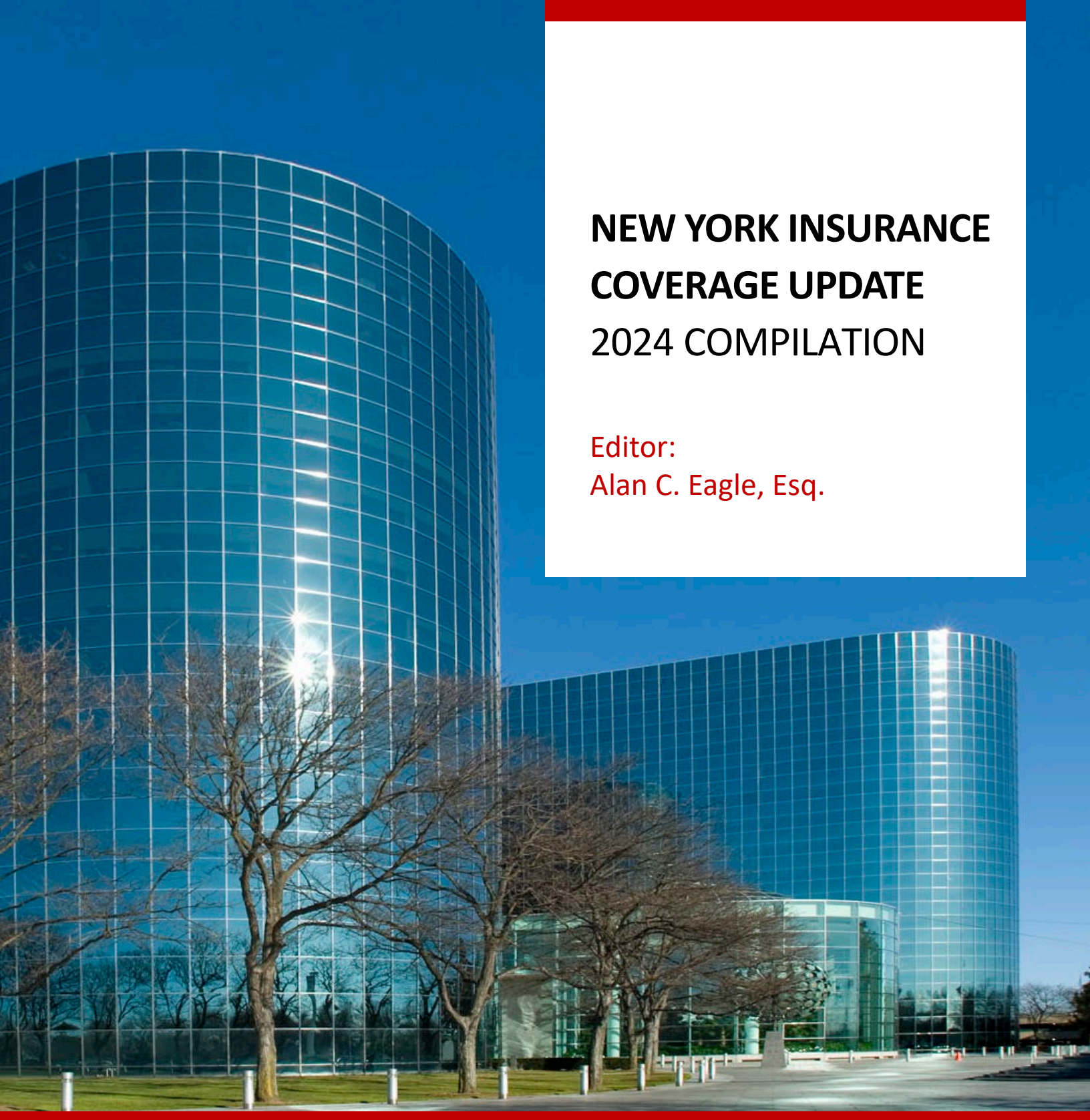

NEW YORK INSURANCE COVERAGE UPDATE

2024 COMPILATION

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ADDITIONAL AND NAMED INSUREDS/PRIORITY

Court Finds Subcontract Requiring Additional Insured Coverage Enforceable and that Insurer Must Reimburse Post-Tender Defense Costs

An owner, general contractor (GC) and subcontractor (Sub) were sued by injured workers at a construction site, and they were defended by the Sub's insurer, U.S. Specialty Insurance Company. U.S. Specialty tendered their defenses to the insurer of a sub-subcontractor (Sub-Sub), State National Insurance Company. State National's policy contained a blanket additional insured endorsement providing additional insured coverage to the owner, GC and Sub if required by a written contract. The Sub-Sub signed a contract with the Sub that required that the Sub-Sub obtain such additional insured coverage, but State National disclaimed coverage because the contract was not signed by the Sub and the Sub-Sub's signature was not dated. The Supreme Court, New York County, held that the contract was enforceable because it was signed "by the party to be charged" and that even though the signature was not dated, the agreement stated that it was made before the alleged accidents. The court found that the affidavit of the Sub-Sub's owner stating that the Sub-Sub did not sign the contract until after the personal injury suits were filed did not undermine the court's conclusion that the contract was enforceable beforehand. Because a comparison of the "other insurance" clauses in the two insurers' policies reflected that State National's coverage obligation was primary, State National was ordered to reimburse post-tender defense costs. [*U.S. Specialty Ins. Co. v. State Natl. Ins. Co., Inc.,* 81 Misc.3d 1222(A) (Sup. Ct., N.Y. Cnty. 2023).]

