NEW YORK INSURANCE COVERAGE UPDATE
2023 COMPILATION

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ADDITIONAL AND NAMED INSUREDS/PRIORITY

Second Circuit Finds That Subcontract Did Not Incorporate GC's Obligation To Obtain Additional Insured Coverage For Owners And That GC's Primary Policy Was Primary To GC's Additional Insured Coverage Under Sub's Umbrella

The owners hired a general contractor (GC) insured by Amerisure to build a movie theatre, and the GC hired a masonry subcontractor (Sub) insured by Selective under a primary and umbrella policy. The Sub's employee was injured, and he sued the owners and the GC. The Sub's insurer defended the GC as an additional insured, but maintained that its umbrella policy was excess to the GC's own primary policy and denied additional insured coverage to the owners. A declaratory judgment action ensued, and the Second Circuit agreed with the Sub's insurer. The court held that the Sub's insurer did not owe additional insured coverage to the owners because the Sub's policy only provided additional insured coverage where required by written contract, and the "text of the Subcontract" did not require that the Sub name the owners as additional insureds. Although the GC's contract with the owners obligated the GC to obtain additional insured coverage for the owners, and the Sub agreed to be bound by and to assume certain obligations in the GC's contract, the court stated that New York law "narrowly construes incorporation clauses in subcontracts" that purportedly bind a subcontractor to provisions in the general contract that do not relate to the work to be performed by the subcontractor. The court also found that GC's additional insured coverage in the Sub's umbrella policy would be excess to the GC's own primary policy because a "traditional priority of coverage analysis" based upon a comparison of the policies' "other insurance" clauses supported this result. The court rejected the argument that the Sub's agreement to indemnify the GC in the Subcontract should "effectively require" the Sub's umbrella policy to provide coverage primary to the GC's policy under the Second Circuit's earlier decision in *Century Surety Company v. Metropolitan Transit Authority,* 2021 U.S. App. LEXIS (2d Cir. Oct. 5, 2021). The court acknowledged that its earlier decision concluded that a trade contract could override a traditional priority of coverage analysis as a matter of "judicial economy" because "an indemnitee's insurer should not have to bring a separate suit to enforce an indemnity agreement that would nullify the court's earlier decision regarding priority of coverage." However, the court distinguished its earlier decision because, here: (i) the indemnity agreement was not raised by the GC's insurer at the trial court level, and (ii) the court in the underlying personal injury action found the indemnity provision void, and the GC's insurer provided "no credible reason" to disagree with this finding. [*Amerisure Ins. Co. v. Selective Ins. Grp., Inc.*, 2023 U.S. App. LEXIS 11332 (2d Cir. May 9, 2023).]

First Department Holds That Additional Insured Endorsement Should Be Reformed To Identify Current Owner Of Premises

This coverage action arose out of a personal injury action filed against the current owner of premises located in New York City. Pursuant to the tenant's lease with the prior owner, the tenant added the prior owner of the premises as an additional insured under its policy with Fulmont Mutual Insurance Company. However, the additional insured endorsement was not updated to identify the current owner when the premises was sold. Fulmont disclaimed coverage to the current owner on the basis that it was not an additional insured under its policy. The Appellate Division, First Department, affirmed summary judgment to the current owner and its insurer reforming the policy to replace the prior owner with the current owner as an additional insured, reasoning that the policy "always extended coverage" to the owner of the building as an additional insured so "the fact that the endorsement was never updated by the tenant to reflect a mere change in ownership is of no moment." The court also held that Fulmont failed to timely disclaim based on an exclusion in its policy. [*Wesco Ins. Co. v. Fulmont Mut. Ins. Co.,* 216 A.D.3d 501 (1st Dep't 2023).]

Southern District Holds That Insurer Cannot Sue Co-Insurer For Contribution Because Of Release By Insured

Rightech, Inc. provided temporary technical workers to BlueStream Professional Services for a construction project. A worker on the project was injured and sued BlueStream, which was insured by Liberty Mutual and added as an additional insured on Rightech's policy with Zurich. After the underlying action was filed, BlueStream and Rightech entered into a settlement agreement in connection with a class action alleging that they improperly classified wage payments and failed to pay overtime to workers. The settlement agreement between BlueStream and Rightech agreed to release each other and their "insurers" for claims that "BlueStream has or which could be asserted on its behalf … relating in any way to any … agreement" between them and Rightech's "work for BlueStream …." Liberty sued Zurich seeking additional insured coverage for BlueStream in connection with the underlying personal injury action and argued that the settlement agreement was not intended to impact BlueStream's right to additional insured coverage under Zurich's policy. However, the United States District Court for the Southern District of New York disagreed and held that the agreement unambiguously released BlueStream's claim for additional insured coverage against Zurich, Rightech's insurer. [*Liberty Mut. Fire Ins. Co. v. Zurich Am. Ins. Co.*, 2023 U.S. Dist. LEXIS 136032 (S.D.N.Y. Aug. 3, 2023).]

CONDITIONS PRECEDENT/LATE NOTICE

Court Holds That Notice Three-Days After Expiration of Extended Reporting Period in Claims-Made Policy Dooms Coverage

Henry Hill Oil Services, LLC, hired the insured, Stomley Sales & Consulting, LLC, as its consultant for an oil well in North Dakota. The oil well blew out; and the State of North Dakota assessed penalties on Henry Hill who then sued the insured. Stomley provided notice to its insurer, Certain Underwriters at Lloyd's of London, under policies that contained a claims-made Oil & Gas Consultants Professional & Pollution Liability coverage part and a New York Choice of Law and Venue endorsement. Underwriters denied coverage because, among other things, notice was three-days after the expiration of the claims-made extended reporting period. The Supreme Court, New York County, granted summary judgment to Underwriters, citing to the Appellate Division, First Department's decision in *Certain Underwriters at Lloyd's London v. Advance Tr. Co., Inc.*, which held that "a claims-made policy can set a precise timeline for reporting regardless of any potential prejudice." The Supreme Court also noted that New York's Insurance Law and regulation governing claims-made coverage did not apply because the policy was not issued in New York. [*Certain Underwriters at Lloyd's, London v. Stomley Sales & Consulting, LLC,* Index No. 651616/2021 (N.Y. Sup. Ct. N.Y. Cty. Sept. 22, 2023).]

