NEW YORK INSURANCE COVERAGE LAW UPDATE

2021 COMPILATION

Editor: Alan C. Eagle, Esq.

WWW.RIVKINRADLER.COM

RIVKIN RADLER LLP
ATTORNEYS AT LAW

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

New York Insurance Coverage Law Update 2021 Compilation

TABLE OF CONTENTS

New York Insurance Coverage Law Update 2021 Compilation

New York Insurance Coverage Law Update 2021 Compilation

ADDITIONAL AND NAMED INSUREDS/PRIORITY

Tenant's Insurer Must Cover Landlord As Additional Insured For Accident On Sidewalk In Front Of Leased Premises, First Department Holds

The plaintiff in the underlying action alleged that he slipped and fell on ice on the sidewalk abutting the front of Capital One's branch building in a shopping center after exiting the building. Capital One leased the building from Waldman, the owner of the shopping center. The owner's insurer, Wesco Insurance Company, sought coverage for the owner as an additional insured under the tenant's policy issued by Travelers. The Appellate Division, First Department, held that the tenant's insurer was obligated to defend and to indemnify the owner in the underlying action because the action arose from the "use" of the leased premises, and that this obligation was "not affected" by the fact that the owner "may have failed to satisfy [its] legal obligations to maintain the sidewalk." The court also held that the owner's insurer had no obligation to defend or to indemnify the tenant because it was not an insured under the owner's policy. The court noted that the owner's policy provided for the defense of the owner's indemnitees under certain circumstances, but that "the condition that there be no conflict between [the owner's] and its indemnitee's interests in the underlying action was not met." The court concluded that the anti-subrogation doctrine barred the tenant's insurer from seeking indemnification from the owner on behalf of the tenant in the underlying action because they were both covered under the tenant's policy for the same risk. [*Wesco Ins. Co. v. Travelers Prop. Cas. Co. of Am.*, 188 A.D.3d 476 (1st Dept 2020).]

Court Finds That Subcontractor's Insurer Owed Additional Insured Coverage Under "Caused, In Whole Or In Part, By" Endorsement Because Subcontractor Found More Than 0% Liable

Kenneth Jacobson was injured on a construction site, and he sued the owner of the premises and the general contractor ("GC"). The owner and GC filed a third-party action for contribution against a subcontractor insured by Excelsior Insurance. The jury found that the owner and GC were 65% at fault and that the subcontractor was 35% at fault. The United States District Court for the Southern District of New York held that Excelsior's obligation to provide additional insured coverage to the owner and GC for bodily injury "caused, in whole or in part, by" the subcontractor's acts or omissions, "leads to the logical conclusion" under New York precedent that "where liability is not attributed to the [putative additional insureds'] sole negligence, and … the named insured is more than 0% liable for the underlying plaintiff's injuries, additional insured coverage is triggered." The court concluded that Excelsior's argument that it was only responsible for the 35% it paid on behalf of its named insured subcontractor is "too clever by half" as it "conflates Excelsior's liability to Jacobson on behalf of [its named insured] with Excelsior's separate obligation to provide coverage" to its additional insureds. [*Starr Indem. & Liab. Co. v. Excelsior Ins. Co.*, 516 F. Supp. 3d 337 (S.D.N.Y. 2021).]

Southern District of New York Finds That Breach Of Contractor Conditions Endorsement By Named Insured Did Not Preclude Coverage For Additional Insureds

A worker was injured on a construction project, and he sued the general contractor ("GC") and subcontractor ("Sub"). The insurer for the GC/Sub sought additional insured coverage on their behalf from Colony Insurance Company which issued an insurance policy to a sub-subcontractor on the project, JPB Fabrications. Colony disclaimed because JPB failed to comply with a Contractor Conditions Endorsement providing that, as "a condition precedent" to coverage, "the insured ... warrants and agrees" that any contractor or sub-contractor "hired to perform work for the insured or on the insured's behalf," has "maintained 'adequate insurance.'" The United States District Court for the Southern District of New York rejected Colony's disclaimer, reasoning that the language of the Endorsement "makes clear" that a breach by "the" particular insured "bars coverage only for that same insured", not the additional insureds seeking coverage. The court also found that Colony waived its right to deny coverage to the additional insureds based upon their failure to comply with the Endorsement because it was not raised in Colony's disclaimer. [*U.S. Specialty Ins. Co. v. Wesco Ins. Co.*, 529 F. Supp. 3d 251 (S.D.N.Y. 2021).]