Court Permits Putative Additional Insured to Intervene in Coverage Action Where Insurer Sought Recission of Policy

A contractor was sued in two personal injury actions arising from construction accidents at a construction site, and the contractor sought coverage under a policy it purchased from Prime Property and Casualty Insurance Company. Prime denied coverage so the contractor filed a declaratory judgement action against the insurer. Prime counterclaimed to rescind the policy based on the contractor's alleged misrepresentations in its application for the policy. A putative additional insured under the Prime policy was also sued in one of the underlying actions, and it filed a motion to intervene in the coverage action. Prime and the contractor opposed the motion. The Supreme Court, New York County, granted the putative additional insured's motion to intervene, reasoning that the putative additional insured had a "bona fide interest in an issue" in the action and timely filed its motion. The court rejected the argument by Prime and the contractor that intervention would hinder a settlement. [*Manhattan Concrete LLC v. Prime Prop. & Cas. Ins. Inc.,* 2023 N.Y. Misc. LEXIS 23318 (Sup. Ct., N.Y. Cnty. Dec. 21, 2023).]

Second Department Holds That Town Not Insured under Dissolved Village's Policy Where Insurer Did Not Consent to Transfer

The Town of Brookhaven filed a declaratory judgment action against New York Municipal Insurance Reciprocal seeking coverage for an underlying personal injury action against the Town under a policy issued to the Village of Mastic Beach. The Town maintained that, upon the Village's dissolution, the Town assumed the Village's liabilities, obligations, and entitlement to insurance pursuant to New York's General Municipal Law. The Town also argued that the insurance rights were transferred pursuant to resolutions in connection with the dissolution. However, the policy included a provision requiring written permission from the insurer to transfer rights under the policy. The Appellate Division, Second Department, affirmed summary judgment to the insurer, reasoning that the Town failed to meet its burden of demonstrating that it was an insured under the policy and, contrary to the Town's contentions, it did not automatically obtain the policy rights under the law or resolutions. In addition, the insurer established that it never consented to a transfer of rights as required by the policy's "explicit terms." [*Town of Brookhaven v. New York Mun. Ins. Reciprocal,* 228 A.D.3d 901 (2d Dep't 2024).]

CONDITIONS/LATE NOTICE

Fourth Department Finds that Insurer Failed to Meet Its Burden of Proving That Insureds Failed to Cooperate

Merchants Preferred Insurance Company filed a declaratory judgment action in New York seeking a declaration that it had no duty to defend or to indemnify its insureds in an underlying Florida personal injury action arising from a motor vehicle accident in Florida. The insurer defended the insureds under their commercial auto policy, but after the underlying action was placed on the trial calendar, the insurer disclaimed based on the insureds' failure to cooperate. The trial court denied summary judgment to the insurer, and the Appellate Division, Fourth Department, affirmed. The Fourth Department first found that New York law applied because New York had the "most significant contacts," which generally focuses on the "principal location of the insured risk." The court explained that the policy was issued in New York to a New York-based insured for a vehicle principally garaged in New York, and that the accident occurring in Florida was not dispositive. The court next found that New York's timely disclaimer requirement

under Insurance Law § 3420 (d) did not apply because it only applies to "accidents occurring" in New York. However, the court concluded that Merchants failed to meet its "heavy" burden of proving that coverage was precluded because of the insureds' failure to cooperate. Although the insurer established that the insureds did not meaningfully respond to inquiries regarding the subject accident, the court found that this "inaction on its own" did not establish, as a matter of law, that the insurer acted "diligently in seeking the cooperation," that its "efforts were reasonably calculated to obtain their cooperation," and that the attitude of the insureds was "one of willful and avowed obstruction." [*Merchants Preferred Ins. Co. v. Campbell,* 229 A.D.3d 1260 (4th Dep't 2024).]

COVERAGE GRANT

New York Trial Court Finds that Multi-Year Policies' Per Occurrence Limits Apply on Term (Not Annual) Basis

Century Indemnity Company insured Brooklyn Union Gas Company under several multi-year policies with per occurrence limits. After a trial, the jury found that Century was obligated to cover certain costs incurred by Brooklyn Union for government-mandated cleanups of three sites in Brooklyn, New York, and the total cleanup were costs allocated to each year in which the Century policies were in effect. In pre-trial and post-trial motions, Brooklyn Union argued that any ambiguity should be construed against Century as the drafter of the policies under the *contra proferentem doctrine* and that, regardless, the per occurrence limit should apply on an annual basis for each year of a multi-year policy. The Supreme Court, New York County rejected the argument and held that the *contra proferentem doctrine* did not apply to the Century policies because Brooklyn Union was a sophisticated policyholder. In turn, the court held that "the most reasonable way to interpret a policy limit that does not specify the period over which it applies is that the limit applies for the length of time the policy is in effect—whether that be a year, two years or five." [*Century Indem. Co. v. Brooklyn Union Gas Co.*, 2024 N.Y. Misc. LEXIS 98 (Sup. Ct., N.Y. Cnty. Jan. 5, 2024).]