COVERAGE GRANT

Southern District Finds That Insured Failed To Meet Burden Of Proving That Loss Occurred During Policy Period

The insureds sought coverage for $1.5 million in art that they claimed was discovered missing from their storage space on August 25, 2019, one week after their policy's coverage with Chubb incepted on August 18, 2019. Chubb denied coverage on the ground that the insureds failed to establish that the loss occurred during the coverage period, among other things. The United States District Court for the Southern District of New York agreed that the insureds failed to meet their burden of proving that the loss occurred during the policy period, as opposed to the period of time from when they last observed their art intact in October 2018 to when the policy incepted on August 18, 2019. The court rejected the insureds' arguments that the "all risk" policy did not include such a burden and that the coverage dates for the policy were on policy pages not delivered to the insureds as contrary to the stipulated facts and because it would "strip from their policy any coverage period limitation at all." [*Weintraub v. Great N. Ins. Co*., 648 F. Supp. 3d 472 (S.D.N.Y. 2022).]

DUTY TO DEFEND/INDEMNIFY

Southern District Refuses To Use Extrinsic Evidence "Bound Up With Merits" Of Underlying Action To Defeat Duty To Defend

622 Third Avenue LLC filed a declaratory judgment action against Harleysville Worcester Insurance Company and others, seeking a declaration that Harleysville must defend 622 Third Avenue as an additional insured in an underlying personal injury action filed by a construction worker against 622 Third Avenue and J.T. Magen & Company Inc. The worker alleged that 622 Third Avenue hired J.T. Magen as the general contractor for a construction project at premises owned by 622 Third Avenue; that one of them retained Harleysville's named insured, Architectural Flooring Restoration (AFR), to perform certain work on the project as a subcontractor; and that he was injured while working for a company hired by AFR to serve as another subcontractor on the project. 622 Third Avenue filed a third-party action against AFR. Harleysville refused to defend 622 Third Avenue as an additional insured under its policy issued to AFR. Harleysville did not dispute that the allegations in the worker's underlying complaint gave rise to a possibility of coverage and a potential duty to defend, but it maintained that it could rely upon facts extrinsic to the underlying complaint, including affirmations, memos and discovery in the underlying action, to defeat the duty to defend. Specifically, Harleysville argued that the extrinsic facts established that 622 Third Avenue's liability did not arise out of AFR's ongoing operations for 622 Third Avenue at the space designated in its additional insured endorsement as required to trigger additional insured coverage. The United States District Court for the Southern District of New York rejected Harleysville's argument and held that Harleysville had a duty to defend. The court acknowledged that the duty to defend is not "interminable" and will end if it is "shown unequivocally that the damages alleged would not be covered." However, the court stressed that the insurer could not rely upon extrinsic evidence "bound up with merits" or that "overlap[s] with facts at issue in the underlying case" to defeat a duty to defend. The court concluded that the extrinsic evidence that Harleysville sought to use was "related to the merits of the underlying case, and thus within the … line of cases finding that insurers may not use such evidence to defeat a duty to defend." [*622 Third Ave. Co., L.L.C. v. Nat'l Fire Ins. Co. of Hartford,* 646 F. Supp. 3d 466 (S.D.N.Y. 2022).]

Court Finds That Construction Manager's Insurer Must Defend City Because Of Its Potential Vicarious Liability

The City of New York contracted with TDX Construction for construction management services at Coney Island Hospital where a worker was injured by a falling object. The worker sued the City alleging that the City owned and operated the hospital, hired contractors for the construction work, and was negligent and violated the Labor Law. The City sought coverage under TDX's policy issued by Travelers, which provided

additional insured coverage to the City for injury "caused by acts or omissions" of TDX or its subcontractor in the performance of TDX's contacted-for work with the City, but not for the City's "independent acts or omissions." The Supreme Court, New York County, held that Travelers had a duty to defend because the City's alleged liability for Labor Law violations for which the City could be vicariously liable "provide[s] a scenario" triggering potential coverage and the duty to defend. [*City of New York v. Travelers Indem. Co*., 2023 N.Y. Misc. Lexis 107 (Sup. Ct. N.Y. Cnty. Jan. 3, 2023.]

Eastern District Holds That General Contractor Entitled To Defense Under Policy Issued To Employer Of Injured Worker

A general contractor (GC) subcontracted with a subcontractor (Sub) to perform and supervise stucco work on a construction project. The Sub's employee (who was not wearing a safety harness) fell off a roof, and he sued the GC. The GC brought a third-party action against the Sub-employer, which was insured by Travelers. The United States District Court for the Eastern District of New York held that Travelers owed a duty to defend the GC as an additional insured under its policy issued to the Sub-employer, reasoning that the allegations of the complaint and/or other facts known to the insurer created a reasonable possibility that the acts or omissions of the Sub or those working on its behalf were a proximate cause of the accident. The court considered the "allegations of [the employee's] complaint, the bill of particulars, facts taken from depositions, and the non-conclusory allegations of the [GC's] third-party complaint," which according to the court, suggested the possibility that the Sub's employee caused his own injuries because he walked to the edge of the roof without wearing a harness and leaned against the railing. [*Certain Underwriters at Lloyd's v. Travelers Ins. Co. of Am.*, 2023 U.S. Dist LEXIS 51835 (E.D.N.Y. March 27, 2023).]

