NEW YORK INSURANCE COVERAGE LAW UPDATE

2020 COMPILATION

Editor: Alan C. Eagle, Esq.

WWW.RIVKINRADLER.COM

ALBANY
66 South Pearl St.
11th Floor
Albany, NY 12207
(518) 462-3000

NEW JERSEY
25 Main St., Court Plaza North
Suite 501
Hackensack, NJ 07601
(201) 287-2460

NEW YORK CITY
477 Madison Avenue
Suite 410
New York, NY 10022
(212) 455-9555

POUGHKEEPSIE
2649 South Road
Poughkeepsie, NY 12601
(845) 473-8100

LONG ISLAND
926 RXR Plaza
West Tower
Uniondale, NY 11556
(516) 357-3000

TABLE OF CONTENTS

Page

ADDITIONAL AND NAMED INSUREDS/PRIORITY 1

Greater New York Mut. Ins. Co. v. State Nat. Ins. Co., Inc., **66 Misc. 3d 1203(A) (Sup. Ct. N.Y. Co. 2019) (Court Rules "C/O" Company In Contract Not An Additional Insured)**

Fireman's Fund Ins. Co. v. State Nat. Ins. Co.**, 180 A.D.3d 118 (1st Dep't 2019) (Property Owner and Manager Covered As Additional Insureds Under Contractor's Policy Providing Coverage "With Respect To" Contractor's Operations Even In Absence Of Contractor's Negligence, First Department Rules)**

Endurance Am. Specialty Ins. Co. v. Harleysville Worcester Ins. Co., **179 A.D.3d 625 (1st Dep't 2020) (Policy Endorsement Waived Contribution From Additional Insured's Insurer, First Department Decides)**

Travelers Indem. Co. v. Harleysville Ins. Co., **2020 U.S. Dist. LEXIS 47817 (S.D.N.Y. Mar. 19, 2020) (District Court Rejects Insurer's Attempt To Rely On Extrinsic Evidence To Deny Defense To Additional Insureds)**

1000 Dean LLC v. Bergen Projects, LLC**, 2020 N.Y. Misc. LEXIS 3021 (Sup. Ct. N.Y. Co. June 29, 2020) (Court Holds Landlord Covered As Additional Insured For Accident On Sidewalk Adjacent To Leased Premises)**

CONDITIONS PRECEDENT/LATE NOTICE 2

Foddrell v. Utica First Ins. Co.**, 178 A.D.3d 901 (2d Dep't 2019) (Insurer Failed To Demonstrate Insured's Failure To Cooperate, Second Department Rules)**

Certain Underwriters at Lloyds London v. Advance Transit Co. Inc., **2020 N.Y. Misc. LEXIS 775 (Sup. Ct. N.Y. Co. Feb. 14, 2020) (Claim Filed More Than 60 Days After Policy Period Expired Was Untimely)**

Stein v. N.Y. National Gen. Ins. Co., **2020 N.Y. Misc. LEXIS 2662 (Sup. Ct. N.Y. Co. June 22, 2020) (Failure to Submit A Proof Of Loss Within 60 Days After Receipt Of Insurer's Notice Deemed Absolute Defense To Action On The Policy)**

State Farm Fire & Cas. Co. v. Accelerated Surgical Ctr., P.C., **2020 N.Y. Misc. LEXIS 1811 (Sup. Ct. N.Y. Co. May 5, 2020) (Court Finds No Coverage Because Insured Made Material Misrepresentations Regarding Where Vehicle Would Be Garaged)**

COVERAGE GRANT 2–3

Danaher Corp. v. Travelers Indem. Co., **414 F. Supp. 3d 436 (S.D.N.Y. 2019) (Southern District Of New York Issues Rulings On Missing Policies, Aggregate Limits And Allocation In "Long-Tail" Asbestos DJ)**

Unitrin Auto and Home Ins. Co. v. Sullivan**, 179 A.D.3d 970 (2d Dep't 2020) (Second Department Finds Triable Issue Of Fact As To Whether There Was A Covered "Accident")**

RD Rice Constr., Inc. v. RLI Ins. Co., **2020 N.Y. Misc. LEXIS 1991 (Sup. Ct. N.Y. Co. May 7, 2020) (New York Court Reaffirms That Contractor's Defective Work Is Not A Covered "Occurrence")**

Waiting Room Solutions, LLLP v. Excelsior Ins. Co., **2020 U.S. Dist. LEXIS 164513 (S.D.N.Y. Sept. 9, 2020) (Federal District Court Finds That Gender Discrimination And Intentional Infliction Of Emotional Distress Claims Were Not Claims For Covered "Occurrences")**

DUTY TO DEFEND/INDEMNIFY 3–5

Port Auth. of New York and New Jersey v. Brickman Group Ltd., LLC, **181 A.D.3d 1 (1st Dep't 2019) (Additional Insured May Recover Its Defense Costs From Insurers Even Where Found Solely At Fault, First Department Rules)**

Value Wholesale, Inc. v. KB Ins. Co., **450 F. Supp. 3d 292 (E.D.N.Y. March 31, 2020) (Eastern District Finds Duty To Defend Under Advertising Injury Coverage Despite Allegations Of Willful Conduct)**

Hanover Ins. Co. v. Weirfield Coal, Inc., **2020 U.S. Dist LEXIS 131108 (E.D.N.Y July 24, 2020) (Federal District Court Holds That Purported Continuing Injuries Do Not Trigger Policy Issued After Suit Filed)**

Argonaut Ins. Co. v. Town of Greenburgh, **2020 U.S. Dist. LEXIS 174909 (S.D.N.Y. Sept. 23, 2020) (Lawsuit Against Town Did Not Trigger Its Public Official Liability Or Public Risk General Liability Insurance)**

Page

Carrier Corp. v. Allstate Ins. Co., 187 A.D.3d 1616 (4th Dep't 2020) (Fourth Department Rejects Insured's Argument That Injury-In-Fact Occurs As A Matter Of Law From Initial Exposure To Asbestos)

Value Wholesale, Inc. v. KB Ins. Co., 2020 U.S. Dist. LEXIS 203659 (E.D.N.Y. Nov. 2, 2020) (Federal District Court Holds That Insurer Obligated To Pay Reasonable Defense Costs Not Paid By Other Insurer)

EXCLUSIONS 5–7

Automobile Ins. Co. of Hartford, Conn. v. Damadian, 178 A.D.3d 489 (1st Dep't 2019) (Watercraft Exclusion Precluded Coverage For Wrongful Death Lawsuit, First Department Rules)

Lepore v. Hartford Fire Ins. Co., 800 Fed. Appx. 29 (2d Cir. 2020) (Second Circuit Finds Intellectual Property Exclusion Bars Coverage)

Hamilton Spec. Ins. Co. v. Kinsale Ins. Co., 2020 U.S. Dist. LEXIS 65916 (S.D.N.Y. Apr. 15, 2020) (District Court Rules that Criminal Act Exclusion Applies To Claims Alleging Hostile Work Environment And Sexual Harassment)

Westchester Fire Ins. Co. v. Schorsch, 184 A.D.3d 64 (1st Dep't 2020) (Bankruptcy Exception To Insured Versus Insured Exclusion Applies, Court Finds)

RJK Elec. Corp. v. American Eur. Ins. Co., 2020 N.Y. Misc. LEXIS 3503 (Sup. Ct. Suffolk Co. May 29, 2020) (Court Holds Employee Of Contractor Exclusion Precluded Coverage For Accident That Would Not Have Occurred "But For" Contractor's Work)