Northern District Denies Insurer's Motion for Summary Judgment Finding Questions of Fact Whether Insured Expected or Intended Claimant's Injuries

The insured admittedly punched and threw the claimant to the ground, but the insured maintained during her plea for reckless assault in criminal court that the claimant was the aggressor, she acted in self-defense, and that she did not intend claimant's injuries. In turn, the claimant amended her civil suit complaint against the insured to drop her intentional tort claim and to add claims of negligence and/or reckless conduct, and then entered into a consent judgment with the insured for $350,000 and sought satisfaction from the insured's homeowner's carrier, Liberty Mutual. Liberty maintained that the amended complaint attempted to "manufacture" coverage and did not change its position that there was no coverage because the incident was not a covered "occurrence", i.e., accident, and was excluded by the policy's "expected or intended" injury exclusion. Relying upon the pleadings and deposition testimony in the claimant's personal injury action, and the insured's plea allocution in the criminal case, the United States District Court for the Northern District of New York denied Liberty's motion for summary judgment, finding that a reasonable jury could conclude that either the insured intended to harm the claimant or that the claimant was injured by the insured's reckless attempt to protect herself. However, the court found that Liberty complied with New York's timely disclaimer requirement under New York Insurance Law § 3420(d) because Liberty timely disclaimed and, besides, the "occurrence" requirement is an element of coverage that is not subject to the statute, and the "expected or intended" injury exclusion is not necessarily subject to the statute because the statute only applies to bodily injury claims arising out of an "accident". [*Bunnenberg v. Liberty Mut. Fire Ins. Co.,* 2024 U.S. Dist. LEXIS 172773 (N.D.N.Y. Sept. 24, 2024).]

DUTY TO DEFEND/INDEMNIFY

Southern District Holds Insured Not Entitled to Judgment on Pleadings as to Duty to Defend Because Extrinsic Evidence May Show Duty Is Terminated

Color Techniques, Inc. (CTI) sold ingredients used in cosmetic formulations and was insured by Ironshore Specialty Insurance Company under a series of Environmental Protection Insurance Coverage Package policies. The insurer sued CTI, seeking a declaration that it had no duty to defend or to indemnify CTI in lawsuits against CTI and others alleging injuries from asbestos exposure. The underlying asbestos plaintiffs made broad claims against CTI and dozens of other underlying defendants without distinguishing between them, including that they manufactured and installed asbestos-containing products. CTI's policies generally excluded asbestos but provided limited coverage for bodily injury from asbestos caused by "your work." The insurer agreed to defend CTI in the underlying actions because the underlying allegations gave rise to the possibility of coverage, and the insurer reserved its right to decline coverage to the extent further information clarified that the actions did not implicate CTI's work. In the declaratory judgment action, CTI moved for partial judgment on the pleadings as to its insurer's duty to defend. The insurer maintained that CTI's motion should be denied because extrinsic evidence showed that CTI's alleged liability was based on its status as a manufacturer or supplier of products containing asbestos, not CTI's work. The

United States District Court for the Southern District of New York denied CTI's motion, explaining that the duty to defend is generally triggered under the "four-corners" rule if the underlying allegations potentially fall within the coverage. However, the court stressed that the duty to defend "will end if and when it is shown unequivocally that the damages alleged would not be covered by the policy," and that one exception to the "four-corners" rule is where "extrinsic evidence unrelated to the underlying merits unambiguously shows that there is no possibility of coverage." Applying these principles, the court held that CTI was not entitled to judgment on the pleadings because the insurer's pleading and the discovery suggested that the underlying plaintiffs were bringing products-liability claims against CTI as a supplier of an allegedly defective product, not claims based on CTI's work. The court concluded that "to end its duty to defend, [the insurer] will need to prove, not just plead, with certainty that no claim" of the underlying plaintiffs "falls within" the "coverage" of the policies. [*Ironshore Specialty Ins. Co. v. Color Techniques, Inc.*, 2024 U.S. Dist. LEXIS 136091 (S.D.N.Y. Aug. 1, 2024).]

Second Department Upholds Summary Judgment to Insurer Finding Assault Not Covered Even Though Labeled by Claimant as Negligence

The insured punched and kicked the Claimant, causing injuries. The Claimant sued the insured alleging that the insured assaulted him, and negligently and recklessly caused his injuries. Nationwide Mutual Fire Insurance Company filed a declaratory judgment action and moved for summary judgment declaring that it had no duty to defend or to indemnify the insured under the insured's homeowners policy because the assault was not a covered "occurrence," which was defined in the policy as an "accident." The Appellate Division, Second Department, upheld summary judgment to Nationwide. The court acknowledged that an insurer's duty to defend generally arises when the allegations in the complaint against the insured give rise to the reasonable possibility of coverage. However, the court found that the way the Claimant "labeled" his causes of action in the underlying action was not dispositive because an alleged "assault" was not a covered "occurrence" within the meaning of the policy. The court also found that the insured's conduct was barred by the exclusions in the policy for bodily injury caused by, or resulting from, intentional or criminal acts of the insured. [*Nationwide Mut. Fire Ins. Co. v. Nelson*, 2024 N.Y. App. Div. LEXIS 5843 (2d Dep't Nov. 13, 2024).]

