New York Insurance Coverage Law Update

2019 Compilation

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ADDITIONAL AND NAMED INSUREDS/PRIORITY

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United Interior Renovations contracted with and obtained additional insured coverage for All State Interior Demolition under United's policy for bodily injury caused, in whole or in part, by United's acts or omissions. United's employee was allegedly injured and sued All State, but did not sue his employer, United. The employee's complaint "implicate[d] United's demolition actions" and was "incorporate[d]" into All State's third-party complaint against United. The Appellate Division, First Department, held that United's insurer had a duty to defend All State as an additional insured because "it failed to establish that there is no possibility that it will be obligated to do so." [*All State Interior Demolition Inc. v. Scottsdale Ins. Co.*, 168 A.D.3d 612 (1st Dep't 2019).]

Defendants Were Not Covered As Additional Insureds Under Contractor's Policy Where Contractor Deemed Not Negligent

An electrical contractor's employee alleged that he was injured while working on a construction project. He sued Verizon and Tishman Construction for negligence, and they brought a third-party claim against the contractor. The trial court granted summary judgment in favor of the contractor, finding that the employee's injuries had not been caused by any negligence of the contractor. Verizon and Tishman Construction brought a declaratory judgment action seeking additional insured coverage from the contractor's insurer, which moved for summary judgment. The court granted the motion, reasoning that the policy's "additional insured" coverage was limited to liability for bodily injury caused in whole or in part by the acts or omissions of the contractor. [*Verizon Communications, Inc. v. Starr Indemnity & Liability Co.*, 2018 N.Y. Misc. LEXIS 5950 (Sup. Ct. N.Y. Co. Dec. 5, 2018).]

Owner Deemed Additional Insured Under Subcontractor's Insurance Policy

The owner of a construction project was sued for injuries allegedly suffered by a subcontractor's employee. The general con-tractor's contract with the subcontractor obligated the subcontractor to obtain additional insured coverage for the owner. The court held that the owner was covered as an additional insured under the subcontractor's insurance policy even though it was not in privity of contract with the subcontractor because the policy provided additional insured coverage to any "organization to whom the named insured [subcontractor] has agreed by written contract to provide coverage". The court reasoned that the words "to whom" as opposed to "with whom" reflected "an intent" to provide additional insured coverage so long as the named insured has agreed to provide such coverage in a contract. [*115 Kingston Avenue LLC v. Mt. Hawley Ins. Co.*, 2019 N.Y. Misc. LEXIS 61 (Sup. Ct. N.Y. Co. Jan. 3, 2019).]

First Department Finds Duty To Defend Additional Insured

Breeze National, Inc. was sued and sought additional insured coverage under a policy providing it with additional insured coverage with respect to liability for bodily injury "caused, in whole or in part, by" the named insured's acts or omissions. The insurer argued against additional insured coverage on the basis that the named insured had never been adjudged negligent and had no control over the means and methods of the work that allegedly caused the injury. Citing *Burlington Ins. Co. v. New York City Transit Authority*, 29 N.Y.3d 313 (2017), the Appellate Division, First Department, found the insurer's argument "misplaced" because the phrase "caused, in whole or in part, by" did not require a finding of negligence, but simply meant more than "but for" causation. The court concluded that the named insured's work that allegedly caused the underlying injury was "sufficient to establish proximate causation" and a duty to defend Breeze. Because of "issues of fact as to whether Breeze was solely responsible, or partially responsible for the accident," the court held that "indemnification cannot be determined at this time." [*Breeze National, Inc. v. Century Surety Co.*, 170 A.D.3d 591 (1st Dep't 2019).]

Southern District Of New York Finds Duty To Defend Property Owner As Additional Insured

Two claimants allegedly tripped and fell at a site in Brooklyn and sued the property owner and the general contractor at the site for negligence. The owner sued the general contractor's insurer for additional insured coverage under the general contractor's policy. The court granted the owner's motion for summary judgment on the duty to defend, explaining that the insurance policy provided additional insured coverage to the owner for bodily injury "caused, in whole or in part," by the acts or omissions of the general contractor, or those acting on its behalf at the site. The court concluded that the allegations in the lawsuits against the owner suggested a "reasonable possibility" that the general contractor's negligence was a proximate cause of the alleged injuries. Specifically, both of the underlying claimants alleged that the general contractor was responsible for the condition of the sidewalk, scaffolding and metal plates at the site, and that its negligence caused them to trip and fall. [*Kingsway Realty, LLC v. Gemini Ins. Co.*, 2019 U.S. Dist. LEXIS 37769 (S.D.N.Y. March 8, 2019).]

Tenant's Insurer Had To Defend Building Owner As Additional Insured, Southern District Of New York Rules

The claimant allegedly tripped and fell on a sidewalk adjacent to a building in the Bronx and sued the building owner and tenant for negligence. The owner's insurer sued the tenant's insurer, contending that the tenant's insurer had to defend the owner as an additional insured under the tenant's insurance policy. The United States District Court for the Southern District of New York granted summary judgment in favor of the owner's insurer. The court found that the tenant's insurance policy listed the owner as an additional insured and extended coverage to the owner for liability "caused, in whole or in part, by [the tenant's] acts or omissions . . . in the performance of [its]

ongoing operations for [the owner] at the [Bronx] location(s) designated above." The court reasoned that the underlying complaint left open the "reasonable possibility" that the sidewalk where the claimant allegedly was injured was used for access in and out of the insured's building and, therefore, was "part of the premises." The court noted that the lease made clear that the tenant had some obligations with respect to the sidewalk and, therefore, its negligent conduct or omissions could be a proximate cause of the injury. The court also observed that the claimant's underlying complaint alleged that all of the defendants – including the tenant – caused his injuries through their "negligen[t] . . . ownership, leasing, operation, maintenance, control and management of their respective premises." As such, the court concluded that it was "reasonably possible" that the injuries were "caused, at least in part, by" the tenant's conduct. [*Kookmin Best Ins. Co., Ltd. (U.S. Branch) v. Foremost Ins. Co.*, 2019 U.S. Dist. LEXIS 35942 (S.D.N.Y. March 5, 2019).]

General Contractor And Building Owner May Be Covered As Additional Insureds Under Insurance Policy Of Subcontractor, The Claimant's Employer

A subcontractor's employee allegedly injured at a New York City construction site sued the project's general contractor as well as the building's owner, and they filed a third-party action against the subcontractor. The general contractor and owner sued the subcontractor's insurer for additional insured coverage. The insurer moved to dismiss the complaint on the basis that the additional insured coverage was limited to injury proximately caused by the sub-contractor. Although the employee's com-plaint did not allege that his employer was negligent, the court denied the insurer's motion to dismiss, reasoning that discovery is still proceeding in the underlying action and, therefore, it was premature to declare that the employer was not a proximate cause of the accident. [*American Empire Surplus Lines Ins. Co. v. Arch Specialty Ins.*, 2019 N.Y. Misc. LEXIS 1624 (Sup. Ct. N.Y. Co. March 21, 2019).]

