC v. State Farm Mut. Auto. Ins. Co*., 45 Misc. 3d 1215(A) (N.Y. Dist. Ct. Nassau Co. Nov. 10, 2014).]

FIRST PARTY PROPERTY

New York Court of Appeals Rejects Policy Provision Barring Suit Before Property Could Reasonably Be Replaced

The New York Court of Appeals, answering a question certified to it by the U.S. Court of Appeals for the Second Circuit, ruled that a provision in a fire insurance policy limiting the time in which the insured could bring suit to two years from the date of the fire was unenforceable where the policy also stated that the insured could recover the cost of replacing destroyed property – but only after the property already had been replaced – and the property could not reasonably be replaced within two years. [*Executive Plaza, LLC v. Peerless Ins. Co*., 22 N.Y.3d 511 (2014).]

Court Finds Coverage For Water Backup From Pipe Or Clogged Drain On Insured's Property

The owner of a four-building apartment complex sought coverage for water damage when waste water allegedly entered the first-floor apartments through toilets, bathtubs, and condensation drains. The insurer disclaimed coverage based upon a "Water Damage" exclusion, which applied to loss caused by "water which backs up through sewers or drains." A second "Water Damage" exclusion excluded coverage for loss caused by a discharge or leakage from a plumbing system, but stated the insurer "does pay for loss caused by the accidental" discharge or leakage from a plumbing system. Finding an ambiguity under the circumstances, the Appellate Division, Third-Department, rejected the insurer's argument that the first "Water Damage" exclusion barred coverage so long as water backed up through a sewer or drain regardless of where the sewer or drain was located. Rather, the court found that water damage caused by a backup that originated from a pipe or clogged drain located within the insured's property line came from the insured's plumbing system, and would be covered by the policy. The court remanded the case back to the trial court to determine the cause of the damage. [*Pichel v. Dryden Mut. Ins. Co*., 117 A.D.3d 1267 (3d Dep't 2014).]

Owners' Property Claim Within Policy's Entrustment Exclusion, Court Rules

Property owners allegedly leased their insured property to a tenant who removed the kitchen cabinets and appliances to turn the kitchens into additional dormitory areas for a youth hostel. When the hostel closed, the tenant did not return the cabinets or appliances. The property owners sought first-party property coverage for their loss. The court held that coverage was precluded by an exclusion for loss due to "[d]ishonest or criminal act[s]" committed by anyone to whom the owners entrusted the insured property for any purpose. The court determined that the term "entrustment" refers to the entire premises, including fixtures. [*Lexington Park Realty LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*, 120 A.D.3d 413 (1st Dep't 2014).]

WAIVER/ESTOPPEL/3420(d)

Second Circuit Upholds Disclaimer That Incorrectly Quoted Assault-and-Battery Exclusion

After an insured was sued, his insurer sought a declaration that it was not obligated to defend or indemnify him. The court upheld the insurer's disclaimer, finding that the policy's assault-and-battery exclusion barred coverage because the action against the insured would not have arisen "but for" the alleged assault. The court also decided that the insurer's disclaimer was sufficient even though it may have quoted an earlier version of the exclusion, reasoning that the disclaimer gave "sufficient notice of the particular language" on which the insurer relied to disclaim coverage. [*Atlantic Casualty Ins. Co. v. Coffey*, 548 F. App'x 661 (2d Cir. 2013).]

New York Court of Appeals Finds "Noncooperation" Disclaimer Was Timely

The New York Court of Appeals held that a disclaimer based upon the insured's noncooperation was timely under New York Insurance Law §3420(d), even though it came about four months after the insurer knew or should have known that the corporate insured's president would not cooperate. The insurer issued its disclaimer within several weeks of determining that another of the insured's employees also would not cooperate. The Court reasoned that insurers may disclaim for noncooperation "after it is clear that further reasonable attempts to elicit their insured's cooperation will be futile." [*Country-Wide Ins. Co. v. Preferred Trucking Services Corp*., 22 N.Y.3d 571 (2014).]

New York Court of Appeals Upholds Insurer's Disclaimer in Letters that Contained "Reservation of Rights" Language

The New York Court of Appeals held that an insurer timely and effectively disclaimed coverage for assault and battery claims asserted against its insured in two letters written through a third-party administrator. The Court stated that although the letters contained some "contradictory and confusing" language about a "reservation of rights," they "specifically and consistently stated" that the policy excluded coverage for the claims. These statements were sufficient to apprise the insured that the insurer was disclaiming coverage on the ground of the exclusion for assault and battery. [*QBE Ins.*

Corp. v. Jinx-Proof Inc., 22 N.Y.3d 1105 (2014).]