EXCLUSIONS

Second Circuit Holds that Malpractice Insurer Has No Duty to Defend or to Indemnify Lawyer Because of Business Enterprise Exclusion

Associated Industries Insurance Company sued its insureds, a lawyer, and his former law firm, seeking a declaration that it had no duty to defend or to indemnify an underlying lawsuit brought by their former client. The client sought damages for legal malpractice, breach of fiduciary duty, elder abuse, and fraud related to the client's 2017 sale of land to the lawyer's separate company. The insurer disclaimed coverage under the law firm's policy because of an exclusion for activities undertaken in the capacity of an officer of another business enterprise. The federal district court granted judgment to the insurer based on the pleadings. On appeal, the lawyer argued that the insurer had a duty to defend him in the underlying action because the client's underlying complaint included potentially covered conduct that predated the existence of the lawyer's company, including that the lawyer allegedly misadvised the client to reject two earlier offers. The United States Court of Appeals for the Second Circuit rejected the lawyer's argument and affirmed, finding that the actual claims stated in the underlying complaint and the lawyer's potential liability all arose at least, in part, from the lawyer's position with his company. [*Associated Indus. Ins. Co. v. Kleinhendler,* 2023 U.S. App. LEXIS 32327 (2d Cir. Dec. 7, 2023).]

First Department Finds Prior Notice Exclusion Precludes Coverage for Recall under One Policy and Questions of Fact under Another

The defendant insurers issued insurance policies to the insured for two years, each of which covered "market withdrawal or recall" as an insured event so long as the insured gives notice "as soon as possible, no longer than 30 days" after discovery of the event. However, the policies excluded coverage where the insured "knew or should have known, prior to the inception of the policy" of pre-existing circumstances that "caused or could reasonably have expected to cause" an insured event. The Appellate Division, First Department, found that the exclusion precluded coverage under the second policy for the insured's recall of its enFlow product because, among other things, the insured decided to suspend enFlow use before that policy was issued. However, the court found questions of fact as to whether the insured gave timely notice under the first policy. [*Vyaire Holding Co. v. Westchester Surplus Lines Ins. Co.,* 224 A.D.3d 525 (1st Dep't 2024).]

Southern District Holds that Legionnaires' Disease Does Not Fall within Communicable Disease Exclusion

Claimants were residents at premises owned and operated by Doe Fund, Inc. in Bronx, New York. The Claimants allegedly inhaled Legionella bacteria from vapors released at a cooling tower by the premises, and they sued the Doe Fund for their alleged bodily injuries. The Doe Fund tendered the bodily injury suits to its insurer, Berkley Insurance Company, which disclaimed coverage based on a Communicable Disease Exclusion in Doe

Fund's policy. The exclusion precluded coverage for bodily injury arising from the "transmission" of a "communicable disease," which was not defined in the policy. The United States District Court for the Southern District of New York held that the exclusion did not apply. The court noted that a policy term is not ambiguous just because it is undefined, or because the parties disagree on its meaning. However, relying upon dictionary definitions, the court found that the plain and ordinary meaning of "communicable disease" is a "disease transmitted from one individual or animal to another," unlike legionnaires' disease, which is usually transmitted through breathing water vapor or mist contaminated with Legionella. [*Doe Fund, Inc. v. Berkley Ins. Co.,* 725 F. Supp. 3d 443 (S.D.N.Y. 2024).]

Second Circuit Applies "But For" Test to Exclusion in Finding No Coverage under D&O Policy

Paraco Gas Corporation purchased an insurance policy for Directors, Officers and Private Company Liability ("D&O") from Ironshore Indemnity, Inc. that covered certain acts of Paraco's officers and directors. Paraco shareholders filed a derivative action against two Paraco officers alleging that they transferred shares violating the terms of two Paraco Shareholder Agreements. The officers tendered the action to Ironshore, which denied coverage. Paraco and the officers filed a declaratory judgment action seeking coverage from Ironshore. The Second Circuit found that claims in the shareholder action arose out of obligations under the Shareholder Agreements, and thus, fell within the policy's exclusion for any claim against the insured "alleging, *arising out of*, based upon or attributable to any actual or alleged contractual liability or obligation of the Company or an Insured Person under any contract [or] agreement …." Paraco argued that one of the claims fell outside the exclusion because it was based on the Board's alleged abdication of its corporate and fiduciary duties to shareholders by allegedly rubberstamping the officer's actions or concealing them. The Second Circuit disagreed, reasoning that New York courts have historically interpreted "arising out of" broadly, which requires a "but for" test. Because the claims "could not exist *but for* the contractual obligations created by the Class A shareholder agreement," the Second Circuit concluded that coverage was precluded by the exclusion. [*Paraco Gas Corp. v. Ironshore Indem. Inc*., 2024 U.S. App. LEXIS 14628 (2d Cir. June 17, 2024).]

AUTO/UNINSURED/ UNDERINSURED MOTORIST

Second Department Holds that SUM Coverage Not Triggered Because Tortfeasor's Liability Policy Had Same Limits

Claimants were in an automobile accident with a vehicle insured under a liability policy issued by Allstate. Allstate tendered its $50,000 per-accident policy limit on behalf of its insured (the alleged tortfeasor) in settlement of the claim. In turn, the claimants sought supplementary uninsured motorists (SUM) coverage under their own policy with State Farm that also had a $50,000 per-accident limit. The New York Appellate Division, Second Department, held that the claimants were not entitled to SUM coverage because "[u]nder New York law, SUM coverage is only triggered where bodily injury liability insurance limits of the policy covering the tortfeasor's vehicle are less than the liability policy under which a party is seeking SUM benefits." [*Matter of State Farm Mut. Auto Ins. Co. v. Diaz*, 223 A.D.3d 674 (2d Dep't 2024).]