First Department Finds That Allegations Of Complaint And Other Documents Sufficient To Trigger Additional Insured Coverage For Vicarious Liability

The City of New York contracted with Central Park Conservancy, Inc. (CPC) to maintain Central Park, and CPC entered into a tree-service subcontract with Bartlett Tree Expert Company (Bartlett) which required Bartlett to obtain additional insured coverage for the City. The Claimant was allegedly injured by a falling tree in Central Park, and she sued the City and CPC, alleging that her injuries were caused by the negligent acts and/or omissions of the City, and CPC, and/or its contractors, subcontractors, and agents in the maintenance and inspection of the tree. The City sought additional insured coverage under Bartlett's policy issued by Travelers, which afforded additional insured coverage for injury caused by Bartlett's acts or omissions, but not "with respect to the independent acts or omissions" of the additional insured. Travelers disclaimed coverage. The Appellate Division, First Department, held that the Claimant's allegations in her complaint, the tree-service subcontract, and business records memorializing Bartlett's work on the park's trees before the accident triggered Travelers' duty to defend because they demonstrate a "reasonable possibility that the City will recover under the policy's additional insured provision, which affords coverage premised on the City's vicarious liability for the acts or omissions" of Bartlett. [*City of New York v. Travelers Prop. Cas. Co. of Am.*, 196 A.D.3d 401 (1st Dept 2021).]

Court Finds Insurer Owed Duty To Defend Additional Insured Relying Upon Additional Insured's Own Third Party Complaint

Axis Construction ("Axis"), a general contractor, hired American Wood Installers ("AWI") as a subcontractor for a construction project, and AWI's employee was injured and sued Axis. Axis sought

coverage under AWI's policy with Travelers which covered Axis as an additional insured for injury "caused by the acts or omissions" of AWI, but not Axis's "independent actions or omissions." The United States District Court for the Eastern District of New York held that Travelers had a duty to defend because the allegations in the action or facts known to the insurer gave rise to the possibility that AWI's operations "proximately caused" the bodily injury. The court rejected the argument that Axis's "self-serving" third-party complaint against AWI should not be used to trigger a duty to defend Axis. The court also rejected the argument that the Travelers policy's "other insurance clause" established it was excess to another contractor's insurance policy, reasoning that "[p]olicies insuring different risks are not 'other insurance' with respect to each other." [*Axis Constr. Corp. v. Travelers Indem. Co. of Am*., 2021 U.S. Dist. LEXIS 166083 (E.D.N.Y. Sept. 1, 2021).]

Court Holds That Contractor's Insurer Must Defend Owner As Additional Insured In Personal Injury Action Filed By Subcontractor's Employee

A premises owner hired a contractor to perform an oil-to-gas boiler conversion, and the contractor subcontracted the work. The subcontractor's employee was injured while working on the project and sued the owner. The owner sought additional insured coverage under the contractor's policy with Harleysville which covered the owner as an additional insured for liability for bodily injury "caused, in whole or in part, by" the contractor's "acts or omissions" or those acting on its behalf. The United States District Court for the Southern District of New York held that Harleysville must defend the owner as an additional insured. The court reasoned that the claimant's allegations, coupled with those in the owner's third-party complaint against the contractor, suggested a reasonable possibility that the contractor's acts or omissions "may have been a proximate cause" of the claimant's injury, "which is all that is necessary to trigger the duty to defend". Although the court determined that the Harleysville policy contained an excess "other insurance" clause, the court held that it was "cancelled out" by the excess "other insurance" clause in the owner's policy making them both primary. In addition, because the owner's policy contained a $100,000 self-insured retention which is not "other insurance", the court concluded that Harleysville was obligated to pay the first $100,000 of the owner's defense costs. [*United States Specialty Ins. Co. v. Harleysville Worcester Ins. Co*., 2021 U.S. Dist. LEXIS 167928 (S.D.N.Y. Sept 3, 2021).]

Second Circuit Holds That General Contractor's "True Excess" Policy Covers Owner Before Owner's Primary Policy Because Of General Contractor's Contractual Indemnity Obligation To Owner

The Long Island Railroad on behalf of the Metropolitan Transit Authority ("Owner") contracted with a general contractor ("GC") for a construction project on a railroad bridge; and a subcontractor's employee was injured on the project and sued the Owner. The Owner's primary insurer and the GC's primary insurer paid to settle the case, but the GC's excess insurer refused to contribute, maintaining that its policy was a "true excess" policy and, therefore, the Owner's primary policy had to be exhausted first. The Owner's primary insurer filed a declaratory judgment action, and the United States District Court for the Southern District of New York agreed with the GC's excess insurer, reasoning that the "other insurance" provision in the GC's excess policy made it a "true excess" policy that was not triggered until the Owner's primary policy paid its limits. The Second Circuit reversed, holding that the GC's excess insurer is liable to tender payment before the Owner's primary insurer because the construction contract obligated the GC to indemnify the Owner for liabilities arising out of the construction project. The Second Circuit opined that New York's highest court would not require a separate action to enforce the parties' indemnity agreement. [*Century Sur. Co. v. Metro. Trans. Auth*, 2021 U.S. App. LEXIS 29860 (2d Cir. Oct. 5, 2021).]