NHJB, Inc. v. Utica First Ins. Co., 187 A.D.3d 1498 (4th Dep't 2020) (Assault and Battery Exclusion Bars Coverage Because No Cause Of Action Would Exist "But For" The Assault, Fourth Department Declares)

Union Mut. Fire Ins. Co. v. C&K 28 Realty Corp., 2020 N.Y. Misc. LEXIS 9578 (Sup. Ct. Kings Co. Oct. 27, 2020) (Insurer's Disclaimer Based Upon Independent Contractor Exclusion Upheld And Insured's Equitable Estoppel Argument Rejected)

C & S Franklin Realty Corp. v. United States Liab. Ins. Co. 2020 N.Y. Misc. LEXIS 7647 (Sup. Ct. Bronx Co. Aug. 28, 2020) (Court Rules That Assault And Battery Exclusion Precludes Coverage For Slip And Fall On Spilled Drinks During Melee)

AUTO/UNINSURED/UNDERINSURED MOTORIST 7–8

Farm Family Cas. Ins. Co. v. Henderson, 179 A.D.3d 1193 (3d Dep't 2020) (Auto Insurer Must Defend Insured Against Suit By Claimant Allegedly Injured While Unloading Tractor From Insured Truck, Third Department Decides)

Matter of Utica Mut. Assurance Co. v. Steward, 179 A.D.3d 815 (2d Dep't 2020) (Claimant Was "Occupying" Insured Tractor-Trailer When He Was Allegedly Injured, Second Department Says)

County of Niagara v. Liberty Mut. Ins. Co., 2020 U.S. Dist. LEXIS 21809 (W.D.N.Y. Feb. 6, 2020) (District Court Rules that Auto Exclusion Precludes Coverage Because "You" Means Named Insured)

Matter of United Fin. Cas. Co. v. Tekel, 185 A.D.3d 830 (2d Dep't 2020) (SUM Endorsement In Commercial Automobile Policy Issued To LLC Deemed To Cover Its Sole Member As "Insured")

FIRST PARTY PROPERTY 8

Humphries v. Metropolitan Prop. & Cas. Ins. Co., 2020 N.Y. Misc. LEXIS 2663 (Sup. Ct. N.Y. Co. May 26, 2020) (Court Finds Multiple Occurrences Where Fire Rekindled Next Day In Another Area)

Ventilla v. Pacific Indem. Co., 2020 U.S. Dist. LEXIS 120669 (S.D.N.Y. July 9, 2020) (Federal District Court Enforces Two-Year Limitation Clause In Homeowner's Policy To Deny Supplemental Claim)

Parauda v. Encompass Ins. Co. of Am., 2020 N.Y. App. Div. LEXIS 6968 (2d Dep't. Nov. 18, 2020) (Second Department Upholds Denial Of Coverage Under Homeowners Policy Because Claimed Loss Was Not A Covered "Collapse")

WAIVER/ESTOPPEL/3420(d) 8–9

United States Liab. Ins. Co. v. WW Trading Co., 813 Fed. Appx. 636 (2d Cir. 2020) (Second Circuit Finds Coverage Where Insurer Unreasonably Delayed In Seeking Rescission and Its Exclusions Did Not Apply)

Burlington Ins. Co. v. Sublink Ltd., 67 Misc. 3d 1208(A) (Sup. Ct. N.Y. Co. 2020) (Court Finds Insurer's Disclaimer Based On Insured's Failure to Cooperate Precluded Because Of Delay)

Page

Mountain Valley Indem. Co. v. Cohen, 68 Misc. 3d 1212(A) (Sup. Ct. N.Y. Co. 2020) (Insured's Notice After Default Judgment Gives Rise to Irrebuttable Presumption of Prejudice, Precluding Coverage)

BAD FAITH/EXTRA-CONTRACTUAL 9

Houston Cas. Co. v. Prosight Specialty Ins. Co., 462 F. Supp. 3d 443 (S.D.N.Y. 2020) (District Court Awards Insurer's Attorneys' Fees In Prosecuting DJ Against Another Insurer Owing Duty To Defend)

Perez v. Foremost Ins. Co., 2020 U.S. Dist. LEXIS 106815 (W.D.N.Y. June 18, 2020) (Federal District Court Denies Insured's Request To Add Claim For Bad Faith And Consequential Damages Based On Insurer's Denial Of Coverage)

MISCELLANEOUS 10

99 Wall Dev. Inc. v. Allied World Specialty Ins. Co., 2020 U.S. Dist. LEXIS 91888 (E.D.N.Y. May 26, 2020) (United States District Court Orders Insured To Produce Certain Pre-Litigation Documents But Not Others Deemed Work Product)

ADDITIONAL AND NAMED INSUREDS/PRIORITY

Court Rules "C/O" Company In Contract Not An Additional Insured

A construction worker sued Blue Woods Management Group, Inc. alleging that he was injured while working at premises owned by Blue Woods. Blue Woods sought additional insured coverage under its general contractor's policy, which provided such coverage "where required by written contract," and the insurer denied coverage. The Supreme Court, New York County, sustained the denial, reasoning that the contract signed by the general contractor identified the owner of the property that was entitled to additional insured coverage as "299 Owners Corp. c/o Blue Woods Management Group Inc." The "c/o", the court ruled, did not confer the title of owner on Blue Woods. [*Greater New York Mut. Ins. Co. v. State Nat. Ins. Co., Inc.,* 66 Misc. 3d 1203(A) (Sup. Ct. N.Y. Co. 2019).]

Property Owner and Manager Covered As Additional Insureds Under Contractor's Policy Providing Coverage "With Respect To" Contractor's Operations Even In Absence Of Contractor's Negligence, First Department Rules

The underlying plaintiff sued a building's owner and manager for injuries she allegedly suffered when she tripped and fell on a step while attempting to pass through a door leading from an interior vestibule to an outdoor passageway on the 14th floor. The underlying plaintiff alleged that she fell because the waterproofing applied to the walkway by the contractor was all the same color. The owner and manager sought additional insured coverage under the contractor's general liability insurance policy, which provided such coverage for the owner and manager "with respect to operations performed by or on behalf of" the contractor. The trial court ruled that although the contractor had not been found negligent in the underlying personal injury action, the owner and manager were covered as additional insureds. The Appellate Division, First Department, affirmed, reasoning that the "broadly worded" additional insured endorsement was "similar" to additional insured provisions applying to liability "arising out of" the named insured's operations. Citing to the 2010 decision by the New York Court of Appeals in Regal Construction Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, the First Department concluded that there was additional insured coverage for the owner and manager because there was a connection between the accident and the insured contractor's operations even in the absence of negligence on the part of the contractor. [*Fireman's Fund Ins. Co. v. State Nat. Ins. Co.*, 180 A.D.3d 118 (1st Dep't 2019).]

Policy Endorsement Waived Contribution From Additional Insured's Insurer, First Department Decides

A claimant sued the New York City Housing Authority ("NYCHA") for personal injuries, and NYCHA was defended as an additional insured under a policy issued to Women Work Construction Corp. ("WWC"). WWC's insurer asserted that NYCHA's insurer had to contribute to NYCHA's defense. The Appellate Division, First Department, ruled that WWC's insurer "waived any contribution" from NYCHA's insurer because WWC's policy contained a "Primary Non-Contributory Endorsement" that provided that the insurer would "not seek contribution from any other insurance available to NYCHA." In addition, the First Department determined that the insurers were not co-primary because the NYCHA policy, by its terms, provided excess coverage to NYCHA. [*Endurance Am. Specialty Ins. Co. v. Harleysville Worcester Ins. Co.,* 179 A.D.3d 625 (1st Dep't 2020).]