New York Supreme Upholds Insurer's Disclaimer Based on Insured's Failure to Sign and Return His EUO Transcript Even If Request for EUO Was Untimely

Simin Brown was injured in an auto accident and assigned his rights to no-fault benefits under his auto policy to his medical providers. State Farm denied coverage, filed a coverage action, and moved for summary judgment against the medical providers on the basis that Brown failed to sign and return the transcript of his examination under oath (EUO), which he attended at State Farm's request. State Farm relied upon the New York mandatory no-fault endorsement providing that "[n]o action shall lie against the [insurer] unless, as a condition precedent thereto, there shall have been full compliance with the terms" of the coverage, including that upon the insurer's reasonable request, the injured person "submit" to an EUO and "subscribe the same." The Supreme Court, New York County, held that Brown's failure to execute and return his EUO transcript precluded coverage even if State Farm failed to timely ask Brown to appear for the EUO. The court reasoned that "having appeared …, [the injured person] must also take basic steps to enable the transcript of the testimony to be introduced at evidence" in a later judicial proceeding. [*State Farm Fire & Cas. Co. v. Atlantic Diagnostics, LLC.,* 82 Misc.3d 1229(A) (N.Y. Sup. Ct., N.Y. Cnty. 2024).]

FIRST PARTY PROPERTY

New York's Highest Court Holds that Restaurants' Business Losses from Coronavirus Not Covered

The insured, Consolidated Restaurant Operations, a company that owns and operates dozens of restaurants, obtained a commercial property policy from Westport Insurance Company. Subject to certain exclusions, the policy covered "all risks of direct physical loss or damage to insured property" and business

interruption losses "directly resulting from direct physical loss or damage" to insured property. The insured sued Westport for coverage for its loss of revenue from the pandemic, alleging that SARS-Co-V2, the virus that causes COVID-19, was present in its restaurants and resulted in cessation of in-person dining services and related business interruption losses. The New York Court of Appeals affirmed the lower court's dismissal of the insured's complaint on the ground that it did not allege "direct physical loss or damage," which the court found required "a material alteration or a complete and persistent dispossession of insured property." The Court concluded as follows: "We do not take lightly the severe economic losses incurred by restaurants and other businesses serving the public as a result of the COVID-19 pandemic. But our task is to faithfully interpret the terms of the insurance policy before us, not to 'rewrite the language of the polic[y] at issue' to reach a result with 'equitable appeal.'" [*Consolidated Rest. Operations, Inc. v. Westport Ins. Corp.*, 41 N.Y.3d 415 (2024).]

Lost Business Income Not Covered Because Not Caused by Direct Physical Loss or Damage, Third Department Finds

87 Uptown Road, LLC owned an apartment complex with 11 apartment buildings in Ithaca, New York, which were insured by Country Mutual Insurance Company. A fire destroyed one building (Building D), and the owner made a claim for coverage for loss of business income based on lost rents from the dispossessed tenants of Building D and lost rents of tenants in other buildings that vacated because of inconveniences resulting from the fire and rebuilding of Building D. The insurer maintained that the policy did not provide coverage for the lost rents associated with the other buildings, and the Appellate Division, Third Department, agreed, finding that the policy unambiguously limited coverage to "lost business income which is caused by direct physical loss or damage to property at the described premises." The court noted that the insurer met its burden of producing evidence that the buildings, other than Building D, were not "severely damaged, destroyed or rendered uninhabitable, and thus did not trigger [coverage] for loss of business income for these other buildings …." The court concluded that loss of business income due to the inconvenience attendant to the fire "alone, absent direct damage," is not enough. [*87 Uptown Rd., LLC v. County Mut. Ins. Co.,* 225 A.D.3d 1016 (3d Dep't Mar. 2024).]

Southern District Grants Summary Judgment to Insurer Based on Insured's Failure to Submit Timely Proof of Loss

The insured owned a home that was insured by State Farm Insurance Company. The home sustained water damage on January 15, 2022; the insured submitted a claim for coverage; and State Farm reserved rights. On July 25, 2022, the insurer's attorney sent the insured's attorney a letter demanding "Sworn Statements in Proof of Loss in support of any claims for damages," and enclosed proof of loss forms. The letter also recited a provision in the policy requiring that the insured submit a "sworn proof of loss" within 60 days after a loss or damage to the premises. The insured signed completed proof of loss statements on August 2, 2022, but the insured's counsel did not send them to the insurer until October 19, 2022. In turn, the insurer disclaimed coverage because of the insured's failure to comply with the proof of loss condition in the policy. The United States District Court for the Southern District of New York granted summary judgment to the insurer, reasoning that the insured's failure to submit proofs of loss within 60 days after receiving the insurer's demand is an absolute defense absent waiver or estoppel. The court rejected the insured's argument that the insurer's demand for the proof of loss was defective because it was sent to the insured's counsel instead of the insured. [*Starikovsky v. State Farm Fire & Cas. Co.,* 2024 U.S. Dist. LEXIS 103740 (S.D.N.Y. June 11, 2024).]

Southern District Holds that Insured Not Covered for Fire Loss Because Three-Family Dwelling Not Covered

The insured resided on the third floor of a three-unit building he owned. He sought coverage for a fire loss at the building under his homeowners policy with Mountain Valley Indemnity Company, which covered the dwelling on the "residence premises." The United States District Court for the Southern District of New York held that the insured was not covered because the definition of "residence premises" included one- or two-family dwellings where the insured resides, but not premises with three units. Although the Court was "sympathetic" to the insured's "unfortunate situation," it found "the law does not permit expansion" of the policy. The court rejected the insured's arguments that the policy should be reformed because of a mutual mistake, reasoning that "even if [the insured] intended the [p]olicy to cover three dwelling units, there is no evidence that [the insurer] shared that intent." [*Hall v. Mt. Valley Indem. Co.,* 2024 U.S. Dist. LEXIS 197932 (S.D.N.Y. Oct. 30, 2024).]