Owner May Be Covered As An Additional Insured Under Insurance Policy Issued To Claimant's Employer, First Department Holds

A contractor's employee allegedly injured at a worksite sued the building owner. The owner sought additional insured coverage under the contractor's policy, which provided coverage where required by contract for injury caused in whole or in part by the contractor, the claimant's employer. The Appellate Division, First Department, found a question of fact as to whether the contract between the owner and contractor required additional insured coverage and remanded the case back to the trial court to decide. The First Department opined that the insurer has a duty to defend if the contract required additional insured coverage because allegations and facts known to the insurer "suggest a reasonable possibility of coverage, *i.e.,* a reasonable possibility that the underlying injury was caused, in whole or in part, by [the contractor's] acts or omissions." The court noted that the insurer "submitted evidence that demonstrates that the acts or omissions of [the contractor], which directed and controlled the underlying plaintiff's work, were a proximate cause of the plaintiff's injuries." [*M&M Realty of N.Y., LLC v. Burlington Ins. Co.*, 170 A.D.3d 407 (1st Dep't 2019).]

Court Rejects Additional Insured Coverage For Live Nation

Claimant was allegedly injured while assembling an advertising structure for Best Buy at Long Island's Jones Beach Theatre when a Live Nation employee negligently drove a fork-lift into the metal trussing on which the claimant was standing. Claimant sued Live Nation, which sought additional insured coverage under an insurance policy issued to Best Buy, with whom Live Nation had a sponsorship agreement. The court held that Live Nation was not covered as an additional insured because the policy limited such coverage to where Best Buy or those acting "on [its] behalf" caused, in whole or in part, the injury. The court reasoned that the trial court in the underlying action found that Best Buy was not negligent and, therefore, those acting on its behalf (claimant) were also not negligent. [*Live Nation Marketing, Inc. v. Greenwich Ins. Co.*, 2019 N.Y. Misc. LEXIS 3354 (Sup. Ct. N.Y. Co. June 12, 2019).]

Tenant's Insurer Must Defend Shopping Center Owner As Additional Insured In Trip-And-Fall Suit, Eastern District Of New York Decides

The claimant allegedly tripped and fell on the sidewalk while walking into a restaurant operated by Vintage Steakhouse, LLC. Vintage leased the restaurant, which was in a shopping center, from Amelia Associate's Inc. Vintage's insurer refused to defend Amelia in the underlying action, asserting that its policy did not cover Amelia as an additional insured because the claimant allegedly fell on a sidewalk that was not part of the leased premises. Amelia's insurer sued Vintage's insurer, and the parties moved for summary judgment. The United States District Court for the Eastern District of New York ruled that Vintage's insurer had to defend and to indemnify Amelia. The court reasoned that New York courts have "repeatedly" held that if a sidewalk is necessarily used for access in and out of the leased premises, it is considered by implication to be part of the leased premises. The court added that the portion of the sidewalk on which the claimant allegedly fell was "more necessary" to the operation of Vintage's business than it was for the other tenants in the shopping center as it was located directly in front of Vintage's front door, not the doors of the other tenants. After noting that both insurers' policies stated that they were "excess" with respect to the type of liability at issue in the underlying action, the court concluded that they were co-primary insurers of Amelia. [*Peerless Ins. Co. v. Technology Ins. Co.*, 2019 U.S. Dist. LEXIS 181828 (E.D.N.Y. July 25, 2019).]

Contractor Entitled To Additional Insured Coverage Under Subcontractor's Policy

A contractor working on the exterior façade of a Manhattan apartment building was sued by an apartment owner for allegedly causing water damage to the apartment. The contractor sought additional insured coverage under its subcontractor's policy. The Supreme Court, New York County, found that the contractor was entitled to a defense under the subcontractor's policy because there was an endorsement providing additional insured coverage to the contractor for damage "caused, in whole or in part, by [the subcontractor's] work." Citing the New York Court of Appeals' decision in *Burlington Ins. Co. v. New York City Trans. Auth.*, 29 N.Y.3d 313 (2017), the court opined that there was a possibility that the subcontractor's work caused the property damage because the subcontractor actually worked on the project while the contractor did not. The court further opined that it was "irrelevant" that the subcontractor was not mentioned in the underlying complaint or added as a third party because the record showed that the subcontractor's insurer had actual knowledge of facts establishing a reasonable possibility that the claim was covered. The court concluded that the endorsement in the subcontractor's policy made clear that the policy was "primary and non-contributory" with respect to the lawsuit against the contractor. [*American Empire Surplus Lines Ins. Co. v. Burlington Ins. Co.*, 2019 N.Y. Misc. LEXIS 4145 (Sup. Ct. N.Y. Co. July 25, 2019).]

Fourth Department Finds Tenant's Insurer Must Defend Plaza Owner As Additional Insured In Delivery Driver's Personal Injury Suit

Claimant sued Pixley Development Corp. alleging that he was injured when he slipped and fell on ice while delivering supplies to Pixley's tenant. Pixley sued the tenant's insurer, seeking a defense and indemnification as an additional insured under the tenant's policy, which provided such coverage "with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the tenant]." The Appellate Division, Fourth Department, ruled that Pixley was entitled to a defense because the personal injury complaint and the policy gave rise to a "reasonable possibility" that the claimant's claims were covered. The court reasoned that the delivery driveway was "necessarily used for access in and out of" the tenant's business and, by implication, was part of the leased premises being used by the tenant. [*Pixley Dev. Corp. v. Erie Ins. Co.*, 174 A.D.3d 1415 (4th Dep't 2019).]

Subcontractor's Insurer Had To Defend General Contractor As Additional Insured In Personal Injury Action

An employee who claimed she was injured as a result of negligent construction work performed at her place of employment sued the general contractor and the sub-contractor that allegedly performed work in the area where the employee claimed she was injured. The general contractor sought additional insured coverage under the subcontractor's insurance policy, but the insurer denied coverage, contending that the general contractor's alleged liability had not been caused in whole or in part by the subcontractor's work. The underlying personal injury action was resolved in favor of the general contractor and subcontractor after trial; however, an appeal remained pending. The Supreme Court, New York County, ruled that the subcontractor's insurer had to defend the general contractor, finding a "reasonable possibility" that the subcontractor had caused the employee's injury because the claimant, employee's complaint named the sub-contractor as a defendant. The court concluded that "[t]o hold otherwise would result in the perverse outcome where insurers are not obligated to bear the cost of an insured's successful defense and may withhold payment of defense costs until their insured is found liable after a failed defense." [*Allied World Assurance Co. (U.S.) Inc. v. Aspen Specialty Ins. Co.*, 2019 N.Y. Misc. LEXIS 5025 (Sup. Ct. N.Y. Co. Sept. 11, 2019).]