First Department Holds That Tenant's Insurer Owes Additional Insured Coverage To Landlord Where Claimant Fell Through Cellar Door Used By Tenant

The claimant fell through an outside cellar door when he was delivering bread to the tenant's restaurant at its leased premises. The claimant sued the landlord, which was insured by Seneca Insurance Company. Seneca sought additional insured coverage for the landlord under the tenant's policy with New York Marine and General Insurance Company, which covered bodily injury "arising out of the ownership, maintenance or use of that part of the premises leased to" the tenant. The Appellate Division, First Department, affirmed the lower court's decision finding that New York Marine had a primary duty to defend and to indemnify the landlord. The court held that contrary to New York Marine's contention, the outside staircase that was used by the tenant for access in and out of its space was, by implication, part of the leased premises. In addition, the court found that the accident necessarily arose out of the tenant's "use" of the leased premises because the claimant was traversing the cellar door to deliver items for the tenant's business when the accident occurred. [*71 Lafayette Ave. LLC v. New York Mar. and Gen. Ins. Co.*, 199 A.D.3d 603 (1st Dept 2021).]

CONDITIONS PRECEDENT/LATE NOTICE

First Department Finds No Coverage Under Claims-Made Policy And That Insurer Can Recoup Its Defense Costs

The insurer defended its insured in an underlying personal injury action under a reservation of rights, including the right to seek back its defense costs. The Appellate Division, First Department, held that the insurer was not obligated to defend or to indemnify its insured because the insured reported the claim to its insurer outside of the policy period and extended reporting

period, and that the insurer was entitled to withdraw from its defense of the insured and recoup the defense costs it had paid. The court reasoned that New York Insurance Law §3420(a)(5) permits a claims-made policy to set a time frame for reporting claims, irrespective of prejudice. Citing other First Department cases, the court concluded that "New York law further permits insurers to provide their insureds with a defense subject to 'a reservation of rights to, among other things, later recoup their defense costs upon a determination of non-coverage.'" [*Certain Underwriters at Lloyd's London v. Advance Tr. Co. Inc.*, 188 A.D.3d 523 (1st Dept 2020).]

Second Department Finds No Coverage Based On Late Notice But That Insurer Could Not Recoup Defense Costs

A default judgment was entered against the insureds in a personal injury action. After the entry of the judgment, the insureds provided notice to their insurer, which disclaimed coverage because of the late notice. Upon the default being vacated, the insurer agreed to defend the insureds under a reservation of rights. However, when an appellate court reinstated the default judgment, the insurer disclaimed and reserved its rights to recover its defense costs in the personal injury action. The insurer then filed a declaratory judgment action against the insureds. The Appellate Division, Second Department, agreed that the insurer had no coverage obligation, but concluded: "To the extent that certain federal courts interpreting New York law and our sister appellate courts in New York have held that an insurer may recover its defense fees when there has been a determination that no duty to indemnify exists …, we decline to adopt that view." The court noted that "if the insurance company had wanted to include language [in its policy] that allowed it to recover the costs of defending claims that are later determined not covered, it could have done so," but it did not. [*American West Home Ins. Co. v. Gjonaj Realty & Mgmt. Co.*, 192 A.D.3d 28 (2d Dept 2020).]

Court Declines To Rescind Policy Based On Issues Of Fact As To Materiality Of Alleged Misrepresentations

Union Mutual disclaimed coverage for a fire loss at its insured's restaurant and sought to rescind its policy based upon the insured's alleged misrepresentations in its application that it did not have "open flame cooking" or a Single Room Occupancy. In denying Union Mutual's motion for summary judgment, the court noted that under New York law, "no misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract" and an "answer to an ambiguous question on an application for insurance cannot be the basis of a claim of misrepresentation by the insurance company against its insured where a reasonable person in the insured's position could rationally have interpreted the question as he or she did". Even though the insured used a standard cooking stove and had an apartment unit at the premises, the court found issues of fact for trial as to whether the insured made material misrepresentations. The court noted that Union Mutual's Underwriting Guidelines were unclear as to what is meant by "open flame cooking" or Single Room Occupancy and whether having either one would have resulted in Union Mutual not issuing the policy. In addition, Union Mutual conducted an inspection of the premises more than a year before the fire but did not find anything warranting rescission. Under these circumstances, the court found issues of fact for trial as to whether the insured made material misrepresentations warranting rescission. [*463 Saddle Up Tremont LLC v. Union Mut. Fire Ins. Co.*, 2021 N.Y. Misc. LEXIS 3551 (Sup. Ct. Bronx Cnty. June 11, 2021).]

Court Grants Default Judgment To Insurer Where Insured Failed To Comply With Policy Conditions

Mt. Hawley Insurance Company filed a declaratory judgment action against its insureds, seeking a declaration that it had no duty to defend or to indemnify the insureds in an underlying personal injury action filed by a worker for a contractor hired for a roofing job at the insureds' premises. Mt. Hawley alleged that the insureds breached certain conditions of the policy including by failing to obtain a sufficient certificate of insurance from the contractor, a written indemnity agreement from the contractor, a written agreement requiring the contractor to procure additional insured coverage for the insureds, and a defense and indemnification from the contractor's general liability insurer. The insureds failed to appear or respond to Mt. Hawley's motion for a default judgment. After determining that the court had appropriate jurisdiction to preside over the case, the United States District Court for the Southern District of New York found that the factual allegations "plainly do not bring the case within the coverage of the policy" and granted Mt. Hawley's motion for a default judgment. The court concluded that Mt. Hawley was relieved of its duty to defend and to indemnify the insureds in the underlying action and that they must reimburse Mt. Hawley for the defense costs it had already paid in connection with the underlying action. [*Mt. Hawley Ins. Co. v. Pioneer Creek B LLC*, 2021 U.S. Dist. LEXIS 184501 (S.D.N.Y. Sep. 27, 2021).]