Southern District Holds That Contractor's Carrier Has Duty To Defend ConEd Even Though Contractor's Work Ended Months Before The Accident

A pedestrian tripped and fell on a Bronx sidewalk, and she sued the owner of the adjacent property. In turn, the owner brought a third-party action against ConEd, the utility company that had opened the sidewalk for a gas installation and repair project. ConEd filed a second third-party action against Petmar Builders, ConEd's contractor. Ten months before the accident, Petmar worked on the sidewalk where the pedestrian allegedly fell and completed a temporary patch that was to be replaced by ConEd but was still in place at the time of the accident. ConEd sought coverage as an additional insured under the contractor's policy with ACE American Insurance Company ("ACE"), which covered ConEd for liability for bodily injury "caused, in whole or in part, by" the contractor's work. ACE denied coverage largely because the contractor's work occurred ten months before the accident. The United States District Court for the Southern District held that ACE had a duty to defend ConEd as an additional insured because the allegations in the pleadings and facts made known to the insurer gave rise to a reasonable possibility that the contractor was a proximate cause of the pedestrian's bodily injury. The court noted that a defendant's negligence qualifies as a proximate cause where it is a "substantial cause of the events which caused the injury," and that the passage of time is only one of many factors. [*Consol. Edison Co. of N.Y., Inc. v. Ace Am. Ins. Co.,* 2023 U.S. Dist. LEXIS 87490 (S.D.N.Y. May 18, 2023).]

Court Finds That Auto Insurer's Tendering Of Policy Limits Did Not Terminate Its Duty To Defend

This declaratory judgment action arose out of an accident between a tractor-trailer and a car. The estates of the car's passengers sued the driver of the tractor-trailer and its owners. Country-Wide Insurance Company, the tractor's insurer, defended the driver and owners. Country-Wide then tendered the balance of its $1 million policy limit to Zurich American Insurance Company, the trailer's insurer under a $5 million policy. Although Country-Wide acknowledged that its policy was primary to the Zurich policy, it argued that its tender of its limits terminated its duty to defend and obligated Zurich to assume the defense of the case. The Supreme Court, New York County, held that Country-Wide was not permitted to "simply send over the full amount of the policy and avoid paying defense costs," and that its policy's purported limitation of its duty to defend is of no moment because it conflicts with New York Insurance Regulation 11 NYCRR § 60-1.1 [b]. The court explained that this regulation has been construed as "requiring automobile insurers to pay all defense costs until a case ends," and "they are not excused from defense obligations by exhaustion of policy limits." [*Country-Wide Ins. Co. v. Zurich Am. Ins. Co.,* 2023 NYLJ LEXIS 2712 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 12, 2023).]

EXCLUSIONS

Court Finds Questions Of Fact As To Application Of Exclusion For Renovation

Pablo Brito sued Mario Tejada for injuries sustained at premises owned by Tejada, and Tejada tendered to his insurer, Union Mutual Fire Insurance Company. The insurer hired an investigator who obtained a signed statement from Tejada reflecting that Tejada was "engaged in renovations" and that he engaged Brito to help. Union Mutual disclaimed coverage based upon two exclusions that were triggered by bodily injury arising out of "construction, renovation or repair," provided a gratuitous defense to Tejada, filed a declaratory judgment action seeking a declaration of no coverage, and moved for summary judgment. In opposition, Tejada filed a declaration stating that he was engaged in cleaning up and removing debris at his premises on the date of the accident, not renovations. The United States District Court for the Southern

District of New York denied the insurer's motion for summary judgment based upon questions of fact, reasoning that the "sham affidavit" doctrine did not apply under the circumstances. The court found that a reasonable factfinder could find that the earlier statement was mis-recorded by the investigator or signed by Tejada because of his imperfect facility with English. The court also rejected Union Mutual's argument that the declaration should be rejected as inconsistent with Tejada's answer, finding enough "flexibility and ambiguity" in the answer. [*Union Mut. Fire Ins. Co. v. Tejada*, 2023 U.S. Dist. LEXIS 3794 (S.D.N.Y. Jan. 9, 2023).]

Southern District Finds That Exclusion In HO3 Form Precludes Coverage Even Though Form Inadvertently Omitted From Copy Of Policy Sent To Insured

Scottsdale Insurance Company issued a homeowner's policy to 232 Dune Road LLC (insured) for a vacant oceanfront property in Quogue, New York where the insured was building a home. On March 26, 2020, the insured's principal received a copy of the policy from his broker. The policy neither contained a copy of an HO3 form nor listed the HO3 Form on the Schedule of Forms, but it did refer to "HO3" as the "policy form" on each of the declaration pages and the first two pages of the policy. Also, several endorsements expressly modified the "Homeowners 3 – Special Form." After the concrete foundation for the home was installed, testing revealed it was defective, and the insured made a claim under its policy. Scottsdale disclaimed coverage based on an exclusion in the HO3 form for faulty workmanship, and the insured sued Scottsdale in the United States District Court for the Southern District of New York. The insured's principal testified that he thought that such a claim would be covered, and that he did not know and was never told by his broker what HO3 means. The court held that the exclusion in the HO3 form precluded coverage, reasoning that courts use an objective "reasonable person" standard in determining whether a document is incorporated by reference into a contract. The court stressed that the policy expressly identified and referred to the HO3 form, which is an ISO form used in the insurance industry. In addition, without the HO3 form, the policy "neither explained its coverage nor set forth its exclusions …." Accordingly, the court granted summary judgment to Scottsdale. [*232 Dune Rd., LLC v. Scottsdale Ins. Co.*, 2023 U.S. Dist. LEXIS 24224 (S.D.N.Y. Feb. 13, 2023).]