WAIVER/ESTOPPEL/3420(D)

First Department Rejects Excess Insurer's Disclaimer as Untimely

Admiral Insurance Company did not disclaim coverage to the New York City Housing Authority for an underlying bodily injury action until August 2018, even though Admiral knew that an exclusion in its policy provided a basis for disclaiming as early as 2016. Admiral contended that its disclaimer was timely because its duty to disclaim was not triggered until there was a reasonable possibility that its excess coverage might be reached. The Appellate Division, First Department, rejected the contention that

the disclaimer was timely under this standard because Admiral had notice of "just such a reasonable possibility" no later than 2017 when it received NYCHA Counsel's litigation plan, which "contained ample grounds to conclude that excess coverage might be triggered." [*New York City Hous. Auth. v. Admiral Ins. Co.,* 227 A.D.3d 447 (1st Dep't 2024).]

Southern District Finds that Insurer's Retention of Coverage Counsel Did Not Excuse Untimely Disclaimer under Circumstances

Builders Choice, a roofing and siding company, retained Exterior Pro as its subcontractor to repair siding and put shingles on roofs at a new condominium construction site. The subcontract required that Builders Choice be named as an additional insured on a primary basis on Exterior Pro's policy. Exterior Pro's policy with Evanston Insurance Company included a blanket additional insured endorsement providing additional insured coverage where required by contract but excluded coverage for injury to employees of the named insured, Exterior Pro. Exterior Pro's employee was injured while installing shingles at the construction site and sued Builders Choice and others. Builders Choice's insurer, Admiral Insurance Company, tendered the action to Exterior Pro, who forwarded the tender to Evanston. On December 7, 2020, Admiral received Evanston's disclaimer letter based on the exclusion for bodily injury to an employee of the named insured (Exterior Pro). In turn, Admiral referred the matter to coverage counsel for review. By letter dated January 7, 2021, thirty-one days after receipt of Evanston's disclaimer, Admiral disclaimed coverage to Builders Choice based on its breach of the Contractors Conditions Endorsement in its policy requiring that Builders Choice's subcontractors maintain "adequate insurance" as defined in the endorsement. In the declaratory judgment action that ensued, Admiral's Senior Claims Superintendent testified that any disclaimer from a subcontractor's insurer would trigger a violation of the endorsement. Under these circumstances, the United States District Court for the Southern District of New York found Admiral's disclaimer late and precluded under New York Insurance Law § 3420(d). The court rejected Admiral's argument that its delay should be excused because it retained coverage counsel given the complexity of the issues, concluding that no further investigation was necessary upon Admiral's receipt of Evanston's disclaimer. [*Admiral Ins. Co. v. Builders Choice of N.Y., Inc.,* 2024 U.S. Dist. LEXIS 165618 (S.D.N.Y. Sept. 12, 2024).]

Eastern District Finds Insurer Precluded from Relying Upon Exclusion Because of Untimely Disclaimer

In early October 2021, Midvale Indemnity Company received notice of an underlying action filed by a worker who was injured at a construction site located at 625 Halsey Street in Brooklyn, New York. In late November, Midvale reserved rights to disclaim coverage to its named and putative additional insureds (who were contractors at the site) under an exclusion for bodily injury at a construction site for a "multi-unit residential building." After receiving a report from its investigator on December 9, 2021, Midvale disclaimed coverage on January 5, 2022, based upon "newly discovered information" that the accident occurred during the construction of a multi-unit residential building. The United States District Court for the Eastern District of New York held that Midvale was precluded from relying upon the exclusion because its disclaimer was untimely under New York Insurance Law § 3420(d). The court noted that reasonable investigations are permitted but found that Midvale's delay was unreasonable as a matter of law because of its unexplained two-month delay between learning of the underlying action and completing its investigation and the additional month-long delay between receiving the investigation report and its disclaimer. The court explained that Midvale offered no explanation why in the "digital age, an investigation into whether [the] address housed a multi-unit building could [not] be gleaned in short order, through public records or online map searches," or why a "simple site visit" could not reveal the necessary information. [*Midvale Indem. Co. v. Arevalos Constr. Corp.*, 2024 U.S. Dist. LEXIS 199183 (E.D.N.Y. Nov. 1, 2024).]