Property Owners Covered As Additional Insureds Under Tenant's Policy, Trial Court Decides

The underlying plaintiff sued New York City property owners, alleging that she fell on the sidewalk in front of a tenant's storefront at the property. The property owners' insurer asked the Supreme Court, New York County, to rule that the store's insurer had to defend the property owners as additional insureds under the store's policy on a primary and noncontributory basis. The court granted summary judgment in favor of the property owners' insurer. The court reasoned that the store's policy afforded additional insured coverage to the property owners "with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the store]." The court ruled that the underlying plaintiff's allegations that she fell on a defective sidewalk in front of the store triggered the duty to defend. Moreover, the store's policy stated that it was "primary except when Paragraph b. below applies." Finding that none of the exceptions identified in that paragraph applied, and that the property owners' policy provided that it was "excess over . . . [a]ny other primary insurance available to you covering liability for damages arising out of the premises," the court ruled that the store's policy was primary. [*Greater New York Mut. Ins. Co. v. Hanover Ins. Co.*, 2019 N.Y. Misc. LEXIS 5561 (Sup. Ct. N.Y. Co. Oct. 7, 2019).]

Project Owner Loses Bid For Additional Insured Coverage In Suit Filed By Subcontractor's Employee

An employee of a subcontractor on a construction project owned by the Metropolitan Transportation Authority ("MTA") sued the MTA for injuries he allegedly sustained while working on the project. The MTA sought additional insured coverage under the subcontractor's insurance policy. The United States District Court for the Southern District of New York granted the insurer's motion to dismiss. The court explained that the subcontract made clear that on-site general liability was to be covered by the MTA's Owner

Controlled Insurance Program ("OCIP") and that the subcontractor's policy provided that it did "not apply to any liability arising out of . . ., operations . . . where [an OCIP] has been provide[d] by the contractor, project manager, or owner of the construction project." Therefore, the court concluded, the MTA was not covered by the subcontractor's insurance policy for the employee's alleged on-site injuries. [*Metropolitan Transp. Auth. v. James River Ins. Co.*, 2019 U.S. Dist. LEXIS 179211 (S.D.N.Y. Oct. 16, 2019).]

First Department Finds Additional Insured Coverage For Landlord Under Tenant's Policy

The claimant sued a landlord alleging that she was injured while walking on the stairs from the second floor restaurant at the landlord's property to the ground floor. The Appellate Division, First Department, ruled that the restaurant's insurer had to defend and indemnify the landlord as an additional insured. The First Department reasoned that the underlying action arose out of the "maintenance or use" of the leased premises within the meaning of the additional insured clause in the restaurant's insurance policy. The First Department pointed out that the accident allegedly occurred in the course of an activity "incidental to the operation of the leased space" and in an area of the premises that was used for access in and out of the leased space. The court added that whether the accident occurred in the leased premises is "not dispositive of the coverage issue." [*Public Service Mut. Ins. Co. v. Nova Cas. Co.*, 177 A.D.3d 472 (1st Dep't 2019).]

CONDITIONS PRECEDENT/LATE NOTICE

Second Circuit Rejects Insurer's Late Notice Defense Based On "Generalized" Assertion Of Prejudice

A milk delivery company was sued because its delivery of contaminated milk allegedly damaged its customer's factory. The milk delivery company's general liability insurer defended and settled the customer's suit and sought reimbursement from the insured's auto insurer which disclaimed coverage. The auto insurer argued that it was not provided with timely notice and that it was prejudiced because it was "deprived of the opportunity to participate in the phases of the litigation" against its insured, "including discovery and summary judgment briefing." The Second Circuit opined that "[s]uch a generalized assertion of prejudice is insufficient to establish" that the insurer was "materially impair[ed] in its ability to defend" the insured. The court concluded that although the insurer "need not show that there would have been a different outcome, it must identify some-thing it could have done differently in discovery, at summary judgment, or at mediation; or identify different defenses or strategies it could have pursued." [*Harleysville Worcester Ins. Co. v. Wesco Ins. Co.,* 752 Fed. Appx. 90 (2d Cir. 2019).]

First Department Rules That Insurer Does Not Have To Indemnify Contractor That Breached Cooperation Clause

After a fire damaged an apartment building in Queens, an insurer for the owner and manager of the building and an insurer for various tenants in the building paid claims of their insureds. The insurers brought subrogation actions against New Triple M. Construction Corp., whose employees allegedly caused the fire through their negligent use of a torch to perform roof repairs. Triple M's insurer disclaimed coverage and did not defend Triple M, and the two insurers obtained default judgments. The two insurers then sued Triple M's insurer to recover the judgments under New York Insurance Law § 3420(a)(2). The trial court awarded nearly $3 million to the two insurers, and Triple M's insurer appealed. The Appellate Division, First Department, reversed. The First Depart-ment explained that Triple M's insurer had no duty to indemnify Triple M because Triple M breached its policy's cooperation clause by making untruthful disclosures to its insurer when reporting the accident. Specifically, Triple M's employees lied to the insurer's investigator about not having used a torch on the roof. [*Greater N.Y. Mutual Ins. Co. v. Utica First Ins. Co.,* 172 A.D.3d 588 (1st Dep't 2019).]

Late Notice Of Accident And Lawsuit Doom Insureds' Bid For Coverage

A worker allegedly injured while performing repair work at a building in Lynbrook, New York, sued the building owner and tenant. Their insurer asked a New York court to declare that it had no obligation to defend or to indemnify the owner or the tenant because they did not provide notice of the accident or the worker's underlying lawsuit until more than two years after the worker filed suit. The insurer asserted that it was prejudiced by the delay because it was not notified until after the underlying court granted the injured worker's motion for partial summary judgment as to liability under Labor Law § 240(1), and the action was about to proceed to trial on damages. The court granted summary judgment in favor of the insurer. The court found that notice was late as a matter of law and resulted in an "irrebuttable presumption of prejudice" under New York Insurance Law § 3420(c)(2)(B) because notice was given after the "insured's liability had been determined". The court also rejected the injured worker's argument that he had acted diligently in providing prompt notice. [*Tower Ins. Co. of N.Y. v. Commissary Direct, Inc.,* 63 Misc. 3d 1229(A) (Sup. Ct. N.Y. Co. 2019).]