District Court Rejects Insurer's Attempt To Rely On Extrinsic Evidence To Deny Defense To Additional Insureds

The City University of New York ("CUNY") hired Genesys Engineering, PC to perform construction work at the Herbert H. Lehman College in the Bronx. In turn, Genesys hired A.K.S. International Inc. to perform certain work at the project, including the installation of construction fencing. A CUNY employee was struck by an automobile in front of the college and sued CUNY, Genesys and AKS in two actions alleging that they contributed to the accident because construction fencing at the college obstructed the driver's visibility. AKS's insurer, Harleysville, denied additional insured coverage to CUNY and Genesys based upon extrinsic evidence, including a police report, indicating that the driver's visibility was not obstructed by construction fencing and, therefore, AKS did not cause the accident in whole or in part. A declaratory judgment action ensued, and the United States District Court for the Southern District of New York held that Harleysville had a duty to defend its additional insureds, reasoning that the allegations triggered a possibility of coverage and Harleysville's extrinsic evidence could not be considered because it went "directly to the merits" of the underlying actions. The court concluded that to hold otherwise, "would wholly undermine the well-established function of the duty to defend." [*Travelers Indem. Co. v. Harleysville Ins. Co.,* 2020 U.S. Dist. LEXIS 47817 (S.D.N.Y. Mar. 19, 2020).]

Court Holds Landlord Covered As Additional Insured For Accident On Sidewalk Adjacent To Leased Premises

The claimant was injured while working as a porter when he fell from a ladder placed on the sidewalk adjacent to a building owned by Bergen Projects, LLC ("landlord") and leased to a tenant for a bar/restaurant at 899 Bergen Street. The claimant sued the landlord which sought coverage as an additional insured under the tenant's policy. The tenant's policy provided additional insured coverage for liability arising out of the ownership, maintenance or use of that part of the premises leased to the tenant. The tenant's insurer moved to dismiss the landlord's declaratory judgment action on the grounds that the claimant fell on a public sidewalk and the tenant's maintenance obligations did not extend to the sidewalk. The Supreme Court, New York County, denied the motion, citing New York appellate cases holding that such additional insured coverage gives rise to coverage for landlords for accidents "on abutting public sidewalks". The court noted that the claimant testified that there were several entrances into the restaurant along Bergen Street. The court concluded that the sidewalk where the accident occurred was necessarily used for access in and out of the leased premises and, by implication,

was part of the leased premises. [*1000 Dean LLC v. Bergen Projects, LLC*, 2020 N.Y. Misc. LEXIS 3021 (Sup. Ct. N.Y. Co. June 29, 2020).]

CONDITIONS PRECEDENT/LATE NOTICE

Insurer Failed To Demonstrate Insured's Failure To Cooperate, Second Department Rules

The principal of a company sued by a claimant for personal injuries allegedly sustained in a construction-related accident twice failed to appear for his court-ordered deposition, did not respond to an investigator's efforts to contact him in writing and on the phone, and failed to appear for the rescheduled deposition. The company's insurer advised the company that it would no longer indemnify the company because of the principal's lack of cooperation. After the law firm retained by the insurer to defend the company withdrew as counsel, the trial court in the underlying action entered judgment against the company in the amount of $673,422, and the claimant sued the company's insurer to recover the amount of the unsatisfied judgment. The Supreme Court, Queens County, denied the insurer's motion for summary judgment, and the Appellate Division, Second Department, affirmed. The Second Department ruled that the insurer failed to meet its "heavy burden" of demonstrating the insured's non-cooperation. Although the court agreed that the insurer made diligent efforts that were reasonably calculated to bring about the insured's cooperation, the court concluded that the insurer failed to demonstrate that the insured's conduct constituted "willful and avowed obstruction." [*Foddrell v. Utica First Ins. Co.*, 178 A.D.3d 901 (2d Dep't 2019).]

Claim Filed More Than 60 Days After Policy Period Expired Was Untimely

Advance Transit Co., Inc. was sued in a personal injury action. Advance's claims-made insurance policy required that Advance report claims during the policy period or, if Advance renewed the policy, within 60 days after the expiration of the policy period. Advance renewed the policy but reported the claim more than 60 days after the initial policy period expired. Advance contended that Insurance Law § 3420(a)(5) required claims-made policies issued or delivered in New York to include a provision that a claim that arose during the policy period could be reported during the renewal policy period. The Supreme Court, New York County, granted summary judgment in favor of the insurer and held that it had no duty to defend or indemnify Advance. The court opined that the legislative history of Section 3420(a)(5) reflects that it was meant to provide that insurers issuing claims-made policies "need not comply with a [late notice] prejudice showing" if the policy provides that the "claim shall be made during the policy period, any renewal thereof, or any extended reporting period …." [*Certain Underwriters at Lloyds London v. Advance Transit Co. Inc.,* 2020 N.Y. Misc. LEXIS 775 (Sup. Ct. N.Y. Co. Feb. 14, 2020).]

Failure to Submit A Proof Of Loss Within 60 Days After Receipt Of Insurer's Notice Deemed Absolute Defense To Action On The Policy

National General Insurance Company paid its insured $30,000 for a water loss under a homeowners policy. In turn, the insured's public adjuster estimated the loss at $405,000 and advised the insurer's third-party administrator of the discrepancy. The insurer disclaimed based on the insured's failure to submit a signed proof of loss within 60 days of the insurer's request as required by the policy. The insured sued. The court granted the insurer's motion to dismiss, finding that the insurer's documentary evidence showed that the insured failed to file a proof of loss within 60 days after receipt of his insurer's demand which was an absolute defense to the insured's claim for coverage under the policy. The court rejected the insured's argument that the insurer improperly failed to send its proof of loss demand to the insured's public adjuster, stressing that New York Insurance Law §3407 only requires that the demand be made upon the insured. [*Stein v. N.Y. National Gen. Ins. Co.,* 2020 N.Y. Misc. LEXIS 2662 (Sup. Ct. N.Y. Co. June 22, 2020).]

Court Finds No Coverage Because Insured Made Material Misrepresentations Regarding Where Vehicle Would Be Garaged

State Farm sought a default judgment against its insured and the insured's medical providers declaring that State Farm was not obligated to pay no-fault benefits in connection with a motor vehicle accident because of material misrepresentations as to where the vehicle was garaged on the application for the auto policy. In support of its motion, State Farm submitted a printout of the history of the auto's license plate, a forged paystub submitted with the insured's application, an authentic paystub from the same employer, and the police accident report. The court held that the evidence was sufficient to find material mis-representations vitiating coverage under the policy. The court also found that the insured's refusal to answer questions at the insured's EUO was sufficient to find that the accident was staged and, therefore, not covered. [*State Farm Fire & Cas. Co. v. Accelerated Surgical Ctr., P.C.,* 2020 N.Y. Misc. LEXIS 1811 (Sup. Ct. N.Y. Co. May 5, 2020).]