Western District Holds That Employee Exclusion Does Not Preclude Coverage To Additional Insureds For Claim By Named Insured's Employee

Employees of a subcontractor were injured on a construction project, and they sued the owner and the general contractor. The subcontractor's excess insurer, Mt. Hawley Insurance Co., disclaimed additional insured coverage to the owner and general contractor based upon an exclusion in its policy for bodily injury to an employee of "**any** insured arising out of and in the course of … employment by **the** insured …." The United States District Court for the Western District of New York held that the exclusion did not preclude such coverage because the injured claimants were not injured in the course of "[e]mployment by the insured" seeking additional insured coverage, i.e., the owner and general contractor. The court distinguished cases holding that an exclusion for bodily injury to an employee of "**any** insured" arising out of employment by "**any** insured" precludes coverage so long as the injured claimant is an employee of any insured under the policy. Because the exclusion at issue included language requiring that the injury arise out of employment by "**the** insured," the court followed cases holding that "**the** insured" means the insured seeking coverage. [*Reidy Constr. Grp., LLC v. Mt. Hawley Ins. Co.,* 2023 U.S. Dist. LEXIS 125599 (W.D.N.Y. July 20, 2023).]

Second Department Upholds Construction Exclusion

Michael Gargiso was allegedly injured when he stepped in a trench in a parking lot, which was dug as part of a construction project that had been left unfinished. He sued the owner and property manager, who were insured by RLI Insurance Company. RLI disclaimed coverage based on an exclusion in its policy for bodily injury arising out of "Construction and Development Activities." The insureds sued RLI for coverage and moved for summary judgment, which was granted by the trial court. On appeal, the Appellate Division, Second Department, reversed, holding that RLI had no duty to defend or to indemnify the insureds, noting that the "plain meaning" of a policy's language cannot be disregarded "to find an ambiguity where none exists." [*Grenadier Realty Corp. v. RLI Ins. Co.*, 218 A.D.3d 751 (2d Dep't 2023).]

Fourth Department Holds that Motor Vehicle Liability Exclusion Unambiguously Precludes Coverage Notwithstanding "Vehicle" Being Undefined

New York Central Mutual Insurance Company disclaimed coverage to its insured under a homeowners policy for a personal injury action arising from the off-premises use of a skid-steer loader owned by the insured. The insured filed a declaratory judgment action, and the trial court granted summary judgment to the insurer. On appeal, the Appellate Division, Fourth Department, affirmed, finding that the trial court properly found that coverage was excluded by the policy's Motor Vehicle Liability Exclusion, which excluded liability coverage for off-premises occurrences involving "motor vehicles," defined as a "self-propelled land or amphibious vehicle." The court rejected the insured's argument that the policy's failure to specifically define the term "vehicle" created an ambiguity, stressing that an "ambiguity does not arise from an undefined term in a policy … merely because the parties dispute the meaning of the term." Instead, the court applied the "plain and ordinary" meaning of "vehicle" – "a means of carrying or transporting something" – as supported by the

dictionary. The court also found that the fact that the Vehicle and Traffic Law may define "motor vehicle" differently is of "no moment" because the policy defined that phrase. [*Fornino v NY Cent. Mut. Fire Ins*. Co., 218 A.D.3d 1192 (4th Dep't 2023).]

Second Circuit Finds That Criminal Activities Exclusion Defeats Coverage For Disability Benefits

Jason Brand made a claim for disability benefits under his disability policy with Principal Life Insurance Company on the basis that he was totally disabled by extreme anxiety that began in July 2014 after a warrant was served on him by the New York State Attorney General's Office. Fifteen months after making the claim, Brand entered into a plea agreement in which he admitted to committing felony crimes in connection with his business between 2009 and 2015, including enterprise corruption, insurance fraud and grand larceny. Brand's policy contained a Criminal Activities Exclusion, which excluded coverage when an insured's commission of a felony "in whole or in part … contribute[s] to" the insured's "injury or [s]ickness." The United States Court of Appeals for the Second Circuit affirmed the trial court's granting of summary judgment to Principal, reasoning that Brand's commission of the felonies necessarily "caused" or "contributed" to the anxiety that formed the basis of his disability claim. The Second Circuit also remanded the case back to the trial court to address Principal's claim that the policy should be deemed void and rescinded based on Brand's fraud in obtaining the policy or submitting his claim. The Court found the recission claim justiciable, rejecting the trial court's determination that the claim was mooted by the finding of no coverage based on the exclusion [*Principal Life Ins. v. Brand,* 2023 U.S. App. LEXIS 31632 (2d Cir. Nov. 30, 2023).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Second Circuit Holds That Absolute Auto Exclusion Clearly Precludes Coverage

The insureds, a country club and motorcycle group, held an annual motorcycle rally. They were sued by two motorcycle riders who were struck by an automobile as the riders and automobile were entering the premises of the club to attend the rally. Covington Specialty denied coverage to the insureds based upon the "Absolute Auto Exclusion" in their policy, which deleted the "standard" auto exclusion applicable to bodily injury arising out of the use of an auto "owned or operated by … any insured," and replaced it with an exclusion for bodily injury "arising out of or resulting from the … use … of any … auto …." The insureds argued that the Absolute Auto Exclusion is ambiguous as to whether it applies only to autos used by the insureds and their employees because it omitted the words "any insured" from the "standard" exclusion without replacing them with "any insured or other persons." The United States Court of Appeals, for the Second Circuit rejected the insureds argument and found that the Absolute Auto Exclusion unambiguously precluded coverage for the suit against the insureds. The court stressed that an exclusion cannot be rendered ambiguous by an exclusion that it deletes and replaces and, instead, must be analyzed "on its own terms." [*Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc*., 62 F.4th 748 App. LEXIS 6859 (2d Cir. March 22, 2023).]