Second Department Reverses Judgment Against Insurer, Finding Prejudice From Late Notice

A tenant sued the owner of her apartment building for property damage she suffered from a fire. After the tenant obtained a default judgment against the owner, the owner notified its insurer. The insurer denied coverage based on late notice and resulting prejudice. In turn, the tenant was awarded judgment for $116,876.99 and sued the insurer to recover the unsatisfied judgment. The trial court granted the tenant's motion for summary judgment and the insurer appealed. The Appellate Division, Second Department, reversed,

finding that the default judgment against the owner – which had not been vacated – entitled the insurer to an "irrebuttable presumption of prejudice" pursuant to Insurance Law § 3420(c)(2)(B). [*Villavicencio v. Erie Ins. Co.,* 172 A.D.3d 1276 (2d Dep't 2019).]

Second Department Finds Issues Of Fact As To Whether Additional Insureds Can Rely On Notice Given By Named Insured

The general contractor on a construction project subcontracted portions of the work to a subcontractor, which in turn sub-subcontracted with Anron Sheet Metal Corp. An Anron employee allegedly was injured while working on the project and sued the general contractor and the subcontractor. The general contractor and the subcontractor sought coverage as additional insureds under Anron's policy, and Anron's insurer disclaimed coverage on the ground that neither the general contractor nor the subcontractor provided it with timely notice. The Appellate Division, Second Department, agreed that additional insureds generally have a duty, independent of the named insured, to provide the insurer with timely notice. However, the court found triable issues of fact as to whether the general contractor and the subcon-tractor could rely on the notice given by the named insured, Anron, on the ground that they all were united in interest. [*Allen v. Leon D. DeMatteis Constr. Corp.,* 175 A.D.3d 642 (2d Dep't 2019).]

Insurer Did Not Have To Defend Insured Where Subcontractor's Certificate Of Insurance Failed To Meet Endorsement's Requirements

The insured was sued by a subcontractor's employee who alleged that he was injured while working at a construction site. An endorsement in the insured's policy required the insured to obtain certificates of insurance "prior to commencement" of the subcontractor's work identifying coverage in effect at all times the work is performed. The court granted the insurer's motion for summary judgment, finding that the insurer demonstrated that the certificates of insurance provided by the insured were dated after the employee's accident or did not reflect coverage in effect at all times the work was to be performed. Therefore, the insured did not satisfy the conditions in the endorsement. [*Integrated Project Delivery Partners, Inc. v. Mt. Hawley Ins. Co.,* 2019 N.Y. Misc. LEXIS 5019 (Sup. Ct. N.Y. Co. Sept. 17, 2019).]

Failure To Report Accident Within 24 Hours Dooms Coverage, Second Department Says

The insured alleged that she was injured when the vehicle she was driving was struck in the rear by another vehicle that left the scene. The insured sought arbitration of her claim for uninsured motorist benefits under her insurance policy. Her insurer asked the Supreme Court, Kings County, to perma-nently stay the arbitration based upon the insured's failure to comply with a provision in the policy that required that the insured or someone acting on the insured's behalf report the collision within 24 hours or as soon as reasonably possible to a "police, peace or judicial officer or to the Commissioner of Motor Vehicles". The court denied the insurer's request but the Appellate Division, Second Department, reversed. The Second Department reasoned that the insured's failure to comply with the reporting requirement in the policy in the absence of a valid excuse vitiated coverage. [*Matter of Progressive Direct Ins. Co. v. Ostapenko*, 176 A.D.3d 1068 (2d Dep't 2019).]

COVERAGE GRANT

Negligent Retention Claim Alleged An Occurrence, Triggering Duty To Defend

Hulk Hogan sued a talent and literary agency for alleged emotional distress, among other things. Hogan alleged that the agency negligently retained an employee when it "knew or should have known" that the employee was "predisposed to committing wrongs." The court found that the alleged injury, from the agency's point of view, was unexpected, unusual and unforeseeable. As such, the court ruled that the negligent retention cause of action alleged an "occurrence," triggering the insurer's duty to defend. [*Zurich Am. Ins. Co. v. Don Buchwald & Associates, Inc.*, 2018 N.Y. Misc. LEXIS 6402 (Sup. Ct. N.Y. Co. Dec. 21, 2018).]

No Coverage For Claims Relating To Facebook Posts Occurring After Policy Was Canceled, Eastern District Of New York Concludes

Five plaintiffs sued a club known as the Scene and its owner, alleging that they used their images without their consent to promote the club in advertisements on social media. The club sought coverage under the "personal and advertising injury" coverage in its liability policy, which covered certain enumerated offenses if committed during the policy period. The insurer main-tained that coverage was barred for the claims of four underlying plaintiffs because the date of publication of the ads fell outside the policy period. The United States District Court for the Eastern District of New York agreed, finding that the underlying claims related to Facebook posts occurring after the policy was canceled. [*Bullseye Rest., Inc. v. James River Ins. Co.*, 387 F. Supp. 3d 273 (E.D.N.Y. 2019).]

Southern District Of New York Rejects Advertising Injury Coverage For Claim Insured Infringed Copyrighted Design

Malibu Textiles sued Jovani Fashion, asserting that Jovani had infringed on Malibu's copyrighted lace textile design by producing and selling garments with a substantially similar design. Jovani's general and excess liability insurers denied coverage, explaining that Malibu's complaint did not allege an infringement of a "copyrighted advertisement" as required under the definition of "advertising injury". Jovani sued, and the United States District Court for the Southern District of New York ruled that the insurers had no duty to defend or to indemnify Jovani. The court found that Malibu's design was not an "advertisement," even if used as a sample or display in a showroom, let alone a

"copyrighted advertisement," as the policy required. The court concluded that interpreting the phrase "copyrighted advertisement" to mean that the policy covered any advertising materials that displayed a copyrighted product, as Jovani asserted, would render the policy's exclusion for copyright infringement "meaningless". [*Jovani Fashion, Ltd. v. Federal Ins. Co.*, 2019 U.S. Dist. LEXIS 165898 (S.D.N.Y. Sept. 26, 2019).]

DUTY TO DEFEND/INDEMNIFY

Second Circuit Finds Duty To Defend Alleged Advertising Injury Claim

Buyer's Direct Inc. asserted that a slipper manufactured by High Point Design, LLC, infringed on Buyer's Direct's design patent. High Point sought a declaratory judgment that its slipper did not infringe, and Buyer's Direct counterclaimed for patent and trade dress infringement. High Point sought defense and indemnification from its insurer, which disclaimed coverage. The United States Court of Appeals for the Second Circuit ruled that the insurer owed High Point a duty to defend. The court found that Buyer's Direct's counterclaim allegation that it was injured by High Point's "offering" the allegedly infringing slippers "for sale," coupled with Buyer's Direct's discovery demands seeking information relating to advertisements for High Point's slipper, triggered the insurer's duty to defend. The court opined that the discovery constituted "extrinsic evidence that supports interpreting the counterclaim's allegation of 'offering for sale' to include a claim for damages due to advertising." The Second Circuit concluded that the insurer's duty to defend arose when High Point provided the insurer with Buyer's Direct's discovery demands. [*High Point Design, LLC v. LM Ins. Corp.*, 911 F.3d 89 (2d Cir. 2018).]