BAD FAITH/EXTRA-CONTRACTUAL

Second Department Finds Duty to Defend but No Bad Faith and that Insurer Did Not Have an Obligation to Advise Insured of Right to Independent Counsel

The parent of an infant sued Kim Eichle for Eichle's alleged negligence in serving alcohol to her houseguest, Jacob Russo, who allegedly assaulted the infant, and for negligence in failing to keep the sidewalk at her residence free from snow and ice. Eichle filed a third-party action against Russo alleging that the infant's injuries were caused by Russo's negligence or assault of the infant. State Farm agreed to defend Russo, but filed a declaratory judgment action, seeking a declaration that it had no duty to defend or to indemnify Russo because the injuries in the underlying action did not result from an "occurrence," i.e., an accident, and were excluded by the "expected or intended" exclusion in Russo's policy. The Appellate Division, Second Department, found that the trial court properly denied State Farm's motion for summary judgment declaring that it had no duty to defend or to indemnify, reasoning that State Farm did not demonstrate that the incident did not arise from an "occurrence" or that the exclusion applied. The Second Department also held that State Farm's declaratory judgment action was properly dismissed as premature because the "declaration sought by State Farm cannot be granted in advance of the trial in the underlying action." However, the Second

Department agreed with State Farm that Russo's bad faith counterclaim should have been dismissed and that Russo's "conflict of interest" counterclaim should have also been dismissed because State Farm "did not have an affirmative duty to advise Russo of the right to retain independent counsel." [*State Farm Fire & Cas. Co. v. Russo*, 227 A.D.3d 927 (2d Dep't 2024).]

Second Department Holds that Trial Court Erred in Allowing Bad Faith Claim

The insured owned a house that was damaged when a refrigerator water line leaked and caused the foundation wall to collapse. Kingstone Insurance Company denied the claim for coverage, and the insured sued Kingstone for breach of their insurance contract and for bad faith in denying the claim for coverage. The Appellate Division, Second Department, held that the trial court correctly found that the claim was covered because the policy provided coverage for "loss caused by accidental leakage" of "liquids" from a "domestic appliance," and Kingstone failed to raise a triable issue of fact as to whether the foundation damage was excluded under the earth movement or water damage exclusions. However, the Second Department found that the trial court should have dismissed the insured's bad faith claim as "duplicative of the cause of action alleging breach of contract" because "there is no separate tort for bad faith refusal to comply with an insurance contract." [*Parisi v. Kingstone Ins. Co.,* 227 A.D.3d 1094 (2d Dep't 2024).]

MISCELLANEOUS

Third Department Upholds Summary Judgment to Insurer Based on Material Misrepresentation by Insured in Insurance Application

Plaintiff loaned money to his employee to purchase a home, and the loan was secured by a mortgage. When the employee failed to pay the loan and to insure the home, Plaintiff obtained a landlord package policy from Erie and Niagra Insurance Association through Naccarato Insurance, Erie's alleged agent. Based upon Plaintiff's ("Erie's") representation that he was about to become the owner due to the pending foreclosure action, Naccarato's vice president filled out Plaintiff's insurance application, stating that Plaintiff owned and rented out the property. The Plaintiff signed the application in December 2013. However, Plaintiff did not own the property until he successfully foreclosed and was deeded the property in July 2014. After a fire on the property in September 2014, Plaintiff sought coverage, and Erie disclaimed based upon the insured plaintiff's material misrepresentations. In support of Erie's motion for summary judgment, Erie submitted an affidavit from its underwriting manager and manual for the landlord package policy program reflecting that "but for plaintiff's misrepresentations that he owned the property and that tenants resided therein," Erie would not have issued the policy. In affirming summary judgment to Erie, the Appellate Division, Third Department, reasoned that "[w]hile materiality is generally a question of fact, an insurer may establish materiality as a matter of law by 'present[ing] documentation concerning its underwriting practices, such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if correct information had been disclosed in the application.'" The court rejected Plaintiff's argument that he should not be bound by the application because he did not read it before signing, stressing that as the signer he was bound "whether he chose to read the document or not." The court also refused to impute Naccarato's knowledge that Plaintiff did not own the property to Erie because Naccarato "abandoned [any] role as agent and, instead, concealed information to assist plaintiff in obtaining insurance …." Finally, the court rejected Plaintiff's argument that Erie should be estopped from disclaiming because of its untimely disclaimer, reasoning that common law estoppel requires prejudice, and New York's timely disclaimer statute, Insurance Law § 3420(d), only applies to claims involving a bodily injury or death. [*Barese v. Erie & Niagra Ins. Assn.,* 224 A.D.3d 1174 (3d Dep't 2024).]

Southern District Rules that Insured Cannot Recover Its Attorney's Fees for Its Coverage Action

The insured, Match Group, LLC, brought a coverage action against its insurer, Beazley Underwriting Limited, and obtained a judgment against Beazley that Beazley appealed. In turn, the insured moved to recover the attorney's fees and expenses it incurred in its coverage action. The United States District Court for the Southern District of New York denied the insured's motion, finding that it was premature given the pending appeal and, regardless, "New York law does not allow" an insured "to recover its legal fees in an affirmative action brought against the insurer …." The court noted that "an insured who is 'cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from policy obligations,' and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action." However, the court ruled that the insurer's disclaimer and exchanges between the insurer's counsel and the insured do not suffice to place the insured in "defensive posture" for the recovery of attorney's fees. The court also rejected the insured's argument that the insurer's filing of a motion to dismiss in the coverage action was tantamount to the filing of a suit, reasoning that the motion was in defense to the insured's affirmative coverage action. [*Match Grp., LLC v. Beazley Underwriters Ltd.,* 2024 U.S. Dist. LEXIS 36831 (S.D.N.Y. Feb 29, 2024).]