Southern District Finds Accident Took Place Before Loading Of Truck And Therefore GL Carrier's Policy Applies

The insured had a business through which customers bought and sold furniture. The insured sent employees with a truck to pick up a couch from a customer's sixth-floor condominium in Manhattan. As the employees began to descend the sixth-floor staircase, the couch struck an exposed sprinkler head allegedly causing millions of dollars in water damage to the building's occupants and resulted in claims against the insured. The insured's GL insurer (Travelers) disclaimed coverage because its auto exclusion precluded coverage for property damage arising out of the loading of an auto, which included the handling of property "[a]fter it is moved from the place where it is accepted for movement into or onto an … auto." And the insured's auto insurer (State Farm) disclaimed coverage on the basis that its policy did not cover accidents before loading. The United States District Court for the Southern District of New York held that the GL carrier was obligated to defend and to indemnify the insured, finding that the accident in the stairwell occurred before the "loading." The court opined that the auto exclusion's reference to "the place" is ambiguous as to whether it means the customer's apartment or building, and that the sixth-floor stairwell was "too remote" from the insured's truck waiting on the street, or from any use of it, to constitute "loading" under New York caselaw. [*Furnishare, Inc. v. Travelers Prop. Cas. Co. of Am.,* 2023 U.S. Dist. LEXIS 73983 (S.D.N.Y. April 28, 2023).]

FIRST PARTY PROPERTY

Eastern District Holds That Retroactive Cancellation Of Policy For Nonpayment Of Premium Allowed Under New York Law But Only If Policy So Provides

A homeowner purchased a policy from Occidental Fire & Casualty Company that provided fire coverage for his home through July 17, 2020. Five weeks before the policy was set to expire, Occidental sent a renewal notice with a premium invoice, which was not paid. Occidental then sent a Notice of Cancellation effective July 17, 2020, which provided a 15-day grace period to pay the renewal premium. Four days into the grace period, a fire occurred at the insured's home. Occidental denied coverage maintaining that the insured's failure to pay the renewal premium during the grace period resulted in a retroactive lapse of coverage on July 17, 2020, before the fire. The United States District Court for the Eastern District

of New York agreed that retroactive cancellation is permitted under the New York Insurance Law if the premium is not paid during the grace period, which “makes sense” or “every policyholder would be insured for free during the grace period.” However, the court held that Occidental could not retroactively cancel its policy because its policy did not clearly provide for retroactive cancellation; instead, the policy’s cancellation provisions merely stated that [w]hen you have not paid the premium, we may cancel” it “by mailing to you at least 15 days’ notice of cancellation.” [*Jiminez v. Occidental Fire & Cas. Co*., 655 F. Supp. 3d 136 (E.D.N.Y. 2023).]

Southern District Holds That Appraisal of Property Loss Premature Before Finding Of Coverage

A property owner brought an insurance coverage action seeking insurance coverage for damage to the roof on the owner’s property. The owner filed a motion to compel an appraisal to determine the amount of the loss. The United States District Court for the Southern District of New York denied the motion, reasoning that the appraisal as to the amount of loss was premature because the dispute over whether there was coverage had not yet been resolved. [*CBKZZ Inv. LLC v. Lloyds*, 2023 U.S. Dist. LEXIS 97902 (S.D.N.Y. June 6, 2023).]

Southern District Refuses To Compel Appraisal Before Resolution Of Coverage Issues

7Group LLC’s property in Florida was damaged during Hurricane Ian. 7Group made a claim under its property policy with Mt. Hawley Insurance Company, which allegedly underpaid 7Group’s claim. 7Group sued and moved to compel an appraisal and to stay the coverage action pending the outcome of the appraisal. The United States District Court for the Southern District of New York enforced the New York choice-of-law provision in the policy and denied the motion, reasoning that an appraisal was premature pending resolution of the scope of coverage under the policy. [*7Grp., LLC v. Mt. Hawley Ins. Co.,* 2023 U.S. Dist. LEXIS 207442 (S.D.N.Y. Nov. 20, 2023).]

Fourth Department Finds That Loss From Underground Water Excluded

The basement of the insured’s premises sustained water damage when an underground water supply line, which supplied the building’s sprinkler system, ruptured, and the water entered underground into the basement. The insured’s property insurer, Utica National Insurance Company of Ohio, denied coverage based upon the Water Exclusion Endorsement in the insured’s policy, excluding coverage for damage caused by “[w]ater under the ground surface pressing on, or flowing or seeping through … [f]oundations, walls, floors, or paved surfaces [or] … [b]asements, whether paved or not,” and “regardless of whether [the loss] is caused by an act of nature or is otherwise caused.” The Appellate Division, Fourth Department, held that the trial court properly determined that the exclusion precluded coverage because the loss “arose when the water from ‘under the ground’ pressed on and flowed through the building’s foundation walls into the basement.” [*Advanced Physical Med. Rehab. PLLC v. Utica Nat’l Ins. Co. of Ohio*, 214 A.D.3d 1331 (4th Dep’t 2023).]