New York Trial Court Finds Insured's Four-Year Delay In Providing Notice Excused And Did Not Result In Prejudice To Insurer

The insured, while serving on a condo's board of managers, allegedly made defamatory statements about another board member. The other board member sued the insured, and all the claims were dismissed except the defamation claim. Wesco Insurance Company initially defended the insured under a policy issued to the condo board for bodily injury, but disclaimed coverage for the defamation claim and filed a declaratory judgment action in 2020. The insured then sought coverage under a separate policy issued by Greater New York Mutual Insurance Company that covered "personal and

advertising injury" including injury from defamation. Greater New York disclaimed coverage based upon the four-year delay between the filing of the suit in 2016 and notice to Greater New York in 2020. The insured filed a declaratory judgment action against Greater New York and moved for summary judgment, which was granted. The Supreme Court, New York County, held that the insured's late notice was justifiably excused because "there is no reason to believe" she "knew or should have known about" Greater New York's policy until 2020 when Wesco filed its action, and she had "no reason to look for other coverage" before then because Wesco took over the defense of the underlying action. The court also found that, despite the delay in notice, Greater New York did not suffer prejudice because "[t]his is a straightforward defamation case" that turns on whether the defamatory statements were made with the requisite intent, not a personal injury case in which preferred IME doctors or witnesses may no longer be available. [*Salvo v. Greater N.Y. Mut. Ins. Co.*, 2021 N.Y. Slip Op. 32045[U] (Sup. Ct. N.Y. Cnty. Sept. 23, 2021).]

COVERAGE GRANT

Southern District of New York Holds That SEC Investigation Did Not Trigger Coverage Because It Was Not A "Security Claim" Or Claim Against "Individual Insureds"

Hertz Global Holdings filed a declaratory judgment complaint against its insurers seeking coverage for millions of dollars it spent defending an SEC investigation before a settlement was reached. The United States District Court for the Southern District of New York granted the insurers' motion to dismiss on the basis that the investigation was not a "Securities Claim" which the policies defined as "'a Claim, other than an investigation of an Organization…alleging' violation of securities laws or regulations." The court stressed that policy considerations are not the basis for "textual interpretation." The court also rejected Hertz's argument that the costs should be covered as a "Claim" against an "Insured Person" because "the mere fact that individuals at the company were cooperating with the SEC's investigation against [the Plaintiff] does not constitute a 'Claim' against those persons." [*Hertz Global Holdings v. National Union Fire Ins. Co.*, 530 F. Supp. 3d 447 (S.D.N.Y. 2021).]

Intentional Infliction Of Emotional Distress From Cyber-Bullying Not A Covered "Occurrence", Court Holds

The minor son of Allstate's insureds allegedly cyber-bullied two classmates, and the classmates' parents sued on their behalf on various grounds including negligence and intentional infliction of emotional distress. Allstate defended the insureds and their son under their homeowners policy, but disclaimed coverage after all the claims were dismissed except the claim against the son for intentional infliction of emotional distress. A declaratory judgment action ensued, and the United States District Court for the Eastern District of New York held that Allstate had no duty to defend or to indemnify, reasoning that there was nothing "fortuitous" about the son's alleged actions or the resultant harm. The court further held that Allstate no longer had any coverage obligation by virtue of the policy's exclusion for bodily injury "intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." [*Allstate Vehicle & Prop. Ins. Co. v. Mars,* 533 F. Supp. 3d 71 (E.D.N.Y. 2021).]

New York Court of Appeals Holds That Disgorgement Payment Under SEC Settlement Not Excluded As A Penalty Imposed By Law

The Securities and Exchange Commission ("SEC") alleged that Bear Stearns facilitated late trading and deceptive market timing practices by its customers in connection with the purchase and sale of mutual fund shares. Bear Sterns sought coverage from its insurers for part of its settlement with the SEC under policies providing coverage for "loss" that Bear Sterns became liable to pay in connection with any governmental investigation into violations of laws or regulations. The policies defined "loss" as including certain types of damages, but not "fines or penalties imposed by law." Bear Sterns argued that $140 million of its settlement payment for "disgorgement" (which was to be deposited into a "Fair Fund" to compensate mutual fund investors allegedly harmed by the trading practices) was derived from estimates of client gain and investor harm and, therefore, was not an uncovered "penalty imposed by law". The New York Court of Appeals agreed, reasoning that a reasonable insured purchasing a policy covering losses for wrongful acts would have understood the term "penalty" to refer to "non-compensatory, purely punitive monetary sanctions." The Court of Appeals concluded that the insurers failed to establish that the payment falls within the policies' exclusion for "penalties imposed by law" and that the lower court erred in granting summary judgment to the insurers on that basis. [*J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 2021 N.Y. LEXIS 2519 (N.Y. Nov. 23, 2021).]