COVERAGE GRANT

Southern District Of New York Issues Rulings On Missing Policies, Aggregate Limits And Allocation In "Long-Tail" Asbestos DJ

Danaher Corporation asked the United States District Court for the Southern District of New York to decide various insurance coverage issues as to underlying silica and asbestos-related bodily injury claims asserted against Chicago Pneumatic Tool Company, which Danaher acquired in 1986. As to certain missing insurance policies, the court found sufficient evidence to demonstrate the existence of

the policies, including the insurer's policy list referencing the policies, certain "binding advices," and deposition testimony of Chicago Pneumatic's former treasurer. The court ruled that, absent evidence sufficient to support a contrary conclusion, the terms of the lost policies should be deemed to be the same as those contained in policies from adjacent years or in form policies from the relevant periods. The court also found that other policies did not have aggregate limits for bodily injury claims, reasoning that they had "strikethrough marks" where aggregate limits might otherwise be listed. As to the allocation of indemnification and defense costs to policies without "non-cumulation" or other similar language, the court ruled that the costs must be allocated pro rata to all triggered years including those years in which the insured does not have insurance. [*Danaher Corp. v. Travelers Indem. Co.,* 414 F. Supp. 3d 436(S.D.N.Y. 2019).]

Second Department Finds Triable Issue Of Fact As To Whether There Was A Covered "Accident"

The claimant sued the insured, alleging that he was injured when he was struck by a cup thrown out of a window of a vehicle operated by the insured. The insurer that issued a combination homeowners and automobile policy to the insured filed a declaratory judgment action seeking a declaration that it had no duty to indemnify the insured. The Appellate Division, Second Department, found a question of fact as to whether there was a covered "accident" because of evidence that the insured intended to douse the claimant with the liquid in the cup but did not intend to throw the cup and strike the claimant with it. Finding that the claim did not fall within the "narrow class of cases" in which the intentional act exclusion applied "regardless of the insured's subjective intent," the court found a triable issue of fact as to whether the event qualified as a covered "accident". [*Unitrin Auto and Home Ins. Co. v. Sullivan*, 179 A.D.3d 970 (2d Dep't 2020).]

New York Court Reaffirms That Contractor's Defective Work Is Not A Covered "Occurrence"

Anthony and Sandra Tamer hired RD Rice Construction ("Rice") as a general contractor to gut and rebuild their combined residential co-operative units. After Rice and its subcontractors completed the renovation work, the Tamers complained of a draft so Rice returned and installed insulation as a service/warranty item. In turn, a HVAC unit pipe broke, causing water damage, including to the custom flooring installed as part of the project. The Tamers' homeowners insurer, AIG, paid for the water loss, filed a subrogation action against Rice, obtained a judgment against Rice which went unsatisfied, and then filed a direct action against Rice's general liability insurer that had disclaimed coverage. The New York Supreme Court, New York County, upheld the general liability insurer's disclaimer, reasoning that a claim against a general contractor for defective workmanship resulting in damage to the contractor's work on the project is not a covered "occurrence" under a general liability policy. The court stressed that New York precedent demonstrates that general liability policies "do not cover as occurrences defective workmanship claims unless the defective workmanship causes damages to property that is outside the scope of the insured's construction project." The court was not persuaded by out-of-state cases finding coverage because the so-called Your Work Exclusion has an exception for work by subcontractors. [*RD Rice Constr., Inc. v. RLI Ins. Co.,* 2020 N.Y. Misc. LEXIS 1991 (Sup. Ct. N.Y. Co. May 7, 2020).]

Federal District Court Finds That Gender Discrimination And Intentional Infliction Of Emotional Distress Claims Were Not Claims For Covered "Occurrences"

Claimants sued Waiting Room Solutions alleging various causes of action arising out of an employee placing a video camera in its women's restroom and Waiting Room's handling of the employee's actions. Waiting Room's liability insurer, Excelsior, initially agreed to defend Waiting Room under a reservation of rights. However, after all the claims against Waiting Room were dismissed except for the claims for gender discrimination under New York's Human Rights Law and for intentional infliction of emotional distress, Excelsior disclaimed coverage as to the remaining claims because they did not allege a covered "occurrence," defined in the policy as an "accident". Waiting Room filed a declaratory judgment action, and the United States District Court for the Southern District of New York upheld the disclaimer, reasoning that the factual allegations in the complaint in the underlying action supported a "disparate treatment" discrimination claim, which is an "intentional wrong whose resultant harm flows directly from the acts committed". The court rejected Waiting Room's waiver argument because the insurer had reserved its rights to disclaim coverage. The court also rejected Waiting Room's argument that the insurer untimely disclaimed under New York Insurance Law §3420 (d) because "this statutory waiver provision only apples to disclaimers of coverage based on exclusions or breaches of policy conditions", not where the claim falls outside the scope of coverage. [*Waiting Room Solutions, LLLP v. Excelsior Ins. Co.,* 2020 U.S. Dist. LEXIS 164513 (S.D.N.Y. Sept. 9, 2020).]

DUTY TO DEFEND/INDEMNIFY

Additional Insured May Recover Its Defense Costs From Insurers Even Where Found Solely At Fault, First Department Rules

The Port Authority of New York and New Jersey was sued by plaintiffs who alleged that they were injured due to the negligence of The Brickman Group Ltd., LLC, a Port Authority contractor, and/or Brickman's subcontractor. The Port Authority sought reimbursement of its defense costs as an additional insured under Brickman's insurance policies, which provided coverage for "loss adjustment expense" which was defined to include costs incurred by the insured in connection

with the defense of any "'suit' to which this policy applies". In turn, "suit" was defined as a civil proceeding for damages because of bodily injury "to which this insurance applies are alleged". Additional insured coverage was provided for bodily injury "caused, in whole or in part, by" the acts or omissions of Brickman or those acting on its behalf. Even though the Port Authority was ultimately found in the underlying actions to be the sole party at fault for the accident, the Appellate Division, First Department, ruled that the Port Authority was entitled to reimbursement of its defense costs because "damages . . . to which [the additional insured coverage] applie[d]" were "alleged" in those actions from inception until the liability determinations. The First Department concluded that the allegations of the complaints were the "determinative factor" for purposes of finding that the Port Authority's defense costs were covered. [*Port Auth. of New York and New Jersey v. Brickman Group Ltd., LLC,* 181 A.D.3d 1 (1st Dep't 2019).]

Eastern District Finds Duty To Defend Under Advertising Injury Coverage Despite Allegations Of Willful Conduct

Abbott Laboratories sued Value Wholesale and other pharmaceutical distributors alleging that they engaged in a wrongful scheme to "import[], advertis[e] and … distribut[e]" boxes of international glucose test strips that were not approved for domestic sale, and that the defendant pharmaceutical distributors profited from this scheme. Abbott asserted claims for trademark and trade dress infringement, fraud, racketeering, unfair competition, and "other illegal and wrongful acts." Value sought coverage from KB Insurance Company (KBIC) under a policy providing coverage for damages because of "personal and advertising injury", which was defined as injury arising out of one or more enumerated offenses, including the "use of another's advertising idea in [Value's] 'advertisement'" and "[i]nfringing upon another's copyright, trade dress or slogan in [its] 'advertisement'". KBIC denied coverage on the bases that the complaint did not allege a "causal nexus between its injuries and Value's advertising activities" and various exclusions. The United States District Court for the Eastern District of New York held that KBIC had a duty to defend, reasoning that Abbott's complaint alleged that Value's advertising activities contributed to the alleged harm and, therefore, alleged a covered "advertising injury". As to the exclusions for "knowing violation of rights of another" and "material published with knowledge of falsity", the court acknowledged that the complaint alleged willful misconduct, but opined that "several claims relating to Value's allegedly infringing conduct" do not require proof of Value's intent. [*Value Wholesale, Inc. v. KB Ins. Co.,* 450 F. Supp. 3d 292 (E.D.N.Y. March 31, 2020).]