Court Rejects Joinder of Liability and Coverage Actions for Trial

Plaintiffs, landlords of property in Chatham, New York, sued their tenants for property damage arising out of a fire at the premises. The landlords filed a related coverage action against the tenants' insurer, and the landlords' insurer filed a related subrogation action against the tenants and their insurer. Plaintiffs sought to join the related actions for purpose of discovery and trial. The Supreme Court, Columbia County, agreed with the consent of the parties to consolidate the cases for discovery. However, the court refused to join the two related actions for purposes of trial, reasoning that under New York law, "the fact of insurance coverage is generally inadmissible in a jury trial to prevent prejudice to an insured defendant" and, therefore, it is "prejudicial to the insurer and its insured to try a main liability action before the same jury" as a coverage action. The court concluded that "the possibility of inconsistent verdicts is outweighed by the prejudice which would occur if the jury were to discover the existence of liability insurance, requiring the denial of the motion to join the actions for trial." [*Harison v. Hover,* 2024 NYLJ LEXIS 875 (N.Y. Sup. Ct., Columbia Cnty. Mar. 22, 2024).]

Bronx Supreme Denies Default Judgment to Insurer Who Did Not Submit Proof of Meritorious Claim

Utica First Insurance Company insured a restaurant and filed a declaratory judgment action against its insured and its insured's landlord, seeking a declaration that it need not cover the restaurant, landlord or any other party in an underlying personal injury action. Utica First asserted that the landlord was not covered as an additional insured and that an exclusion for injuries to an insured's employee precluded coverage. Utica First named the injured claimant as a nominal defendant in the declaratory judgment action. The restaurant failed to appear, so Utica First filed a motion seeking a default judgment against the restaurant. Utica First provided proof that the restaurant was in default, but admittedly neglected to provide any proof of a meritorious claim. In opposition, the owner and claimant submitted deposition transcripts from the underlying personal injury action reflecting that the claimant was not an employee of the insured. The court denied Utica First's motion, rejecting its argument that a limited default judgment may be issued finding that the restaurant had not appeared in the action. The court reasoned that default judgments are not "rubber stamped" and, instead, require some showing as to a viable or meritorious claim. [*Utica First Ins. Co. v. Montespino Rest. Corp.,* 2024 NYLJ LEXIS 1088 (Sup. Ct., Bronx Cnty. Apr. 9, 2024).]

Second Department Keeps Coverage Action in New York and Applies New York Law to Find No Coverage under Pollution Exclusion

The New Jersey Department of Environmental Protection sued Getty Properties Corp. to recover damages for the contamination of surface and ground waters with methyl tertiary butyl ether (MTBE), a fuel additive used in gasoline. Others also sued Getty for such contamination in Pennsylvania and Maryland. In turn, various Travelers insurance companies sued Getty in New York seeking a declaration that Travelers had no duty to defend or to indemnify Getty in the underlying MTBE actions. Three weeks later, Getty filed a competing coverage action in New Jersey as to Travelers' coverage obligations for the New Jersey MTBE action. The New York Appellate Division, Second Department, held that the New York trial court "did not improvidently exercise its discretion" in denying Getty's motion seeking the dismissal of Travelers' coverage action as to the New Jersey MTBE action. The Second Department noted that the trial court correctly considered, among other things, that Getty's principal place of business was in New York. In a companion decision on the same day, the Second Department held that New York law should be applied in the New York coverage action, stressing that where liability policies cover risks over multiple states, the insured's principal place of business is "deemed to be a proxy for the principal location of the insured risk and would ordinarily be the source of the applicable law." The court found that the existence of state-specific endorsements in some of the policies did not raise a triable issue of fact as to whether the parties expected that multiple states' laws would be applied in a future coverage dispute, and that, importantly, the application of New York law to the entire coverage dispute favors the goal of "certainty, predictability and uniformity of result …." In its final decision that day, the Second Department found that Getty failed to meet its burden to "demonstrate a reasonable interpretation of the underlying complaint[s] potentially bringing the claims [for pollution over many years] within the sudden and accidental discharge exception to the exclusion of pollution coverage, or to show that extrinsic evidence exists that the discharge was, in fact, sudden and accidental." The Second Department rejected Getty's argument that it did not know that MTBE (which was required by the Environmental Protection Agency as a fuel additive) was harmful and, therefore, should not be considered a pollutant within the meaning of the pollution exclusion. [*St. Paul Fire & Mar. Ins. Co. v. Getty Props. Corp.,* 228 A.D.3d 971, 975 & 979 (2d Dep't 2024).]

Southern District Denies Motion For Summary Judgment Based On Insured's Misrepresentations

Travelers Casualty Insurance Company of America filed an action seeking rescission of certain policies because of its insured's misrepresentations in its insurance application and moved for summary judgment. The United States District

Court for the Southern District of New York agreed that the insured misrepresented whether it met the Travelers' eligibility requirements by not performing operations on a list of ineligible operations, and rejected the insured's argument that the application was ambiguous because the list was broad and could be read as asking only whether the insured was currently engaged in any ineligible operations. The court found questions of fact as to whether the misrepresentations were material, reasoning that to "establish materiality as a matter of law, the insurer must present documentation concerning the underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application." [Travelers Cas. Ins. Co. of Am. v. BRB Constr. Corp., 2024 U.S. Dist. LEXIS 154102 (S.D.N.Y. Aug. 27, 2024).]

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This publication is provided for informational purposes only and is not intended to serve as legal advice. Naturally, the particular facts and circumstances of each claim will determine the impact of the cases discussed in this Compilation. Alan Eagle retired at the end of 2024. For more information or to share your comments, please contact Joanne Engeldrum, Esq., who has taken over authoring the New York Insurance Coverage Update. Joanne can be reached at 516.357.3254 or joanne.engeldrum@rivkin.com.