DUTY TO DEFEND/INDEMNIFY

Court Denies Insurers' Motion Seeking Declaration Of No Coverage For Lead Paint Abatement Action

Several California counties sued NL Industries for the abatement of lead-based paint used in California residences, and its insurers filed a declaratory judgment action against NL Industries seeking a declaration that they were not obligated to cover NL Industries. The insurers moved for summary judgment, arguing that the abatement fund ordered in the underlying action was not an award for covered "damages" because of "property damage" under the policies, but rather, was a remedy to prevent future harm. The Supreme Court, New York County, denied the insurers' motion, noting that the fund was monies paid to the government, depleted by its ongoing efforts to remediate the longstanding contamination of houses and buildings by lead paint in California. The court also rejected the

insurers' argument that there was no covered "occurrence" and/or the harm was expected or intended because the company was held liable in the California action for intentionally and affirmatively promoting lead paint for interior residential use with actual knowledge of the public health hazard that it would create. The court reasoned that there is a distinction between knowledge of the risk of the hazardous consequences of one's actions, and the intention to cause harm. [*Certain Underwriters at Lloyd's, London v. NL Indus.,* 2020 N.Y. Misc. LEXIS 10905 (Sup. Ct. N.Y. Cnty. Dec. 29, 2020).]

EXCLUSIONS

Second Department Holds Insurer Has No Duty To Defend Or To Indemnify Insured In Underlying Trademark Infringement Action

The insured was sued in an underlying action seeking damages and injunctive relief for alleged trademark infringement. The insured tendered the action to its CGL insurer which disclaimed. The insured settled the underlying action and sued its insurer for coverage. The parties agreed that the underlying action included allegations of "advertising injury" as defined by the policy. On appeal, the sole issue was the application of the Intellectual Property Exclusion, which precluded coverage for "advertising injury … arising out of, giving rise to or in any way related to any actual or alleged … infringement or violation by any person or organization … of any intellectual property law or right [including trademarks]…." The Appellate Division, Second Department, held that the Intellectual Property Exclusion precluded coverage because of allegations in the underlying complaint that the insured counterfeited and infringed upon another's trademark and engaged in the sale and distribution of offending goods. The court also found that the insured failed to meet its burden of proving the applicability of the exception to the exclusion for injury that does not "in any way relate to any actual or alleged assertion, infringement or violation of any intellectual property law or right, other than one described in the definition of advertising injury", because the underlying complaint also contained allegations unrelated to advertising injury. [*Pro's Choice Beauty Care, Inc. v. Great N. Ins. Co*., 190 A.D.3d 868 (2d Dept 2021).]

First Department Finds Exterior Work Over Two Stories Exclusion Did Not Apply To Accident From Work On Lower Floors

Adelphi University hired a general contractor for a construction project to build, from the ground up, a three-story building. The employee of a structural steel and iron work sub-subcontractor was injured when he fell from the first floor to the ground level while performing metal work, and he sued the subcontractor. The subcontractor was covered as an additional insured under the sub-subcontractor's policy. The sub-subcontractor's insurer disclaimed coverage based on an exclusion for certain activities including "[a]ny exterior work over [two] stories". The New York Appellate Division, First Department, held that the exclusion did not apply. The court found that even though "the construction of the building contemplated multiple floors, at the time of the accident, the injury did not arise out of exterior work over two stories". [*Damon G. Douglas Co. v. Mt. Hawley Ins. Co*., 193 A.D.3d 610 (1st Dept 2021).]

Sexual Misconduct Claims Against Physician's Assistant And Medical Practice Found Not Covered

Certain patients of Vitality Psychiatry Group sued Vitality and its physician's assistant alleging that the physician's assistant subjected them to unwanted sexual advances. The United States District Court for the Southern District of New York held that Allstate was not obligated to defend or to indemnify the assistant under Vitality's Businessowners policy because: (i) the alleged sexual advances did not occur within the scope of the assistant's employment and, therefore, he did not qualify as an "insured"; (ii) the assistant intended the harm he allegedly caused as a matter of law and, therefore, there was no covered "occurrence" and the "expected or intended" injury exclusion applied; and (iii) the negligence and malpractice claims were barred by the professional services exclusion. The court also found that Allstate had no duty to defend or to indemnify Vitality or its principal because the professional services exclusion precluded coverage for the claimants' claims against Vitality and its principal for their alleged failure to meet the required standard of medical care. Moreover, the court found that the exclusion for "actual or threatened abuse or molestation by anyone of any person while in the care … of any insured" applied to preclude coverage for the claimants' claims against Vitality and its principal for negligent employment, investigation and supervision. [*Allstate Ins. Co. v. Vitality Physicians Group Practice P.C*., 2021 U.S. Dist. LEXIS 85292 (S.D.N.Y. May 4, 2021).]