Federal District Court Holds That Purported Continuing Injuries Do Not Trigger Policy Issued After Suit Filed

In April, 2016, Claimants filed suit against Weirfield Coal for alleged injuries from exposure to toxic coal dust from Weirfield's facility, and Penn-Star Insurance Company was ordered to defend Weirfield in the action. Penn-Star sought contribution from other insurers including Markel Insurance Company. Markel insured Weirfield under a pollution liability insurance policy with a policy period from June 30, 2017 to June 30, 2018, after the bodily injury action was filed. The Markel policy required that the bodily injury occur "during the policy period" and that "[p]rior to the policy period, no insured … and no 'responsible insured' knew that the 'bodily injury' … had occurred, in whole or in part…." Penn-Star argued that Markel's policy was triggered because the bodily injury action plead a continuous tort to the present. The United States District Court for the Eastern District of New York found Penn-Star's argument "unpersuasive," stressing that there is no coverage by virtue of the "plain language" of the policy and New York case law recognizing that there is no coverage for a known loss. [*Hanover Ins. Co. v. Weirfield Coal, Inc.,* 2020 U.S. Dist LEXIS 131108 (E.D.N.Y July 24, 2020).]

Lawsuit Against Town Did Not Trigger Its Public Official Liability Or Public Risk General Liability Insurance

In 2006, S&R Properties purchased a parcel of land in the Town of Greenburgh, that was zoned for multi-family residential complexes. In 2007, the parcel was rezoned for one-family use. From 2007 to 2016, S&R filed seven lawsuits challenging the rezoning. In the seventh lawsuit, S&R sued the Town and others alleging that it suffered nearly a decade of ongoing harm due to the Town's efforts to block the development of the land. The Town sought insurance coverage for this lawsuit under a policy issued by Argonaut Insurance which provided Public Risk General Liability ("PRGL") Insurance and Public Official Liability ("POL") Insurance for the policy period from December 31, 2015 to December 31, 2016. The United States District Court for the Southern District of New York held that the Town was not covered under the POL coverage because it only applied to a claim "first made against the [insured] during the policy period," and provided that "all claims arising out of a 'public officials wrongful act' will be deemed to have been made at the time the first of such 'claims' is made …." The court reasoned that the claims in the 2016 action arose out of the same alleged effort to block and delay S&R's development of the property as the prior actions/claims before the policy period. The court also found no coverage under the PRGL insurance which covered liability for "property damage." While the court found the suit arguably alleged covered "property damage" in the form of "loss of use", the court explained that the coverage applied only if prior to the policy period, no insured knew or had reason to know" that "property damage occurred". The court found that the Town knew about the alleged loss of use from the earlier lawsuits before the policy period. [*Argonaut Ins. Co. v. Town of Greenburgh,* 2020 U.S. Dist. LEXIS 174909 (S.D.N.Y. Sept. 23, 2020).]

Fourth Department Rejects Insured's Argument That Injury-In-Fact Occurs As A Matter Of Law From Initial Exposure To Asbestos

Carrier Corporation and Elliot Company ("Plaintiffs") sought coverage from various insurers for lawsuits claiming personal injuries from exposure to asbestos contained in their products. In an appeal before the New York Appellate Division, Fourth Department, Fireman's Fund Insurance Company maintained that the trial court erred in granting Plaintiffs' motion for partial summary judgment declaring that, as a matter of law, injury-in-fact in an asbestos case occurs from the date of first claimed exposure through death or the filing of suit, thereby triggering each policy in effect from the date of first claimed exposure. The Fourth Department agreed, reasoning that Fireman's Fund raised a triable issue of fact and, in particular, submitted the affidavits of two medical experts who averred that harm occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms. [*Carrier Corp. v. Allstate Ins. Co.*, 187 A.D.3d 1616 (4th Dep't 2020).]

Federal District Court Holds That Insurer Obligated To Pay Reasonable Defense Costs Not Paid By Other Insurer

Value Wholesale, Inc. retained a law firm to defend Value in a trademark lawsuit, and MedPlus, Inc. retained the same firm for its defense in the same suit. Continental Casualty agreed to defend the lawsuit and reimbursed certain past defense costs. Value filed a declaratory judgment action against KB Insurance (which had insured Value) seeking reimbursement of those defense costs not paid by Continental. After finding that KB breached its duty to defend, the court held that KB owed the full amount of the defense costs being sought by Value less those costs charged solely to defend MedPlus in the total amount of $347,800, plus pre-judgment interests at a rate of nine percent per annum. The court found that $400 - $600 per hour rates to defend a trademark infringement case were not unreasonable under the circumstances, noting that KB's own expert in the DJ charged $550 per hour to review the invoices. The court also declined to find that the hours spent were unreasonable noting that Value paid them, and there was no reason that it would have tolerated excessive billing. [*Value Wholesale, Inc. v. KB Ins. Co.*, 2020 U.S. Dist. LEXIS 203659 (E.D.N.Y. Nov. 2, 2020).]

EXCLUSIONS

Watercraft Exclusion Precluded Coverage For Wrongful Death Lawsuit, First Department Rules

A wrongful death lawsuit against the insured alleged that he was negligent for not providing proper life preservers at his lake house and for failing to properly check and maintain kayaks he allowed renters to use on a nearby pond. The Appellate Division, First Department, held that the insurer had no duty to defend or to indemnify the insured, reasoning that the policy excluded coverage for bodily injury "resulting from the use, occupancy, renting, loaning, or entrusting" of watercraft while not ashore and that the kayak was not ashore at the time of the accident. [*Automobile Ins. Co. of Hartford, Conn. v. Damadian*, 178 A.D.3d 489 (1st Dep't 2019).]

Second Circuit Finds Intellectual Property Exclusion Bars Coverage

Nanette Lepore sold her business assets, including her trademarks, copyrights and other intellectual property ("IP") rights in 2014. The purchaser sued Lepore in 2016 in a suit asserting seventeen causes of action, including breach of contract and tortious interference with an advantageous business relationship. The purchaser alleged that Lepore violated their licensing agreement by, among other things, "flouting all contractual requirements governing use of the purchased IP, failing to adhere to non-compete and non-disparagement obligations and public-statement prohibitions, and wrongfully co-mingling licensed marks with the products and marks of third-party collaboration partners." Lepore sought coverage from Hartford under primary and umbrella liability policies providing coverage for damages because of "personal and advertising injury", but the policies contained an IP exclusion for "personal and advertising injury" "arising out of any actual or alleged infringement or violation of any intellectual property right, such as copyright, patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity". The United States Court of Appeals for the Second Circuit held that the IP exclusion applied to preclude coverage, rejecting Lepore's argument that an express violation of IP rights had to be asserted for the exclusion to apply. The Second Circuit reasoned that although "no direct claims for IP relief" were alleged, the complaint alleges that Lepore violated the purchaser/licensor's IP rights, particularly in the unfair competition claim which was premised upon trademark infringement and alleged that Leopore "used, displayed and otherwise exploited the Purchased IP … without authorization … to further [Lepore's] own competing interests". The Court stressed that "the complaint's factual allegations rather than its legal assertions" are determinative of whether the exclusion applies. [*Lepore v. Hartford Fire Ins. Co.*, 800 Fed. Appx. 29 (2d Cir. 2020).]