Court Finds No Coverage For Stolen Jewelry Based On Conveyance Clause And Unattended Auto Exclusion

The insured, a jewelry business, filed a coverage action against Certain Underwriters at Lloyd’s of London, which denied coverage to the insured under a policy purchased for the insured’s jewelry. The insured’s complaint alleged that after attending a marketing event in New York City, the insured’s team put 84 pieces of jewelry in a duffel bag and loaded it into a double-parked SUV while the insured’s driver stood within three feet of the open rear door and kept an eye on things. When the SUV arrived in Great Neck, Long Island later that evening, the insured discovered that the jewelry was stolen. The Supreme Court, New York County, dismissed the complaint because the Personal Conveyance Clause in the policy limited coverage to property “in transit” when “in hand or sight” of the insured. The court rejected the insured’s argument that the property was not “in transit,” reasoning that its “ordinary meaning” as used in Black’s dictionary is “being conveyed by a carrier.” And because the insured’s team admittedly did not witness the theft, the court concluded that the jewelry was not “in hand or sight” of the insured when stolen. The court also held that the Unattended Automobile Exclusion unambiguously applied because it precluded coverage for property in an auto “unless, at the time of the loss …, there is [an insured designee] actually in or upon such vehicle.” [*Alpha & Omega Manhattan Corp. v. Lonmar Global Risks, Ltd.,* 2023 N.Y.Misc. LEXIS 4398 (N.Y. Sup. Ct. N.Y. Cty. August 21, 2023).]

Fourth Department Holds That Ensuing Loss Exception To Faulty Workmanship Exclusion Applies To Restore Coverage For Water Loss

The insureds owned a house covered by an all-risk homeowner’s insurance policy issued by Erie Insurance Company of New York that provided coverage for damage to the house unless specifically excluded. The policy contained an exclusion for loss caused or contributed to by faulty workmanship with an exception restoring coverage where “as a result of an excluded peril, a covered peril arises and causes damage.” The insureds hired contractors to install a shower, and the shower leaked because of faulty workmanship resulting in extensive water damage throughout the house. Erie disclaimed coverage based on the faulty workmanship exclusion, and the insured sued. The trial court granted summary judgment to Erie, but the Appellate Division, Fourth Department, reversed, reasoning that “the ensuing loss exception provides coverage here because,

as a result of an excluded peril (faulty workmanship), a covered peril arose (water discharge from a plumbing system) and caused other harm (water damage) to separate property (areas throughout the house). The court rejected Erie's argument that the insureds were attempting to resurrect coverage for an excluded peril and distinguished cases where insureds sought coverage under an ensuing loss exception for the cost of correcting the faulty or defective workmanship. [*Ewald v. Erie Ins. Co. of N.Y.,* 214 A.D.3d 1382 (4th Dep't 2023).]

WAIVER/ESTOPPEL/3420(d)

Court Holds That Insurer's Disclaimer to Additional Insured's Insurer Did Not Comply With New York Insurance Law Section 3420(d)

The owner of a building in Queens was sued for a construction accident, and the owner's insurer sought additional insured coverage on the owner's behalf from the contractor's insurer, Rockingham Insurance Company. Rockingham sent a disclaimer to the owner's insurer based on an exclusion for bodily injury to an employee or contractor. Rockingham did not send the disclaimer to the owner. The Supreme Court, New York County, held that Rockingham had a duty to defend the owner as an additional insured because its disclaimer did not comply with New York Insurance Law § 3420(d). The court acknowledged that the demand for additional insured coverage came from the owner's insurer, but stressed that the Court of Appeals has held that notice of disclaimer "provided by an insurance company to another carrier instead of to the additional insureds did not constitute proper notice under the Insurance Law," citing *Sierra v. 4401 Sunset Park, LLC,* 24 N.Y.3d 514 (2014). [*83rd St. Tenants, Inc. v. Rockingham Ins. Co.*, 2023 N.Y. Misc. LEXIS 1874 (Sup. Ct. N.Y. Cnty. April 10, 2023).]

Eastern District Finds That Insurer's Delay In Disclaiming After Insured Gave Notice Of Occurrence Precluded Insurer's Reliance Upon Exclusions

Two employees of Extreme Residential Corp. were involved in a construction accident on July 30, 2019, and they sued several entities involved in the project who, in turn, filed a third-party action against Extreme. Extreme's insurer, Prime Insurance Company, disclaimed coverage based on several exclusions on March 11, 2021 – approximately six months after Extreme's counsel sent a report to Prime about the accident. Extreme argued that the insurer's disclaimer was invalid because it was not timely as required by New York Insurance Law § 3420 (d). In response, the insurer argued that its disclaimer was timely because it only learned about the underlying and third-party actions approximately 30 days before it disclaimed; and any delay in disclaiming should be excused by its investigation. The United States District Court for the Eastern District of New York held that the insurer's delay in disclaiming coverage was unreasonable as a matter of law and granted summary judgment to Extreme. The court reasoned that an insurer is obligated to disclaim when the insured provides notice of an accident or claim and found that there was no genuine dispute that Prime received notice of the accident from Extreme when it received the report from Extreme's counsel. The court acknowledged that "there is room for an insurer to conduct an investigation" but concluded that disclaimers after 30 days are generally untimely unless the insurer establishes a reasonable justification, which Prime did not do. [*Berkley Ins. Co. v. Prime Ins. Co.*, 2023 U.S. Dist. LEXIS 123656 (E.D.N.Y. July 18, 2023).]