Fourth Department Holds That Assault And Battery Exclusion Did Not Preclude Duty To Defend Because Cause Of Action For Unlawful Detention Existed Notwithstanding Assault

The insured operated a nightclub, and its bar manager shoved a patron down a flight of stairs. The patron sustained fatal injuries, and the manager pleaded guilty to manslaughter in the first degree. The patron's estate sued the nightclub and its security guard, and the nightclub's insurer (Utica First) disclaimed coverage based on an exclusion for assault and battery. The Appellate Division, Fourth Department, held that the exclusion precluded coverage to the nightclub but that it did not preclude a duty to defend the security guard because "[w]e cannot say that all of the claims in the underlying action against [the security guard] are based on or arise out of the bar manager's assault." The court pointed to the cause of action for unlawful detention alleging that the security guard unlawfully arrested the decedent, which the court opined "would still exist notwithstanding the assault." The court, however, found a question of fact as to whether the security guard was covered as an insured under the nightclub's policy,

i.e., whether he was acting within the scope of his employment at the time of the incident. [*O'Shei v. Utica First Ins. Co*., 195 A.D.3d 1499 (4th Dept 2021).]

Southern District of New York Holds That Exclusion Could Not Be Waived But Did Not Apply In Any Event

Evanston Insurance Company defended its insureds in an underlying action under a Professional Liability Policy for five years before issuing a disclaimer on the basis that the "intentional conduct" claims remaining in the action were not covered. The insureds sued and argued that Evanston waived its right to disclaim. The United States District Court for the Southern District of New York held that "where the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable" under New York law. The court also noted that estoppel did not apply because, among other things, the insureds had not adduced enough evidence to demonstrate that they were prejudiced by Evanston's delayed disclaimer of coverage, especially considering that the record did not reflect that Evanston controlled the insureds' defense or interfered with the strategies of the defense counsel retained by the insureds. In turn, the court concluded that the "intentional act" and "conversion" exclusions did not preclude a duty to defend because certain remaining allegations sounded in negligence. The court concluded that the insureds' motion with respect to Evanston's duty to indemnify should be denied as premature. [*Wentworth Group v. Evanston Ins. Co.*, 2021 U.S. Dist. LEXIS 126873 (S.D.N.Y. July 8, 2021).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Court Holds Willfulness Not Required To Deny Coverage For Failure To Appear For No-Fault EUO

Country-Wide Insurance Company moved for summary judgment against Citimedical PLLC seeking a declaration that Country-Wide was not obligated to pay Citimedical's claim under a no-fault policy. Citimedical sought payment for treatment and medical equipment provided to Kanado Gordon for injuries he allegedly sustained in an auto accident. Country-Wide denied coverage because Gordon failed to appear for duly scheduled Examinations Under Oath ("EUO"), as required under the policy. Citimedical argued that Country-Wide failed to demonstrate that Gordon's non-cooperation was willful. The court found that Country-Wide met its burden of proving that the EUO notice was mailed and held that coverage was precluded, reasoning that willful non-cooperation is not necessary to deny no-fault coverage based upon the insured's failure to appear for a properly scheduled EUO. [*Country-Wide Ins. Co. v. Gordon*, 2020 N.Y. Misc. LEXIS 9895 (Sup. Ct. N.Y. Cnty. Nov. 4, 2020).]

FIRST PARTY PROPERTY

Southern District Of New York Holds That Insured Not Entitled To Coverage For Losses Resulting From COVID-19

Sparks Steakhouse in New York City filed a coverage action against its insurer, Admiral Indemnity, alleging that Admiral breached its obligation to provide coverage under its all-risk commercial property policy for losses resulting from governmental orders to close restaurants due to the COVID-19 outbreak. The United States District Court for the Southern District of New York granted Admiral's motion to dismiss and held that Sparks was not entitled to business income and extra expense coverages under the policy because the alleged suspension of Spark's business was not "caused by direct physical loss of or damage to" Spark's property as necessary to trigger the coverages. The court reasoned that the plain meaning of the phrase connotes a "negative alteration in the tangible condition of property," and New York and out-of-state case law supports the court's holding. The court also dismissed Sparks' claim for civil authority coverage under the policy because Sparks did not allege two prerequisites to such coverage under the policy: (1) that there was "damage to property other than [its own]" and (2) that "action of civil authority … prohibit[ed] access" to its restaurant and the area immediately surrounding the damage. [*Michael Cetta, Inc. d/b/a Sparks Steakhouse v. Admiral Indem. Co*., 506 F. Supp. 3d 168 (S.D.N.Y. 2020).]

Western District of New York Follows Other New York Courts Holding That COVID-19 Losses Are Not Covered

The insured operated a martial arts and fitness business in Buffalo, New York, that sustained losses in revenue when its business closed due to the COVID-19 pandemic and related executive orders. The insured sought coverage under its commercial property policy. The United States District Court for the Western District of New York held that the insured's allegations that the virus became widespread and governmental orders led to business closures by sharply reducing occupancy fell short of the requirements of a "direct physical loss or damage" to the insured premises to trigger the business income coverage. As to the insured's claim for civil authority coverage, the court sympathized about the devastating impact of the pandemic on businesses, but held that the insured had not "provide[d] specific, non-general allegations that document a direct physical injury to property (not theirs) that gave rise to the civil authority orders." The court concluded that the absence of a virus exclusion in the insured's policy "does not increase the available coverage". [*Kim-Chee LLC v. Phila. Indem. Ins. Co.,* 2021 U.S. Dist LEXIS 78241 (N.D.N.Y. April 23, 2021).]