Additional Insured's Refusal To Replace Its Counsel With Counsel Selected By Insurer Did Not Absolve Insurer Of Duty To Defend, New York Federal District Court Rules

An employee of Preferred Builders, Inc., alleged that he was injured while working at a construction site in the Bronx. The employee sued the construction manager, Gilbane Building Company, and Gilbane asserted third-party claims against Preferred. Preferred's insurer defended Preferred, and Gilbane's counsel sought additional insured coverage for Gilbane under Preferred's insurance policy. The insurer indicated it wanted to replace Gilbane's counsel with counsel of its own choosing. Gilbane's insurer resisted on the basis that Preferred's insurer was subject to a potential conflict of interest flowing from its defense of Preferred and its position that Gilbane's additional insured coverage was limited to bodily injury arising out of Preferred's work. Gilbane's insurer sued Preferred's insurer to recover the costs it incurred to defend Gilbane, and the United States District Court for the Southern District of New York ruled that Preferred's insurer had a duty to defend Gilbane as an additional insured and that Gilbane's refusal to use the counsel selected by Preferred's insurer did not absolve the duty. The court reasoned that the apparent conflict of interest between Preferred's insurer and Gilbane entitled Gilbane to select its own counsel. The court then ordered Preferred's insurer to reimburse Gilbane's insurer for the defense costs, plus interest. [*Liberty Mutual Fire Ins. Co. v. Hamilton Ins. Co.*, 356 F. Supp.3d 326 (S.D.N.Y. 2018).]

Court Denies Insurer's Motion To Dismiss Where Allegations Against Insured Might Not Implicate Subsidence Exclusion

A building owner sued a contractor working on an abutting property, alleging that its property was damaged by the contractor's negligence. The contractor's insurer disclaimed, citing the policy's subsidence exclusion, and the contractor sued. The Supreme Court, New York County, denied the insurer's motion to dismiss, reasoning that the contractor was alleged to have caused damage not solely due to excavation activity which fell within the subsidence exclusion, but also due to "any construction activity it might be proven to have engaged in." The court found that it was "conceivable" that the building owner may prove that its damage was caused solely by the contractor's construction activity, if any, which would fall outside the subsidence exclusion. "Given that possibility," the court denied the insurer's motion to dismiss. [*UMF Contracting Corp. v. Arch Specialty Ins. Co.*, 2019 N.Y. Misc. LEXIS 1150 (Sup. Ct. N.Y. Co. March 11, 2019).]

EXCLUSIONS

Building Was Not "Insured Location" Because Neither Owner Resided There

A resident of a Brooklyn apartment building was killed when a planter box located underneath a front window came loose and fell on him, and his estate sued the building owners. The building owners' insurer disclaimed based on, among other things, an exclusion for bodily injury arising out of premises rented to others by the insured that is not an "insured location." The insurer maintained that the building was not an "insured location" as it did not qualify as a "residence premises" because the owners of the building did not reside there. The court agreed, reasoning that the definition of "residence premises" was "unambiguous" and required an insured to reside at the property when the loss occurred. [*Integon Nat. Ins. Co. v. Chen*, 2019 N.Y. Misc. LEXIS 475 (Sup. Ct. N.Y. Co. Feb. 6, 2019).]

No Advertising Injury Coverage For Suit Against Fashion Designer, Southern District Of New York Concludes

A New York fashion designer and related parties sued for allegedly violating the terms of a license agreement asked the United States District Court for the Southern District of New York to compel their insurer to defend them. The court granted summary judgment in favor of the

insurer, explaining that the insurance policies excluded coverage for "personal and advertising injury" arising out of any actual or alleged infringement or violation of any intellectual property right and any injury or damage alleged in any claim or suit that also alleged infringement or violation of any intellectual property right. The court found that the suit against the designer and related parties alleged a number of intellectual property violations, "any one of which" sufficed to bring the suit within the exclusion. In addition, the court ruled that the allegations were "wholly bound up" in the fashion designer's contractual obligations, which also fell within the policies' exclusion for claims arising out of a breach of contract. [*Lepore v. Hartford Fire Ins. Co.*, 374 F. Supp. 3d 334 (S.D.N.Y. 2019).]

Court Finds Coverage Based On "Insured Contract" Exception To Employer's Liability Exclusion

After the underlying plaintiff filed a lawsuit alleging that he was injured due to the negligence of two defendants, the defendants sought contractual indemnification from the underlying plaintiff's employer. The employer's insurers contended that they did not have to defend or to indemnify the employer based on the employer's liability exclusion for bodily injury to the insured's employee in their policies. The court found that the insurers were obligated to defend the employer. The court acknowledged that the underlying plaintiff was the insured's employee and that the policies contained an exclusion for bodily injury to the insured's employees. However, the court continued, the exclusion in both policies had an "insured contract" exception that defined "insured contract" to include an agreement in which the insured assumed the tort liability of another party to pay for bodily injury to a third party. The court concluded that the claim for contractual indemnification against the employer stemmed from a written agreement/ purchase order that fell within the "insured contract" exception to the employer's liability exclusion. [*Wesco Ins. Co. v. Hellas Glass Works Corp.*, 2019 N.Y. Misc. LEXIS 5195 (Sup. Ct. N.Y. Co. Sept. 23, 2019).]

No Coverage Where Owner Did Not Live At Insured Three-Family House

The owner of a three-family house in the Bronx was sued by the claimant who asserted that she was injured when she fell on the driveway, sidewalk, or driveway apron abutting the property. The owner's insurer disclaimed, asserting that the property was not an "insured location" because the owner was not living there as required by the policy at the time the claimant allegedly fell. The insurer agreed to defend the owner until its disclaimer was resolved in the declaratory judgment action. The Supreme Court, New York County, granted summary judgment in favor of the insurer. The court ruled that the term "insured location" was "clear and unambiguous" and required that the owner reside in at least one of the units. The court rejected the owner's argument that the insurer should be equitably estopped from disclaiming coverage based on its control of the owner's defense in the underlying action because the insurer undertook the defense subject to a reservation of rights. In addition, the owner did not show that the insurer's control of the defense "irreparably changed the character and strategy of the underlying action." [*Tower Ins. Co. v. Johnson*, 65 Misc. 3d 1225(A) (Sup. Ct. N.Y. Co. 2019).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Insurer That Failed To Seek Stay Of Arbitration Waived Right To Litigate Whether Petitioner Was Covered Under Auto Policy, Second Department Decides

Marvin Banegas was allegedly injured when a hit-and-run vehicle struck the vehicle in which he was a passenger. He demanded arbitration of his uninsured motorist claim and the insurer did not move to stay arbitration. The arbitrator allowed the insurer to call a witness to demonstrate that Banegas was not covered because he was not occupying the covered vehicle at the time of the accident. In turn, the arbitrator denied Banegas' claim. The Appellate Division, Second Department, ruled that the insurer never moved to stay the arbitration and, therefore, waived its right to litigate whether Banegas was a covered person under the policy. The Second Department vacated the arbitrator's denial of Banegas' claim, and ordered a new hearing on the issues of whether Banegas sustained a serious injury as a result of the negligence of the operator of the hit-and-run vehicle and, if so, the amount of damages to which he was entitled. [*Matter of Banegas v. GEICO Ins. Co.*, 167 A.D.3d 873 (2d Dep't 2018).]