Insurer's Disclaimer Of Bodily Injury Claims Found Timely When Earlier Notice Only Indicated Property Damage

An insurer was notified on June 30, 2008 of alleged property damage to an apartment building caused when the insureds' employees were applying a floor finish. A year later, on July 2, 2009, the employees' counsel notified the insurer that the employees had suffered bodily injuries. The insurer disclaimed coverage on July 30, 2009 and brought a declaratory judgment action. The court found the disclaimer timely, explaining that because the insurer had received notice of only property damage in June 2008 and had learned of the bodily injury claims only when it received the July 2009 letter, the insurer's July 30, 2009 disclaimer, issued after it conducted an investigation and determined that the two men were its insureds' employees and had been injured in the course of their work, was timely. [*Hermitage Ins. Co. v Evans Floor Specialist, Inc*., 118 A.D.3d 494 (1st Dep't 2014).]

Statutory "As Soon As Reasonably Possible" Disclaimer Standard Does Not Apply To Property Damage Claims, New York Court Of Appeals Rules

Keyspan Gas East Corporation contended in a declaratory judgment action ("DJ") against its excess insurers that they owed Keyspan a defense and indemnity for liabilities associated with the investigation and remediation of environmental damage at certain manufactured gas plant sites. The insurers had reserved rights and then asserted late notice as an affirmative defense in the DJ. The Appellate Division, First Department, ruled that there was a question of fact as to whether the insurers fulfilled their "obligation" to timely disclaim coverage "as soon as reasonably possible." The New York Court of Appeals reversed, holding that the Appellate Division had wrongly applied the "strict timeliness" standard from Insurance Law § 3420(d)(2) in considering whether the insurers had waived their right to disclaim coverage. The Court explained that Section 3420(d)(2) only applies to insurance claims involving death and bodily injury arising out of a New York accident and brought under a New York liability policy. The Court stressed that an insurer is not precluded from disclaiming coverage on a property damage claim "simply as a result of the passage of time" and that such a delay must be considered under common law waiver and/or estoppel principles. The Court remanded the case to the Appellate Division for consideration under common law waiver principles, including "whether [the insurers] clearly manifested an intent to abandon their affirmative defenses." [*KeySpan Gas E. Corp. v. Munich Reins. Am., Inc*., 23 N.Y.3d 583 (2014).]

Insurer Precluded From Denying Coverage Where It Had Not Copied Third Party Plaintiff On Disclaimer To Insured Third Party Defendant

A construction worker employed by Bando Construction alleged that he was injured while working at a site Bando leased from Key Fat Corporation. The worker sued Key Fat, which filed a third-party action against Bando. Bando's insurer informed Bando and Key Fat's insurer that it was disclaiming coverage, but it did not inform Key Fat of the disclaimer. After judgment was entered in favor of the worker against Key Fat, Key Fat obtained judgment against Bando. Key Fat and its insurer then sued Bando's insurer. The court concluded that Bando's insurer was precluded from denying coverage because it failed to give Key Fat notice of its disclaimer in violation of N.Y. Insurance Law § 3420(d). [*Key Fat Corp. v. Rutgers Cas. Ins. Co.,* 120 A.D.3d 1195 (2d Dep't 2014).]

Insurer Must Send Disclaimer To Purported Additional Insureds, New York Court Of Appeals Decides

The owner and managing agent of an apartment building hired a contractor to perform renovations. One of the contractor's employees alleged that he was injured at the site and sued the owner and managing agent, who were insureds under their own policy and who were alleged additional insureds under the contractor's policy. The insurer for the owner and managing agent tendered to the contractor's insurer which responded with a written disclaimer solely to the tendering insurer. The New York Court of Appeals ruled that the disclaimer did not comply with §3420(d) of the New York Insurance Law. The Court reasoned that because the owner and managing agent had their own interests at stake, they were entitled to a disclaimer delivered to them or to their attorney. [*Sierra v. 4401 Sunset Park, LLC*, 2014 WL 6607303 (N.Y. Nov. 24, 2014).]

BAD FAITH/EXTRA-CONTRACTUAL

Court Dismisses Homeowners' Fraud Claims Against Their Flood Insurer

Homeowners who alleged that their property had been damaged by Superstorm Sandy sued their flood insurer for fraudulent misrepresentation and inducement in connection with the advertising and marketing of its flood insurance policies. The court dismissed those claims, finding that the homeowners had not alleged that the insurer owed them any legal duty separate from its duty to perform under the insurance policies and that the only misrepresentation they had alleged related to the insurer's future obligations under the policies. [*Smith v. American Security Ins. Co*., 2013 WL 6628358 (E.D.N.Y. Dec. 16, 2013).]