Southern District Of New York Holds That COVID-19 Claim Not Covered

Café du Soleil (the Café) operates a small Manhattan restaurant that suffered financial losses during the COVID-19 pandemic and suspended operations following state and municipal shutdown orders. XL Insurance issued the Café a commercial property policy that provided business interruption coverage in the event

of "direct physical loss of or damage to [its] property", subject to a Virus Exclusion. The Café sought coverage for the loss of business income, and XL disclaimed. The Café sued XL, and the United States District Court for the Southern District of New York dismissed the complaint, holding that the Café did not plausibly allege that it suffered a "direct physical loss" of property. The court rejected the Café's argument that the phrase "direct physical loss" is ambiguous and should be broadly construed to include the deprivation of property. The court also found that the Café's complaint did not allege a covered claim under the policy's Civil Authority provision because the Café was not prohibited from accessing the premises due to damaged property. Lastly, the court concluded that the policy's exclusion for "loss or damage caused by or resulting from any virus" unambiguously precluded coverage. [*Broadway 104, LLC v. XL Ins. Am., Inc.*, 2021 U.S. Dist. LEXIS 117198 (S.D.N.Y. June 23, 2021).]

Suffolk County Trial Court Holds That COVID-19 Claim For Lost Business Income Not Covered

The insureds, Island Gastroenterology Consultants and Island Endoscopy Center, obtained business owners' insurance policies with General Casualty Company of Wisconsin that covered lost business income caused by "direct physical loss of or damage" to covered property and "civil authority that prohibits access" to the covered premises "due to direct physical loss of or damage to property, other than at the described premises." Due to the COVID-19 pandemic, the insureds were unable to perform all but a *de minimis* number of emergency medical procedures, resulting in a substantial loss of business income. The Supreme Court of New York, Suffolk County, held that the insureds' complaint for coverage against their insurer did not allege a covered claim for "direct physical loss of or damage" to the insureds' premises. The court also found the insureds' allegations insufficient to allege coverage under the civil-authority provisions, noting that access to the premises was not prohibited due to direct physical loss or damage to neighboring property. The court concluded that the claimed losses also "fall squarely within the policies' virus exclusion." Accordingly, the court dismissed the insureds' complaint. [*Island Gastroenterology Consultants, PC v. General Cas. Co. of Wis.*, 72 Misc. 3d 1221[A] (Sup. Ct. Suffolk Cnty. Aug. 25, 2021).]

Federal District Court Finds That Virus Exclusion Precludes Coverage For COVID-19-Related Losses

A Manhattan law firm sued Midvale Indemnity Company seeking coverage under the firm's commercial property insurance policy for losses caused by stay-at-home and social distancing directives issued by New York State in response to the COVID-19 pandemic. The law firm claimed that the stay-at-home orders prevented clients from visiting the firm's offices, and thus cost it business. The insurer moved to dismiss, and the United States District Court for the Southern District of New York held that the law firm's claim for coverage was precluded by the "Virus or Bacteria" exclusion in the policy. The court was not persuaded by the law firm's argument that the firm's loss most immediately resulted from New York State's stay-at-home and social distancing orders, not the COVID-19 virus. The court stressed that these emergency orders were prompted by the virus, and the policy expressly precluded coverage for any damage caused "directly or indirectly" by "[a]ny virus" "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Because the court found that this exclusion precluded coverage, it did not reach the insurer's alternative arguments for dismissal, including that there was no "direct physical loss or damage" to the premises. [*Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, 515 F. Supp. 3d 95 (S.D.N.Y. 2021).]

Disappearance of Large, Heavy Item May Satisfy Physical Evidence Requirement For Claim Of Stolen Property, Court Rules

The insureds (who were in the collectible stamp business) moved their warehouse and discovered that a cabinet full of stamps was missing. They sought coverage from Aspen American Insurance, which denied coverage on the grounds that one of the insureds was not listed on the policy and an exclusion for "missing property where the only proof of loss is unexplained or mysterious disappearance of covered property…or any other instance where there is no physical evidence to show what happened to the covered property." The insureds filed a declaratory judgment action and the parties moved for summary judgment. After determining that the policy should be reformed to add the unnamed insured to reflect the parties' intentions in the insurance application, the court found a question of fact as to whether the stamps were stolen property because the disappearance of a large, heavy item, such as the missing cabinet, and the claim of theft, may satisfy the physical evidence requirement necessary to establish a claim of stolen property. [*Inter-Governmental Philatelic Corp. v. Aspen Am. Ins. Co.*, 73 Misc. 3d 265 (Sup. Ct. Kings Cnty. June 24, 2021).]