Second Department Concludes That Insurer Demonstrated That SUM Claimant Was "Occupying" Uninsured Vehicle When He Was Allegedly Injured

Davon Rice alleged that he was injured when he put his hand into his vehicle's partially opened window to unlock the door and it moved forward and dragged him along the road. He sought supplementary underinsured/uninsured motorist ("SUM") benefits under his mother's insurance policy. The Second Department ruled that Rice was not entitled to SUM benefits because the SUM endorsement did not apply to "*bodily injury* to an *insured* incurred while *occupying* a motor vehicle owned by that *insured*." The policy defined "occupy-ing" as "in, upon, entering into, or exiting from a motor vehicle." [*Matter of GEICO Ins. Co. v. Rice*, 167 A.D.3d 884 (2d Dep't 2018).]

Second Department Rules That Payment Under Tortfeasor's Policy Precluded Insured's Recovery Of SUM Benefits

Three occupants of a vehicle injured in an automobile accident received a total of $100,000 under the tortfeasor's automobile insurance policy, which they split equally. One of the three then sought supplemental uninsured/underinsured motorist ("SUM") benefits under his own automobile insurance policy. The Appellate Division, Second Department, ruled that the insured was not entitled to

SUM benefits. The court explained that Condition 6 of the SUM endorsement stated that the maximum SUM payment was the difference between the SUM limit (in this case, $100,000) and bodily injury liability insurance payments received from or on behalf of the tortfeasor. The Second Department concluded that the total received by all three vehicle occupants ($100,000) had to be offset against the SUM limit under the insured's policy, thereby precluding any recovery of SUM benefits by the insured under his policy. [*Matter of Farm Family Cas. Ins. Co. v. Gonzalez*, 171 A.D.3d 1053 (2d Dep't 2019).]

Insurer Did Not Have To Cover Insured's Brother Who Drove Covered Vehicle Without Permission, First Department Rules

The insured asserted that his brother was driving the insured's vehicle without his permission when the brother was involved in an accident. The Supreme Court, Bronx County, declared that the insurer did not have to provide coverage to the brother, and he appealed. The Appellate Division, First Department, affirmed. The First Department pointed out that the insured's "uncontradicted testimony" reflected that he did not give his brother permission to use the vehicle and was asleep when his brother took the keys and crashed it, and the insured "promptly reported to the police" that his brother did not have his permission to use the vehicle and subsequently filed an official complaint concerning his brother's unauthorized use. Moreover, the First Department noted, the brother was indicted and criminally prosecuted in connection with his operation of the insured's vehicle. The appellate court concluded that the brother failed to submit competent evidence suggesting implausibility, collusion, or implied permission so as to require the issue of consent to be submitted to a jury. [*American Country Ins. Co. v. Umude*, 176 A.D.3d 542 (1st Dep't 2019).]

FIRST PARTY PROPERTY

Second Department Finds No Coverage For Business Income Loss Due To Telephone Service Disruption After Superstorm Sandy

After the insured's telephone service was disrupted by flooding at a service provider's lower Manhattan switch center during Superstorm Sandy, the insured sought coverage for loss of business income. The Appellate Division, Second Department, held that the loss was not covered. The court explained that the policy covered loss of business income due to the necessary suspension of operations caused by direct physical loss or damage by a covered cause of loss to "dependent property," which was defined to exclude property that delivered communication services to the insured. [*Cohen & Slamowitz, LLP v. Zurich Am. Ins. Co.*, 168 A.D.3d 905 (2d Dep't 2019).]

Third Department Affirms Dismissal Of Coverage Case Filed More Than 24 Months After Loss

After a building in the city of Troy was burglarized, the building owner sought coverage for the damage. On September 18, 2014, the insurer denied the claim because of the policy's lack of coverage for theft and water damage. On October 19, 2016, the owner sued the insurer, alleging breach of contract. The Appellate Division, Third Department, affirmed the trial court's dismissal of the action because it was not filed within 24 months "after inception of the loss" as required by the policy. [*Anderson v. Allstate Ins. Co.*, 171 A.D.3d 1331 (3d Dep't 2019).]

Second Department Finds Coverage For Fire Damage By Virtue Of Ensuing Loss Exception To Faulty Workmanship Exclusion

The owners of a two-family home damaged by fire submitted a claim for coverage to their insurer. The insurer disclaimed coverage based upon the policy's faulty workmanship exclusion, maintaining that "improper conditions" regarding a junction box "were the direct cause of the fire and instant loss". The owners sued. The Appellate Division, Second Department, held that the owners were entitled to summary judgment based on the ensuing loss exception to the faulty workmanship exclusion. The Second Department reasoned that the fire occurred two years after the alleged faulty workmanship related to the junction box, and that the fire caused ensuing loss to property "wholly separate from the defective property itself." The court distinguished cases where an insured sought coverage under an ensuing loss exception for the cost of correcting the faulty or defective work. [*Fruchthandler v. Tri-State Consumer Ins. Co.*, 171 A.D.3d 706 (2d Dep't 2019).]

Fourth Department Affirms Judgment Against Homeowner Who Did Not Repair Or Replace Roof Within Two Years From Date Of Loss

After a homeowner's roof was damaged by a storm, her insurer paid her the actual cash value of the damage. She subsequently sued the insurer for breach of contract, seeking payment of the cost to replace the roof. The trial court granted summary judgment in favor of the insurer, and the Appellate Division, Fourth Department, affirmed. The Fourth Department explained that the policy required the insurer to pay the homeowner the actual cash value of damage to her home (which the insurer paid) and to pay additional repair or replacement costs only if the homeowner made the repairs or replaced the damaged property within two years from the date of loss. Because the homeowner did not repair or replace the roof within two years from the date of loss, the insurer properly denied coverage. [*Cushing v. Allstate Fire and Cas. Ins. Co.*, 173 A.D.3d 1819 (4th Dep't 2019).]