District Court Rules that Criminal Act Exclusion Applies To Claims Alleging Hostile Work Environment And Sexual Harassment

Sway Lounge, LLC's employee sued Sway for damages arising from an alleged sexual assault committed by her manager. The employee asserted causes of action for hostile work environment, sexual harassment, gender discrimination, retaliation, and assault and battery. Kinsale Insurance Company disclaimed coverage to Sway under its Employment Practices Liability Policy based upon, among other things, the Criminal Act Exclusion which precluded coverage for claims "based upon, arising out of or in any way involving any criminal act." The United States District Court for the

Southern District of New York held that the Criminal Acts Exclusion precluded coverage. The court noted that while Sway's manager was not criminally prosecuted for the alleged sexual assault, it is the criminal "act", not a criminal indictment or conviction, that triggers the exclusion. [*Hamilton Spec. Ins. Co. v. Kinsale Ins. Co*., 2020 U.S. Dist. LEXIS 65916 (S.D.N.Y. Apr. 15, 2020).]

Bankruptcy Exception To Insured Versus Insured Exclusion Applies, Court Finds

Westchester Fire Insurance Co. sought a declaration that it had no coverage obligations under an excess Directors and Officers ("D & O") liability insurance policy issued to RCS Capital Corporation ("RCS") in connection with an underlying action filed by RCS's creditor trust against RCAP's directors and officers alleging they breached their fiduciary duties to the company. In 2014, a financial scandal decimated RCS's business, and RCS entered into a restructuring support agreement with its unsecured creditors. The agreement provided for the creation of a creditor trust. In turn, RCS filed for bankruptcy, and the bankruptcy court issued an order declaring that the creditor trust shall retain and "may enforce, sue on, settle, or compromise . . . all Claims, rights, Causes of Action, suits, and proceedings . . . against any Person without the approval of the Bankruptcy Court [and] the Reorganized Debtors ...." Westchester maintained that the "insured versus insured" exclusion of the D&O policy barred coverage for the underlying action because the creditor trust was a successor-in-interest to RCS (an insured) and RCS's directors and officers were also insureds under the policy. The insureds argued that the bankruptcy exception to the insured versus insured exclusion applied because it restored coverage for claims asserted by the "bankruptcy trustee" or "comparable authority". The Appellate Division, First Department, held that the bankruptcy exception applied to restore coverage, reasoning that the creditor trust was an authority comparable to a "bankruptcy trustee" because the trust was created and granted authority as part of the bankruptcy reorganization proceeding and empowered by the bankruptcy court's order of confirmation. [*Westchester Fire Ins. Co. v. Schorsch*, 184 A.D.3d 64 (1st Dep't 2020).]

Court Holds Employee Of Contractor Exclusion Precluded Coverage For Accident That Would Not Have Occurred "But For" Contractor's Work

Pierce Management, a general contractor, subcontracted with RJK Electric for electrical work on a drive-thru at a Starbucks. Pierce's project manager was allegedly injured while walking to his car in the parking lot by a grinder being used by an RJK employee in connection with the project. The project manager sued RJK, and RJK's insurer disclaimed coverage based on an exclusion in RJK's policy for bodily injury to any employee of any contractor "arising out of" the contractor or its employees performing services. RJK argued that the exclusion did not apply because the injured project manager was not actually working at the time of the accident. The New York State Supreme Court, Suffolk County, disagreed, reasoning that New York courts have applied a "but for" test to determine whether the accident falls within such an exclusion. The court concluded that the exclusion precluded coverage because "but for" the project manager performing work at the job site, his alleged injury would not have occurred. [*RJK Elec. Corp. v. American Eur. Ins. Co.*, 2020 N.Y. Misc. LEXIS 3503 (Sup. Ct. Suffolk Co. May 29, 2020).]

Assault and Battery Exclusion Bars Coverage Because No Cause Of Action Would Exist "But For" The Assault, Fourth Department Declares

NHJB, Inc., doing business as Molly's Pub, was sued in a wrongful death action after a bar manager at the pub shoved the decedent, causing him to fall down a flight of stairs. NHJB's insurer, Utica First, disclaimed coverage based upon an assault and battery exclusion. NHJB filed a declaratory judgment action against Utica First, and the trial court held that Utica First owed a duty to defend NHJB because one of the causes of action in the complaint was based upon premises liability, not an assault or battery. The Appellate Division, Fourth Department, reversed and granted summary judgment to Utica First. The Fourth Department stressed that the application of the exclusion "depends on the facts which are pleaded, not the conclusory assertions" or theory in the complaint about premises liability. The court concluded that based upon the alleged facts, "no cause of action would exist but for the assault" and, therefore, the assault and battery exclusion precluded coverage. [*NHJB, Inc. v. Utica First Ins. Co*., 187 A.D.3d 1498 (4th Dep't 2020).]

Insurer's Disclaimer Based Upon Independent Contractor Exclusion Upheld And Insured's Equitable Estoppel Argument Rejected

A worker allegedly fell off a ladder and suffered injuries while performing renovation work for C&K 28 Realty, and he sued C&K. C&K's insurer, Union Mutual, disclaimed coverage based upon policy provisions precluding coverage for bodily injury arising out of "work performed by independent contractors" unless they carry primary insurance with certain limits that names C&K as an additional insured. Union Mutual retained counsel to defend C&K subject to the disclaimer, filed a declaratory judgment action, and moved for summary judgment seeking a declaration that it may withdraw from C&K's defense based upon no coverage. The court granted summary judgment to Union Mutual because the underlying complaint, bill of particulars and claimant's deposition testimony reflected that the claimant was an independent contractor, and there was no evidence that additional insured coverage was procured for C&K. The court also rejected C&K's argument that Union Mutual should be equitably estopped from denying coverage because C&K could not demonstrate that it detrimentally relied upon C&K's defense or that it was otherwise prejudiced when Union Mutual disclaimed coverage and informed C&K that the defense provided was subject to resolution of a declaratory judgment action. [*Union Mut. Fire Ins. Co.*

v. C&K 28 Realty Corp., 2020 N.Y. Misc. LEXIS 9578 (Sup. Ct. Kings Co. Oct. 27, 2020).]

Court Rules That Assault And Battery Exclusion Precludes Coverage For Slip And Fall On Spilled Drinks During Melee

C&S Franklin Realty (a landlord) filed a declaratory judgment action against the insurer of C&S's tenant (a nightclub), seeking additional insured coverage for an underlying personal injury action alleging a slip and fall on spilled drinks "due to a melee which erupted within and without the club." The insurer, USLI, moved for summary judgment based upon an assault and battery exclusion precluding coverage both for suits "based upon any actual or alleged 'assault' or 'battery' … whether caused by or at the instigation or direction of an insured" and for bodily injury "in which the underlying operative facts constitute 'assault' or 'battery' … arising out of, directly or indirectly resulting from, in consequence of or in any way involving 'assault' or 'battery'". C&S argued that the exclusion did not apply because the bodily injury was allegedly caused by the tenant's negligence in connection with the spillage on the floor, not an assault or battery. The court applied a "but-for" test and held that coverage did not exist because the accident would not have occurred "but for" the melee in the nightclub (i.e., an assault or battery) which caused a puddle of spilled drinks. The court explained that the plain language of the exclusion applied because the pleadings were "based upon" an assault or battery and the bodily injury "involv[ed]" an assault or battery. [*C & S Franklin Realty Corp. v. United States Liab. Ins. Co.*, 2020 N.Y. Misc. LEXIS 7647 (Sup. Ct. Bronx Co. Aug. 28, 2020).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Auto Insurer Must Defend Insured Against Suit By Claimant Allegedly Injured While Unloading Tractor From Insured Truck, Third Department Decides

While a tractor was being unloaded from the back of a flatbed truck on the insured's farm, the tractor rolled over the insured's son. The son sued his father and the farm, and they tendered the suit to their commercial auto insurer. The Appellate Division, Third Department, held that the insurer must defend the father and the farm. The court opined that the loading and unloading of the flatbed truck, a covered vehicle under the policy, constituted "use or operation" of the flatbed truck and that the insurer's attempt to limit its "use" liability through policy language violated its obligation under New York's Vehicle and Traffic Law. Finding that the facts, as alleged in the son's complaint and as elaborated upon during discovery, suggested "a reasonable possibility of coverage," the court concluded that the insurer had a duty to defend. [*Farm Family Cas. Ins. Co. v. Henderson,* 179 A.D.3d 1193 (3d Dep't 2020).]