BAD FAITH/EXTRA-CONTRACTUAL

Northern District Dismisses Insured's Claim For Breach of the Covenant Of Good Faith And Fair Dealing As Duplicative Of Breach Of Contract For Coverage

Continental Insurance Company (CIC) disclaimed coverage to its insured for an underlying action based on late notice and the insured's failure to meet its burden to prove the terms of the policies from 1970 to 1990 under which the insured claimed coverage. The insured sued CIC in the United States District Court for the Northern District of New York seeking a declaration that CIC breached its duty to defend and to indemnify the insured under an insurance contract, and that CIC's denial violated its duty of good faith and fair dealing. The insured alleged that the insurer's denial lacked any reasonable basis. The court dismissed the breach of good faith and fair dealing claim, reasoning that it is "well-settled" in New York that there is no separate cause of action for breach of the implied covenant of good faith and fair dealing when based upon the same alleged facts as the breach of contract claim. The court found that the insured's allegations that CIC "failed to allege a good faith claim or basis for claiming [late notice] prejudice" and "exhibited a gross disregard" for the insurance policies merely "rehashed" the allegations of the breach of contract claim that CIC offered "meritless reasons for the denial of coverage." [*County of Warren v. Cont'l Ins. Co.*, 2023 U.S. Dist. LEXIS 27043 (N.D.N.Y. Feb. 17, 2023).]

MISCELLANEOUS

Second Department Holds That Assault And Battery Sublimit Applies to Negligence Claims Arising From Assault And Battery

A decedent was stabbed to death during a party in a room at a Howard Johnson hotel owned by Commack Hotel LLC, and his estate sued and was awarded summary judgment against the hotel. The hotel's insurer, Great American E&S Insurance Company, maintained that it had no obligation to indemnify the hotel in excess of the $25,000 limitation of coverage for assault and battery under an endorsement in the hotel's policy. The Appellate Division, Second Department, agreed, reasoning that the assault and battery limitation applied to preclude coverage for amounts in excess of $25,000. The court explained that the limitation applies to

limit coverage if "no cause of action would exist 'but for' the assault and/or battery," including for "negligence claims arising from an assault and battery." [*Great Am. E&S Ins. Co. v Commack Hotel*, LLC, 211 A.D.3d 704 (2d Dep't 2022).]

Court Holds That Insurer Was Not Volunteer And May Seek Subrogation From Other Insurer But That Other Insurer's Policy Is Excess

Walter Breitenbach, who was insured by Adirondack Insurance, struck a pedestrian with his automobile while driving within the scope of his employment with the Town of Riverhead, which was insured by ACE Insurance. The pedestrian and his wife sued Breitenbach and Riverhead, and Adirondack denied coverage to Riverhead. At mediation, ACE agreed to pay $1 million on behalf of Riverhead under its primary policy, and Adirondack agreed to pay $750,000 on behalf of Breitenbach - $500,000 under a primary policy and $250,000 under an umbrella/excess policy. In a Post-Mediation Agreement, the parties to the litigation released each other. In turn, ACE filed a declaratory judgment action against Adirondack, seeking to recover ACE's settlement payment on behalf of Riverhead under Breitenbach's umbrella/excess policy, which covered Riverhead as an additional insured. The Supreme Court, New York County, rejected Adirondack's argument that ACE acted as a volunteer in settling the underlying action and, therefore, could not seek subrogation from Adirondack, reasoning that subrogation is a viable theory where an insurer makes payments on its policy after the other insurer denies coverage. The court also rejected Adirondack's argument that ACE waived its right to recovery in the Post-Mediation Agreement and ensuing settlement releases, stressing that neither ACE nor Adirondack were signatories. However, the court ultimately concluded that ACE could not recover from Adirondack because ACE's primary policy issued to Riverhead was primary to Adirondack's umbrella/excess policy that covered Riverhead as an additional insured. Although the ACE primary policy had a clause providing it was excess to other insurance, the court found that it did not "manifest a clear intent" to be excess to a true umbrella/excess policy. [*ACE Am. Ins. Co. v. Adirondack Ins. Exchange*, 2023 N.Y. Misc. LEXIS 253 (Sup. Ct. N.Y. Cnty. Jan. 4, 2023).]

Southern District Agrees That Life Insurance Company Properly Denied Benefits Due To Premium Non-Payment

Rebeca Singer sued Massachusetts Mutual Life Insurance Company seeking life insurance benefits under a policy issued to her late husband. When her husband, the insured, procured the policy, he elected a semi-annual payment frequency in the amount of $644 twice a year that could be changed by advanced written notice. From April 2017 to July 2018, the insured remitted semi-annual payments, but no further payments were made. Accordingly, on November 11, 2019, the insurer issued a Notice of Payment Due reflecting that the policy would lapse if the $644 payment was not received by the December 10, 2019 due date or within the 31 day grace period after that date. On December 17, 2019, the insurer issued a Second Notice of Payment Due. Pursuant to the terms of the policy, the insurance "terminat[ed]" if not paid within 31 days of its due date, but the insured could seek reinstatement within 30 days, which the insured did not do. By correspondence dated February 10, 2020, the insurer informed the insured that the policy lapsed because the premium was not paid. The insured died on April 11, 2020. The United States District Court for the Southern District of New York granted summary judgment to the insurer, rejecting the wife's argument that the insurer's notices failed to comply with New York Insurance Law § 3211 (a)(1), stressing that the statute should not be used as a "trap" and that "minor variations" from the statutory requirements are not automatically noncompliant. The court also "disregarded" the wife's unsworn transcription of a purported telephone call during which the insurer allegedly told the insured he could not pay his premium on a quarterly basis because the transcription was unauthenticated. [*Singer v. Mass Mut. Life Ins. Co*., 2023 U.S. Dist. LEXIS 86817 (S.D.N.Y. May 17, 2023).]