No Coverage For Code Upgrades, Northern District Of New York Rules

An insured sued his insurer for coverage under his homeowner's policy after a pipe burst and his home was damaged by water. The insurer moved for partial

summary judgment, maintaining that the portion of the insured's claim seeking recovery for the cost of "code upgrades" – that is, the cost of upgrading non-compliant electrical work found by inspectors while the water damage was being repaired – was excluded by the policy's ordinance or law exclusion. The insured argued that an endorsement to the policy provided coverage for electrical repairs "necessary" to complete the project. The court ruled in favor of the insurer, reasoning that the ordinance or law exclusion precluded coverage for losses "caused directly or indirectly" from the enforcement of any ordinance or law, "regardless of any other cause or event contributing concurrently or in any sequence to the loss." The court pointed out that the upgrade was "unrelated to the water damage covered by the homeowner's policy" and was not necessary to repair the damage. [*Sanderson v. First Liberty Ins. Corp.*, 2019 U.S. Dist. LEXIS 76494 (N.D.N.Y. May 7, 2019).]

WAIVER/ESTOPPEL/3420(d)

Equitable Estoppel Could Not Be Used To Create Coverage, First Department Rules

An insurer asked a court to stay the claimant's arbitration seeking to recover supplementary uninsured/underinsured motorist benefits. The claimant argued that the insurer was equitably estopped from denying coverage. The Appellate Division, First Department, held that the claimant was not insured under the policy, and equitable estoppel could not be invoked to create coverage. [*Matter of U.S. Specialty Ins. Co. v. Navarro*, 169 A.D.3d 415 (1st Dep't 2019).]

New York Insurance Law § 3420(d)(2) Inapplicable to Risk Retention Group, New York Court Of Appeals Rules

After a general contractor was sued in a personal injury action by a subcontractor's employee, the general contractor sought additional insured coverage under the subcontractor's insurance policy. The insurer – a foreign risk retention group ("RRG") chartered in Montana and doing business in New York – disclaimed coverage. The general contractor sued the RRG, alleging that it failed to timely disclaim under New York Insurance Law § 3420(d)(2). The New York Court of Appeals held that § 3420(d)(2) does not apply to the RRG because it does not involve a failure to promptly disclose coverage within the meaning of New York Insurance Law § 2601(a)(6) which is the statutory provision applicable to foreign RRGs. [*Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Group LLC*, 34 N.Y.3d 1 (2019).

Insurer Estopped From Denying Coverage After Accepting Coverage Without Reservation, First Department Rules

A temple sought additional insured coverage under a subcontractor's insurance policy for a lawsuit brought by an employee of the subcontractor. The insurer defended the temple without reservation, but later sought to deny coverage. The Appellate Division, First Department, held that the insurer was estopped from denying coverage. The First Department reasoned that the temple relied to its detriment on the defense provided by the insurer, which was in conflict with the defense the insurer provided to the general contractor. [*Temple Beth Sholom, Inc. v. Commerce & Indus. Ins. Co.*, 173 A.D.3d 637 (1st Dep't 2019).]

Insurer's Failure To Provide Timely Written Notice Of Disclaimer To Additional Insureds Rendered Disclaimer Ineffective, Second Department Holds

An employee of Vinny Construction Corp. was allegedly injured while working at a construction site in College Point, Queens. The insurer for the owner and the general contractor at the site tendered a claim for additional insured coverage to Vinny's insurer on behalf of the owner and the general contractor. Vinny's insurer sent a disclaimer to Vinny and to the insurer for the owner and the general contractor based upon an employee exclusion in its policy. The Appellate Division, Second Department, ruled that the failure of Vinny's insurer to provide timely written notice of disclaimer directly to the additional insureds rendered its disclaimer of coverage "ineffective" against them pursuant to New York Insurance Law § 3420(d). The Second Department rejected Vinny's insurer's contention that it did not have to comply with § 3420(d) until it received certain contract documents, reasoning that it did not need those documents to disclaim coverage to the additional insureds based on the employee exclusion. "An insurer may not delay issuance of a disclaimer upon a ground that the insurer knows to be valid while investigating other possible grounds for disclaiming coverage," the Second Department concluded. [*AVR-Powell C Dev. Corp. v. Utica First Ins. Co.*, 174 A.D.3d 772 (2d Dep't 2019).]

Without Evidence That Insured Had 'Substantial Business Presence' In New York, Section 3420(d) Did Not Apply, Court Rules

A contractor that was sued in a personal injury action sought coverage from its insurer for the action. The insurer disclaimed and filed a declaratory judgment action against the contractor and other parties in the underlying action, asserting that the contractor breached its duty to cooperate as required by the policy. One of the defendants moved for summary judgment, arguing that the insurer's disclaimer was untimely under New York Insurance Law § 3420(d). The defendant argued that although the policy was issued and delivered in Florida, § 3420(d) applied under the Court of Appeals' *Carlson* decision because the contractor had a substantial business presence in New York. The court denied the motion and held that §3420(d)'s timeliness requirements did not apply, reasoning that the moving party did not provide sufficient evidence to establish that the contractor had a substantial business presence in New York. [*Colony Ins. Co. v. Int'l Contractors Serv., LLC*, 2019 N.Y.

Misc. LEXIS 4960 (Sup. Ct. N.Y. Co. Sept. 13, 2019).]

Section 3420(d) Does Not Apply To Claims Between Insurers, Court Holds

Four companies were named as defendants in an underlying lawsuit alleging that the plaintiff sustained bodily injuries in an accident at a construction site. National Casualty asked the Supreme Court, New York County, to declare that Utica First Insurance Company had a duty to indemnify the companies as additional insureds. Utica First maintained that coverage was pre-cluded by an exclusion in its policy. Relying upon New York Insurance Law § 3420(d), National Casualty moved for summary judgment and argued that Utica First failed to timely disclaim coverage based upon the exclusion. The court denied the motion. The court reasoned that a stipulation of discontinuance was filed by the parties in the underlying lawsuit reflecting that the parties had reached a settlement in principle which confirmed that the only party in interest with respect to the claim for additional insured coverage was National Casualty. As such, the court ruled, the claim was between two insurers and, therefore, § 3420(d) did not apply. [*National Casualty Co. v. Utica First Ins. Co.*, 2019 N.Y. Misc. LEXIS 5564 (Sup. Ct. N.Y. Co. Oct. 10, 2019).]