Claimant Was "Occupying" Insured Tractor-Trailer When He Was Allegedly Injured, Second Department Says

The claimant alleged that he was injured at the end of his work day as he was stepping down from a ramp attached to his employer's tractor-trailer and was hit by a passing minivan. The claimant sought supplementary uninsured/underinsured motorists ("SUM") benefits under his employer's commercial automobile liability insurance policy. The Supreme Court, Suffolk County, ruled that the claimant was not occupying the tractor-trailer, and he appealed. The Appellate Division, Second Department, reversed, stressing that the SUM endorsement in the policy defined "occupying" as "in, upon, entering into, or exiting from a motor vehicle." The Second Department found that, as a matter of law, the claimant was "upon" the tractor-trailer at the time of the alleged incident and was therefore "occupying" the tractor-trailer within the meaning of the SUM endorsement. The court reasoned that the claimant's testimony established that he had stepped upon the ramp, which was attached to the tractor-trailer, and that he was struck by the minivan while his right leg was still on the ramp and he was stepping down with his left leg. The court concluded that his testimony established that he was in physical contact with the vehicle at the time of the accident and was therefore "occupying" it. [*Matter of Utica Mut. Assurance Co. v. Steward*, 179 A.D.3d 815 (2d Dep't 2020).]

District Court Rules that Auto Exclusion Precludes Coverage Because "You" Means Named Insured

Niagara County contracted with T.G.R. Enterprises, Inc. ("TGR") to replace windows and doors at Niagara County Community College, and TGR added Niagara as an additional insured under its excess policy. A TGR employee loaded the windows into a truck owned by TGR. While transporting the windows, they fell on him, and he was injured. TGR's employee sued Niagara, and Niagara sought additional insured coverage from TGR's excess insurer. The insurer denied coverage because the policy excluded coverage for injury arising out of "owned autos", defined as "'autos' you own …." The policy defined "you" as the named insured, TGR. The United States District Court for the Western District of New York agreed that the exclusion clearly and unambiguously precluded coverage because the alleged injury arose from an accident involving a vehicle owned by "you", TGR, the named insured. The court rejected the County's argument that "you" in the phrase "'autos' you own" is ambiguous and could refer to vehicles owned by an additional insured (like the County). [*County of Niagara v. Liberty Mut. Ins. Co.*, 2020 U.S. Dist. LEXIS 21809 (W.D.N.Y. Feb. 6, 2020).]

SUM Endorsement In Commercial Automobile Policy Issued To LLC Deemed To Cover Its Sole Member As "Insured"

Alan Tekel was struck by a vehicle. After Tekel settled with the driver of the vehicle for the full limit of the driver's auto policy, Tekel submitted a claim for supplementary underinsured motorist (SUM) benefits under a commercial auto policy issued by Progressive Insurance Company to Air Repair, LLC – an LLC of which Tekel was the sole member. Progressive denied coverage on the ground that Tekel was not insured because he was not the named insured on the policy and, at the time of the accident, he was not occupying a motor vehicle insured for SUM coverage under the policy. Tekel filed a demand for arbitration, and the Appellate Division, Second Department, affirmed the trial court's denial of Progressive's petition seeking a stay. The court reasoned that a limited liability company is like a partnership which is a combination of individuals who can suffer injuries and have spouses, households, and relatives. Although the declarations sheet of the policy identified the LLC as the named insured, "insured" was defined to mean "you, as the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse". In addition, the SUM endorsement contained a provision for survival rights coverage. The Second Department concluded that the definition of "insured" should be resolved in Tekel's favor to cover him too. [*Matter of United Fin. Cas. Co. v. Tekel*, 185 A.D.3d 830 (2d Dep't 2020).]

FIRST PARTY PROPERTY

Court Finds Multiple Occurrences Where Fire Rekindled Next Day In Another Area

The insureds, well-known artists, kept paintings in their condominium unit. There was a fire on the second floor of an adjoining building, and a rekindling of the fire on the third floor of the adjoining building during the next day. The insureds sought insurance coverage for smoke and water damage to their paintings under a property policy issued by MetLife. The policy provided coverage for loss to personal property in the amount of $75,300 per "occurrence", defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions…." The insureds maintained that there were two occurrences entitling them to recover up to two policy limits. The New York Supreme Court, New York County, agreed with the insureds, stating that policy terms must be considered with the "temporal and spatial relationship between the incidents and the extent to which they were a part of an undisrupted continuum to determine whether they can, nonetheless, be viewed as a single unfortunate event – a single occurrence". The court concluded that there were two occurrences under the circumstances but found a question of fact as to whether the paintings were covered personal property or business property to be sold by the insureds. [*Humphries v. Metropolitan Prop. & Cas. Ins. Co*., 2020 N.Y. Misc. LEXIS 2663 (Sup. Ct. N.Y. Co. May 26, 2020).]

Federal District Court Enforces Two-Year Limitation Clause In Homeowner's Policy To Deny Supplemental Claim

Martha Ventilla's bathtub overflowed and flooded her Manhattan apartment on January 31, 2015, and she reported the claim to her homeowners insurer the next day. The insurer paid to remediate for damage to certain contents. Then, more than two years later, Ventilla made a supplemental contents claim. Her insurer disclaimed coverage on the basis that the claim was time barred by the policy's two-year limitation clause. The United States District Court for the Southern District of New York upheld the disclaimer, rejecting Ventilla's equitable estoppel argument that she relied on the insurance company to tell her what to do. The court reasoned that an insurer is under no obligation to remind an insured of the policy's terms, and that "upon acceptance of an insurance policy and in the absence of fraud or misrepresentation, an insured is charged with knowledge of all of the terms and conditions of the policy." [*Ventilla v. Pacific Indem. Co.*, 2020 U.S. Dist. LEXIS 120669 (S.D.N.Y. July 9, 2020).]

Second Department Upholds Denial Of Coverage Under Homeowners Policy Because Claimed Loss Was Not A Covered "Collapse"

Plaintiffs made a claim with their home-owners insurer for alleged damage to their house, including decayed framing behind a brick facade due to water infiltration, and the insurer denied coverage on the grounds that the claim did not involve a "collapse" for which coverage is provided and was subject to various exclusions. The plaintiffs filed a coverage action against their insurer. The trial court denied the insurer's motion for summary judgment, and the insurer appealed. The Appellate Division, Second Department, reversed and held in favor of the insurer. The court reasoned that the insurer had met its prima facie burden on summary judgment of establishing that the claimed damage did not involve "an abrupt falling down or caving in of … any part of [the property]" which was no longer "standing", as required to constitute a covered "collapse" under the policy. In addition, the plaintiffs failed to raise a question of fact through their contractor's affidavit, which did not indicate any portion of the property that was no longer standing or any specific damage that constituted a covered "collapse". Accordingly, the Second Department concluded, the insurer should have been granted summary judgment in its favor declaring that it owed no coverage. [*Parauda v. Encompass Ins. Co. of Am.,* 2020 N.Y. App. Div. LEXIS 6968 (2d Dep't. Nov. 18, 2020).]