In Hurricane Sandy Case, Court Dismisses Insureds' Claims For Unfair Settlement Practices, Punitive Damages, And Attorney's Fees

Claiming that they sustained extensive damage from Hurricane Sandy, car dealers sued their insurers. The court dismissed the dealers' cause of action under Insurance Law § 2601 for engaging in "unfair claim settlement practices," finding no private right of action for a violation of that law. The court also dismissed the dealers' demands for punitive damages because the insurers' alleged conduct did not involve moral turpitude or wanton dishonesty and/or a pattern of conduct directed at the public generally, and the dealers were not seeking to vindicate a

public right. Finally, the court dismissed the claim for attorneys' fees and costs, explaining that insureds cannot recover their attorneys' fees and costs to prosecute claims for insurance coverage. [*Kings Infiniti Inc. v. Zurich Am. Ins. Co*., 43 Misc. 3d 1207(A) (Sup. Ct. Kings Co. Apr. 3, 2014).]

Court in Hurricane Sandy Case Dismisses Extra-Contractual Claims Against Insurer

The owner of commercial property in Brooklyn sued its insurer after the insurer denied the owner's claim for property damage from Hurricane Sandy. Upon the insurer's motion, the court dismissed the insured's claim for breach of the implied covenant of good faith and fair dealing, explaining that New York does not recognize an independent cause of action for bad faith denial of insurance coverage. The court also dismissed the insured's unjust enrichment claim, declaring that the insured could not recover in "quasi contract" because the parties had a valid, enforceable insurance contract that governed the same subject matter as the claim. Next, the court dismissed the insured's punitive damages claims, finding that it had failed to plead that the insurer's conduct was actionable as a tort that was independent of the asserted breach of contract. However, the court concluded that the insured's allegations were sufficient to support its demand for consequential damages on its breach of contract claim. [*Sikarevich Family L.P. v. Nationwide Mutual Ins. Co*., 2014 WL 3127729 (E.D.N.Y. July 3, 2014).]

Court Dismisses General Contractor's "Bad Faith" Claims Against Subcontractor's Insurer

A general contractor sued a subcontractor's insurer for additional insured coverage and "breach of the implied covenant of good faith and fair dealing" and breach of its "fiduciary obligations." The court dismissed the extra-contractual claims, reasoning that there were no allegations of "independent breaches of tort duties such as fiduciary duties owing to the plaintiff from [the insurer] which would support a breach of fiduciary duties claim or other tort claim." The court also found that it was "implausible" for the plaintiff and the insurer to have had "any mutual contemplations of consequential damages at or prior to the issuance of the policy" especially because the plaintiff, which was "merely an additional insured," had not contracted with the insurer for coverage. [*J. Kokolakis Contracting Corp. v. Travelers*, 2014 WL 5394461 (Sup. Ct. Suffolk Co. Oct. 21, 2014).]

MISCELLANEOUS

Insurer Ordered To Produce Electronic Claims Diary and Counsel's Letters Concerning Their Investigation On Behalf Of Insurer

Insureds claimed that their boat had been vandalized. Their insurer denied the claim and the insureds sued. The insureds then moved to compel the insurer to produce an unredacted copy of an electronic claims diary prepared by an employee of the insurer, as well as certain letters from the insurer's counsel prepared while investigating the claim on behalf of the insurer. The material sought had been prepared before the denial of the claim. The court rejected the insurer's argument that the materials were protected by the attorney-client privilege, reasoning that they had been "prepared as part of the [insurer's] investigation into the claim, and were not primarily and predominantly of a legal character." [*Melworm v. Encompass Indem. Co*., 112 A.D.3d 794 (2d Dep't 2013).]

Plaintiff's Suit Against Defendant's Insurer is Dismissed Because Plaintiff Had Not Yet Obtained A Judgment Against the Insured

A person who alleged that he was injured at a building in Brooklyn sued the company that leased the property. He also brought a separate action against the lessee's insurance company. The court dismissed the plaintiff's action against the insurer, finding that, having not obtained a judgment against the lessee, the plaintiff lacked standing to bring a direct action against the insurer. [*Alfonso v. Zurich Am. Ins. Co*., 42 Misc. 3d 1202(A) (Sup. Ct. Kings Co. Dec. 4, 2013).]

New York Appellate Division Allows Private Right Of Action Against Health Care Insurer Under Prompt Pay Law

The New York Appellate Division, Second Department, has ruled that Insurance Law § 3224-a, known as the "Prompt Pay Law," affords claimants a private right of action to recover payment for health care services based on a violation of the statute. The Appellate Division, Second Department, rejected the argument that enforcement of the statute, which sets forth time frames within which an insurer must pay a claim, notify the claimant of the reason for denying a claim, or request additional information, was vested solely with state insurance regulators. The appellate court found, instead, that the claimant, a health care provider, could bring its own action against the insurer to recover the full amount of its claim, plus interest at the rate of 12 percent per year. [*Maimonides Med. Ctr. v First United Am. Life Ins. Co*., 116 A.D.3d 207 (2d Dep't 2014).]