BAD FAITH/EXTRA-CONTRACTUAL

Amount Of Damages Recoverable In Bad Faith Action Not Limited By Claimant's Death, New York Federal District Court Holds

An injured claimant sued the insured, and a jury awarded her more than $3.3 million in compensatory damages, more than the insured's policy limits. The award included damages for future pain and suffering and for future medical expenses. The insurer asked the United States District Court for the Eastern District of New York to declare that it did not have to make payments in excess of its limits and that it did not act in bad faith. The insured assigned her rights against her insurer to the injured claimant who asserted a bad faith counterclaim against the insurer. After the injured claimant died and an administrator was named for her estate, the insurer moved to limit any damages on the bad faith claim to damages incurred before the claimant's death. The insurer argued that any obligation to make monthly payments to the injured woman for future pain and suffering and future medical expenses terminated upon her death. The district court decided that the death of the claimant did not limit the estate's ability to recover bad faith damages, even though New York law terminates a personal injury defendant's obligation to pay future damages installments upon the claimant's death. The court reasoned that the insured would be able to recover the full amount of the judgment from the insurer, and the estate should be able to pursue the full amount of the excess judgment based on "basic principles of assignment". [*Government Employees Ins. Co. v. Saco*, 2018 U.S. Dist. LEXIS 209652) (E.D.N.Y. Dec. 11, 2018).]

Northern District Of New York Dismisses Insured's Punitive Damages Claim Against Insurer

The owner of a fraternity house at Syracuse University sued its property insurer over its claim for damage caused by a ruptured sprinkler pipe. They argued over the amount to be paid and the timeliness of acting on the claim. The insurer moved to dismiss the punitive damages cause of action, and the United States District Court for the Northern District of New York granted its motion. The court ruled that the owner's failure to specifically enumerate any independent tortious conduct on the part of the insurer foreclosed recovery of punitive damages from the insurer. [*Phi Epsilon Building Ass'n of Alpha Chi Ro, Inc. v. RSUI Indemnity Co.*, 2019 U.S. Dist. LEXIS 53461 (N.D.N.Y. March 29, 2019).]

MISCELLANEOUS

Two Insurers' "Other Insurance" Clauses Cancel Out, Providing Co-Insurance

An employee of a contractor working on a project owned by the New York City Housing Authority ("NYCHA") was allegedly injured. The worker sued the NYCHA, which sought additional insured coverage under two commercial general liability insurance policies. The "other insurance" clauses of each policy stated that it was excess as to the other insurance. Accordingly, the court held that the "other insurance" clauses canceled each other out, and that the insurers had to share equally in the costs of defending NYCHA. The court opined that an endorsement in one of the policies that said that the insurer would "not seek contribution from any other insurance available to a contractor" did "not vitiate NYCHA's rights" as an additional insured under the other policy. [*Endurance Am. Specialty Ins. Co. v. Harleysville Worcester Ins. Co.*, 2019 N.Y. Misc. LEXIS 382 (Sup. Ct. N.Y. Co. Jan. 22, 2019).]

Criminal Case Against Harvey Weinstein Did Not Warrant Stay Of Coverage Action, Southern District Of New York Decides

An insurer that issued a number of insurance policies to Harvey Weinstein, his company, and/or members of his family asked the United States District Court for the Southern District of New York to declare that it had no obligation under the "personal injury" coverage of any of its policies to defend or to indemnify Weinstein in any of 18 civil and criminal cases and claims pending against him. Weinstein moved to stay the insurer's action pending the resolution of those underlying actions, but the court found a stay was not warranted. The court explained that questions of fault and liability in the underlying actions were "wholly irrelevant, and in fact, inadmissible evidence," to its analysis of the insurer's duty to defend. The court added that Weinstein's pending criminal case did not change the analysis, given the "limited nature of the duty to defend inquiry." The court concluded that any testimony from Weinstein as to his guilt, innocence, or

potential liability in the underlying actions was "immaterial" to its assessment of whether the insurer's policies contemplated coverage for the underlying actions, which would be assessed "on the face of their pleadings." [*Federal Ins. Co. v. Weinstein*, 2019 U.S. Dist. LEXIS 53165 (S.D.N.Y. March 28, 2019).]

Insurer Failed To Cancel Life Insurance Policy Properly, Second Department Rules

After the insured died, his beneficiary sought the proceeds under the insured's $1 million life insurance policy. The insurer disclaimed coverage on the ground that the policy was cancelled for nonpayment of the premium prior to the insured's death. The beneficiary sued, asserting that the insurer failed to give notice of the premium due as required by Insurance Law § 3211 and, therefore, the policy was in effect when the insured died. The Appellate Division, Second Department, ruled in favor of the bene-ficiary. The court found that the insurer was aware that the insured had changed his address but failed to send a notice of premium due to that address at least 15 days prior to the day when the payment became due. Consequently, the court concluded, the policy remained in effect for one year after the premium due date and was in effect on the date of the insured's death. [*Bradley v. William Penn Life Ins. Co. of N.Y.*, 170 A.D.3d 936 (2d Dep't 2019).]

Insurers Need Not Prove Fraud To Deny No-Fault Payments To Healthcare Providers, New York Court Of Appeals Decides

After insurance companies stopped paying no-fault claims submitted by Andrew Carothers, M.D., P.C., a professional service corporation, as assignee, the PC sued the insurers. The insurers asserted that, under *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313 (2005), the PC was not eligible to receive those payments because it was controlled by non-physicians. The PC countered that *Mallela* allowed insurers to withhold payments only where a professional corporation's ostensible or real managers had engaged in conduct "tantamount to fraud," which had not occurred here. The New York Court of Appeals agreed with the insurers, holding that *Mallela* does not require a finding of fraud for an insurer to withhold payments to a medical service corporation improperly controlled by non-physicians. Accordingly, the Court concluded, the insurers did not have to allege or demonstrate fraudulent intent or conduct "tantamount to fraud" to be able to reject a professional corporation's no-fault claims. [*Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 33 N.Y.3d 389 (2019).]

Employee Theft Exclusion Barred Coverage For Hotel Owners' Claim That Their Former Manager Stole Over $700,000, Northern District Of New York Holds

The owners of two Albany-area hotels alleged that their former hotel manager – the sole member of the limited liability company (LLC) they hired to manage both hotels – stole over $700,000 from them by depositing checks intended for the hotels into his own bank account. Their insurer denied coverage for the claim based on the policy's employee theft exclusion, and the owners sued. The United States District Court for the Northern District of New York granted summary judgment in favor of the insurer. The court explained that the policy excluded coverage for theft committed by a named insured or by any partner or member of a named insured, and that the LLC was a named insured under the policy. Accordingly, the court concluded, there were no triable issues of material fact regarding the applicability of the exclusion, and the hotels sought coverage for "what the policy simply does not cover – an alleged theft by a member of a named insured." [*Albany Airport HIE, LLC v. Hanover Ins. Group, Inc.*, 391 F. Supp. 3d 193 (N.D.N.Y. 2019).]

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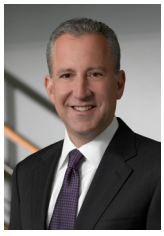

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