WAIVER/ESTOPPEL/3420(d)

Second Circuit Finds Coverage Where Insurer Unreasonably Delayed In Seeking Rescission and Its Exclusions Did Not Apply

WW Trading was sued and sought coverage from United States Liability Insurance Company (USLI) which sought to

rescind its policy on the basis of WW Trading's alleged misrepresentations in its application. The Second Circuit affirmed the district court's finding of coverage on the ground that USLI unreasonably delayed in seeking rescission. The Court found that USLI "clearly had constructive knowledge of WW Trading's potential misrepresentations" in 2014 when it "sent WW Trading a nonrenewal notice accusing WW Trading of violating the exact provisions of the insurance application that form the basis for USLI's rescission claim." Yet, USLI did not assert its rescission claim until 2017. The Court also found that USLI's "employee" and "construction operations" exclusions did not apply under the circumstances. [*United States Liab. Ins. Co. v. WW Trading Co*., 813 Fed. Appx. 636 (2d Cir. 2020).]

Court Finds Insurer's Disclaimer Based On Insured's Failure to Cooperate Precluded Because Of Delay

Burlington Insurance Company defended Sublink, Ltd in an action arising from an accident at a construction project, and Sublink's Answer was stricken due to Sublink's repeated failure to appear for a deposition. Burlington filed an appeal on behalf of Sublink and, in May 2018, sent Sublink a letter warning its principal that his failure to appear for deposition violated the terms of Sublink's insurance policy. Burlington, however, did not disclaim coverage based upon Sublink's failure to cooperate until 16 months later, after the appellate court upheld the striking of Sublink's Answer. In Burlington's coverage action seeking a declaration of no coverage, the court held that Burlington's failure to timely disclaim in May 2018 when it was aware of sufficient grounds to do so rendered its subsequent disclaimer invalid under New York Insurance Law § 3420(d). The court noted that the Appellate court's decision may have "locked in" the prejudice to Burlington, but that an insurer is not required to establish prejudice due to noncooperation before it may disclaim. Instead, "[n]on-cooperation alone, if sufficiently willful and obdurate, will suffice." [*Burlington Ins. Co. v. Sublink Ltd.*, 67 Misc. 3d 1208(A) (Sup. Ct. N.Y. Co. 2020).]

Insured's Notice After Default Judgment Gives Rise to Irrebuttable Presumption of Prejudice, Precluding Coverage

Mountain Valley Indemnity issued a personal liability policy to the owner of residential premises who was sued for a slip-and-fall at his premises. The owner defaulted, and a default judgment was entered against the owner. The owner filed a motion to vacate the default on the ground that he was not properly served, but his motion was denied. In turn, the owner sought insurance coverage from Mountain Valley which disclaimed coverage based on the owner's failure to comply with the timely notice condition in the policy. A declaratory judgment action ensued, and the court upheld the disclaimer. Citing New York Insurance Law § 3420(a) and (c), the court stressed that untimely notice does not preclude coverage unless the insurer has been prejudiced, but that an "irrebuttable presumption" of prejudice arises if "prior to notice, the insured's liability has been determined by a court of competent jurisdiction." The court held that the default judgment constituted a determination of liability and, therefore, established prejudice to the insurer as a matter of law. The court also rejected the owner's argument that the insurer's disclaimer was untimely and invalid because it waited 19 days to disclaim after being provided with notice and the basis for the disclaimer. [*Mountain Valley Indem. Co. v. Cohen*, 68 Misc. 3d 1212(A) (Sup. Ct. N.Y. Co. 2020).]

BAD FAITH/EXTRA-CONTRACTUAL

District Court Awards Insurer's Attorneys' Fees In Prosecuting DJ Against Another Insurer Owing Duty To Defend

Houston Casualty filed a declaratory judgment against New York Marine in the United States District Court for the Eastern District of New York, seeking a declaration that New York Marine had a duty to defend Houston Casualty's named insured as an additional insured under New York Marine's policy. Houston Casualty prevailed and sought its attorneys' DJ fees from New York Marine. The district court acknowledged that the "American Rule" does not permit the prevailing party to recover attorneys' fees and that New York's "narrow exception" limits such a recovery to where an insured prevails in a declaratory judgment action brought by the insurance company to free itself from its policy obligations. Notwithstanding, under the "factual record before it," the district court found that Houston Casualty was entitled to the attorneys' fees it incurred to establish the duty to defend. The court stressed that New York Marine resisted, "from the jump," its now-conceded duty to defend, including in its answer and counterclaim seeking a declaration that it owed no duty to defend, and that New York Marine "persistently and seemingly reflexively denied this duty" despite the documentation and the New York Marine policy which made this duty "plain." [*Houston Cas. Co. v. Prosight Specialty Ins. Co*., 462 F. Supp. 3d 443 (S.D.N.Y. 2020).]

Federal District Court Denies Insured's Request To Add Claim For Bad Faith And Consequential Damages Based On Insurer's Denial Of Coverage

In this declaratory judgment action, the insured filed a motion for leave to add a new claim against his insurer for its alleged "bad faith" failure to indemnify him in the underlying bodily injury action. The insured's proposed claim also sought damages because he was allegedly "forced" to sell property to pay for his defense in the underlying action. The United States District Court for the Western District of New York denied the insured's motion, explaining that a "bad faith" claim based solely upon the denial or delay of coverage would be futile because it is not recognized under New York law. The court also held that the insured's proposed claim did not allege a valid basis to recover consequential damages because the insured did not cite to a specific

provision in his policy contemplating coverage for such a loss. [*Perez v. Foremost Ins. Co.*, 2020 U.S. Dist. LEXIS 106815 (W.D.N.Y. June 18, 2020).]

MISCELLANEOUS

United States District Court Orders Insured To Produce Certain Pre-Litigation Documents But Not Others Deemed Work Product

99 Wall sued Allied World seeking coverage under a property policy for water losses at 99 Wall's condominium complex. 99 Wall withheld certain documents concerning communications between 99 Wall and its consultants in connection with the adjustment of the insurance claim as work product in anticipation of litigation. 99 Wall argued that most of the documents involved strategy to prepare for the coverage litigation. The United States District Court for the Eastern District of New York explained that the key factor in determining the applicability of the work product doctrine is whether the documents were prepared "with an eye towards" or "in anticipation of" or "because of the prospect of litigation." Applying these principles, the court held that certain documents were not protected because they were prepared in the normal course of presenting the claim to the insurer. Another document was deemed protected work product because it reflected strategy as to settlement in lieu of litigation. And certain documents generated after the settlement meeting but before the insurer disclaimed coverage were deemed protected while others were deemed in pursuit of a business function. [*99 Wall Dev. Inc. v. Allied World Specialty Ins. Co.*, 2020 U.S. Dist. LEXIS 91888 (E.D.N.Y. May 26, 2020).]

2020 New York Insurance Coverage Law Compilation
is published by

This publication is purely informational and not intended to serve as legal advice.

Rivkin Radler LLP
926 RXR Plaza, Uniondale NY 11556
www.rivkinradler.com
© 2021 Rivkin Radler LLP. All Rights Reserved.

This publication is provided for informational purposes only and is not intended to serve as legal advice. For more information, please contact Alan Eagle, Esq. at 516.357.3545 or Alan.Eagle@rivkin.com. Your comments are welcome. Naturally, the particular facts and circumstances of each claim will determine the impact of the cases discussed in this Compilation.