Title Insurers Could Not Proceed Directly Against Agency's Professional Liability Insurer, Court Rules

Two title insurance companies sued an agency that issued policies on their behalf for breach of contract, among other things. The title insurance companies also sued the agency's professional liability insurance carrier, asserting that they were third party beneficiaries of the agency's policy. The agency's insurer moved to dismiss, and the court granted the motion. The court found that the title insurers had no legal basis under New York common law to directly sue the agency's insurance company. Moreover, the court ruled that it need not decide if New York Insurance Law §3420(d) applies to a professional liability policy because the statute only permits a direct action after a judgment against the insured goes unsatisfied, which did not happen. [*Commonwealth Land Title Ins. Co. v. Am. Signature Services, Inc*., 2014 WL 672926 (E.D.N.Y. Feb. 20, 2014).]

Law Firm Defrauded By Forged Cashier's Check Loses Bid For Coverage

A law firm alleged that after it deposited a cashier's check and wired out the funds, it discovered that the check had been forged. The District Court for the Northern District of New York rejected the law firm's contention that its loss was covered by its insurance policy, explaining that the policy excluded from coverage any loss caused by or resulting from "[v]oluntary parting with any property" by the firm, even though the money may have been wired in reliance on misrepresentations or false pretenses. [*Martin, Shudt, Wallace, DiLorenzo & Johnson v. The Travelers Indem. Co. of Conn*., 2014 WL 460045 (N.D.N.Y. Feb. 5, 2014).]

Court Finds "In Transit" Coverage For Money Allegedly Stolen From A Vault

Insureds asserted that principals of an armored car company stole their cash while it was being processed at the armored car company's vault before being delivered to the insureds' check-cashing businesses and ATMs. The court found that the losses were covered under an insurance bond's "in transit" clause. It rejected the insurer's argument that the clause provided coverage only when the money was inside of, or being loaded onto or unloaded from, an "armored vehicle." Rather, the court determined, the armored car company's act of collecting money and transporting it to its vault, to place it in the form necessary for its transportation and delivery to the insureds' locations, was "one continuous shipment process." [*CashZone Check Cashing Corp. v. Vigilant Ins. Co.,* 116 A.D.3d 146 (1st Dep't 2014).]

Where Insurers' Counsel Were Engaged in Claims Handling, Documents Were Not Protected From Disclosure, Court Rules

A special referee decided that the majority of documents that insurers sought to withhold from pre-trial discovery were not protected by the attorney-client privilege or the work product doctrine as material prepared in anticipation of litigation. The insurers appealed, but the appellate court affirmed, concluding that the insurers had to disclose certain documents that pre-dated the insurer's denial of the insureds' claims. The appellate court found that the insurers' counsel "were primarily engaged in claims handling." The appellate court concluded that documents prepared in the ordinary course of an insurer's investigation were not privileged and did not become so "merely because [the] investigation was conducted by an attorney." [*National Union Fire Ins. Co. Of Pittsburgh, Pa. v. TransCanada Energy USA, Inc*., 119 A.D.3d 492 (1st Dep't 2014).]

Court Rules That Insured May Discover Reserve Information

A competitor sued HRB Tax Group, Inc., alleging false advertising. HRB's insurer denied coverage and sought a declaration of no coverage, claiming that it had insufficient information to value the claim because of HRB's failure to cooperate. HRB counter-claimed and sought to discover the insurer's reserve for the underlying lawsuit. The court acknowledged that a number of courts have refused to order discovery of reserve information, but it granted HRB's motion under the circumstances of the case. The court emphasized, however, that it was expressing no opinion as to the ultimate admissibility of that information at trial. [*National Union Fire Ins. Co. of Pittsburgh, PA v. H&R Block, Inc.,* 2014 U.S. Dist. Lexis 123966 (S.D.N.Y. Sep. 4, 2014).]

Court Finds Owner Collaterally Estopped From Suing Contractor's Insurer

After a property owner sued a contractor, the contractor's insurer brought a separate declaratory judgment action against the contractor and obtained a judgment declaring that it was not obligated to defend or indemnify the contractor in the owner's action because it had not been afforded timely notice of the owner's claim. In turn, the owner obtained a judgment against the contractor and brought a direct action against the contractor's insurer. The court ruled that the determination in the declaratory judgment action precluded the owner from litigating coverage in the direct action. The court reasoned that the owner was in privity with the contractor for the purpose of collateral estoppel and had no greater rights against the insurer than the insured. [*River View at Patchogue, LLC v. Hudson Ins. Co*., 122 A.D.3d 824 (2d Dep't 2014).]

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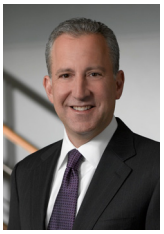
Rivkin Radler LLP
926 RXR Plaza, Uniondale NY 11556
www.rivkinradler.com



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