Eastern District Finds That Coverage Counsel's Legal Opinion Is Privileged But Counsel's Work As A Claims Investigator Is Not

In this declaratory judgment action seeking coverage under a Financial Institution Bond issued by Great American Insurance Company, the insured moved to compel documents withheld from discovery by Great American based on attorney-client privilege and the work product doctrine. The United States District Court for the Eastern District of New York held that a letter providing coverage counsel's legal opinion was privileged. However, the court found that the insurer did not meet its burden of proving privilege as to certain documents concerning counsel's involvement in the insurer's investigation. The court reasoned that documents between a claims adjuster and outside counsel are privileged where counsel is providing legal advice, but documents reflecting that counsel is "acting as an investigator of a claim (the job of a claims adjuster)" are not. After an *in camera* review of the insurer's documents, the Magistrate Judge ordered the production of documents reflecting work performed by counsel "as a claims investigator rather than legal counsel." [*Cadaret Grant & Co. v. Great Am. Ins. Co.*, 2023 U.S. Dist. LEXIS 128370 (E.D.N.Y. July 25, 2023).]

Southern District Upholds Life Insurer's Termination Of Policy

Principal Life Insurance Company denied payment to the beneficiary under a life insurance policy that covered his deceased wife. The policy was renewable on a yearly basis subject to payment of an annual premium. The insured could elect to change the frequency of the premium payments with the insurer's approval and an additional charge. The insured did not request such a change and failed to pay the

premium on the yearly due date. Accordingly, the insurer sent a notice stating that the policy would be terminated if the annual premium was not paid within the 30-day grace period, i.e., by January 28, 2016. The insured paid the premium in February 2016, but her check was returned with a letter stating that the policy had been terminated. The beneficiary sued and argued that the insurer's "grace period" notice was deficient under the policy and the New York Insurance Law because it demanded the entire annual premium rather than the payment of an installment. The United States District Court for the Southern District of New York rejected the beneficiary's argument and dismissed his complaint, reasoning that he "confused the option to modify the frequency of premium payment subject to [the insurer's] approval with a supposed unilateral right to do so," which was not supported under the policy. [*Moskowitz v. Principal Life Ins. Co., 2023 U.S. Dist. LEXIS 132034* (S.D.N.Y. July 31, 2023).]

Southern District Rules That Coverage Action Meets Federal Amount-In-Controversy Requirement Based On Record Outside Pleadings

Greater New York Insurance Company (GNY) filed an action in state court against Kinsale Insurance Company seeking a declaration that Kinsale was obligated to defend GNY's insured in an underlying personal injury action. Kinsale removed the action to federal court, and GNY moved to remand the case back to state court claiming that the case did not meet the federal $75,000 amount-in-controversy requirement. The United States District Court for the Southern District of New York denied GNY's motion, reasoning that Kinsale established a "reasonable possibility" that defense costs in the underlying action will exceed $75,000. Although GNY's complaint and Kinsale's petition for removal did not establish the amount in controversy, the court stressed that a district court may consider documents outside the pleadings to determine the amount in controversy. Because the plaintiff's bill of particulars in the underlying action revealed spine, shoulder and knee injuries likely requiring the defense to retain several experts, the court concluded that defense of the action would almost certainly cost more than $75,000, which is enough to support jurisdiction. The court also granted Kinsale's motion to compel arbitration as required under its policy. [*Ins. Co. of Greater N.Y. v. Kinsale Ins. Co.,* 2023 U.S. Dist. LEXIS 204754 (S.D.N.Y. Nov. 15, 2023).]

New York's Highest Court Holds That Portion Of Premium Need Not Be Refunded For Death During Policy Period Of Universal Life Policy

The Joan C. Lupe Family Trust purchased a policy under which Lincoln Life and Annuity Company of New York agreed to provide universal life insurance coverage with Joan C. Lupe as the insured. The policy listed a "planned premium" of $53,877 but explained that the Trust could pay premiums by other agreeable methods subject to certain minor limitations. The Trust paid an annual planned premium on May 7, 2018, and Ms. Lupe died on October 6, 2018. Her Trust filed a putative class action in federal court against Lincoln, alleging that its refusal to refund a prorated portion of the final year's premium violated Insurance Law § 3203 (a)(2), which requires a refund of any life insurance premium "actually paid for any period beyond the end of the policy month in which" the death of the insured occurs. The case made its way to the Second Circuit Court of Appeals, which found that no New York state cases had resolved the issue. Accordingly, the Second Circuit certified the following question to the New York Court of Appeals: "Whether a planned payment in an interest-bearing policy account, as part of a universal life insurance policy, constitutes a 'premium actually paid for any period' under the refund provision" of § 3203 (a)(2). The New York Court of Appeals answered the certified question in the negative because "the plain language of section 3203 (a)(2) does not apply to such discretionary payments." [*Nitkewicz as Tr. of Joan C. Lupe Fam. Tr. v. Lincoln Life & Annuity Co. of New York*, 40 N.Y.3d 349 (2023).]

Policies Both Deemed To Be "True Excess" and Therefore Co-Insurance

Walter Breitenbach struck a pedestrian while driving his automobile within his course of employment with the Town of Riverhead. The pedestrian sued Breitenbach who was insured under a homeowner's policy with Adirondack Insurance Exchange that contained an endorsement providing applicable umbrella coverage excess of a retained limit and other available insurance. The Town was insured by Ace American Insurance Company under a Public Entity Policy that provided applicable insurance excess of a self-insured retention and other available insurance. After the personal injury action settled, Ace filed a declaratory judgment action against Adirondack to determine the priority of coverage. The Supreme Court, New York County, held that the two insurers must contribute pro rata based on their policy limits towards the settlement because they both cover the accident as "true excess" policies. [*Ace Am. Ins. Co. v. Adirondack Ins. Exch.,* 2023 N.Y. Misc. LEXIS 9619 (Sup. Ct. N.Y. Cnty. Oct. 17, 2023).]

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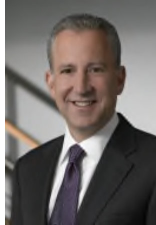

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