Fourth Department Holds That Maintenance Company's Removal Of Items From Home And Placement Into Dumpster Not "Theft" Under Homeowner's Insurance Policy

The insured defaulted on his mortgage, vacated his home, and filed for bankruptcy. Geddes Federal Savings and Loan hired a maintenance company to inspect, secure and maintain the property, and it cleared out the house and placed items in a dumpster on the front lawn. The insured sought coverage under his homeowners policy with Liberty Mutual, which disclaimed coverage on the ground that the loss was not a theft (a covered peril). On appeal, the Appellate Division, Fourth Department, agreed with the insurer that

"'the average policyholder of ordinary intelligence' would not think that the maintenance company's employees committed theft by removing items from plaintiff's house and placing them in garbage dumpsters on the front lawn." However, the court found a triable issue of fact for trial as to whether "some unknown person or persons entered the residence before it was cleaned out by the maintenance company and stole the items that plaintiff claims were missing." [*Prusik v. Liberty Mut. Ins. Grp. Inc*., 2021 N.Y. App. Div. LEXIS 6332 (4th Dept Nov. 12, 2021).]

WAIVER/ESTOPPEL/3420(d)

Second Department Applies Insurance Law §3420(d)

Plaintiff, Harco Construction, LLC, filed a declaratory judgment action (DJ) against First Mercury Insurance Company seeking to be defended and indemnified in underlying bodily injury actions as an additional insured under a policy issued to Harco's subcontractor. On an initial appeal, the Appellate Division, Second Department, held that the trial court erred in granting the insurer's motion for summary judgment, finding the insurer did not timely disclaim as required by Insurance Law §3420(d). Thereafter, the trial court granted summary judgment to Harco, and the subcontractor's insurer appealed, arguing that §3420(d) no longer applied because "this action is, in effect, one for contribution and/or indemnification asserted by [Harco's insurer] as the real party in interest." The court opined that the fact that Harco's insurer "provided a defense in [the underlying actions] and settled one of them [after the DJ was filed] above the limits of [the subcontractor's] policy did not relieve [the subcontractor's insurer] of its obligation" to reimburse certain defense and indemnity costs. [*Harco Constr., LLC v. First Mercury Ins. Co.,* 190 A.D.3d 831 (2d Dept 2021).]

Eastern District of New York Finds That New York Insurance Law § 3420(d) Did Not Preclude One Insurer From Raising A Priority Of Coverage Defense Against Another Insurer

State National Insurance Company settled a personal injury action against its named insureds and filed a declaratory judgment action on its own behalf and as subrogee of its insureds against Mt. Hawley Insurance Company seeking additional insured coverage under an excess policy issued by Mt. Hawley. Mt. Hawley had disclaimed but did not expressly raise as a defense that the State National policy, as a primary policy, must be exhausted before the Mt. Hawley policy would apply. On summary judgment, State National argued that Mt. Hawley could not rely upon its priority of coverage defense because it failed to timely disclaim on this basis pursuant to New York Insurance Law § 3420(d). The United States District Court for the Eastern District of New York disagreed for several reasons, including because it is "well-settled" that § 3420(d) "does not apply to claims between insurers, [regardless of] whether those claims are for contribution or for full defense and indemnity." The court observed that the "plain language" of that provision refers only to "the insured and the injured person or any other claimant," not to another insurance company. [*State Natl. Ins. Co. v. Mt. Hawley Ins. Co*., 2021 U.S. Dist. LEXIS 60375 (E.D.N.Y. Mar. 29, 2021).]

Court Declares Insured Collaterally Estopped From Seeking Coverage For Environmental Pollution Claims

Travelers filed a declaratory judgment action seeking a declaration that it did not owe coverage to Northrop Grumman for a natural resources damages claim by the New York State Department of Environmental Conservation and a putative class action arising from the dumping of contaminants at Northrop's facility. Travelers argued on summary judgment that Northrop was collaterally estopped from claiming coverage because it had already been determined in a prior action that the "sudden and accidental" pollution exclusion precluded coverage under Travelers' policies. In opposition, Northrop argued that collateral estoppel did not apply because the earlier claims involved remediation while the new claims involved past injury and residual costs or losses, and different contaminants may be at issue. The United States District Court for the Southern District of New York held that Northrop was collaterally estopped from claiming coverage because "the same discharge practices" and pollution exclusions were at issue. The court noted that regardless of whether th discharges included any specific contaminant, they did not fall within the "sudden and accidental" exception to the pollution exclusions. In addition, the court found Northrop's argument that the claims were different "unpersuasive" because it confused claim preclusion with collateral estoppel, which focuses on whether the "same issues are presented in two proceedings", not on whether they involve identical claims. [*Travelers Indem. Co. v. Northrop Grumman Corp.,* 2021 U.S. Dist. LEXIS 177555 (S.D.N.Y. Sept. 17, 2021).]

BAD FAITH/EXTRA-CONTRACTUAL

Court Dismisses Claims Against Insurer For Bad Faith Failure To Settle, And For Consequential And Punitive Damages

Scottsdale issued a policy to Watershed Ventures, LLC, which included Directors and Officers Liability Coverage. Scottsdale filed a declaratory judgment action seeking a declaration that Patrick McGrath was not covered under the policy for a claim against McGrath. McGrath filed counterclaims for bad faith, and consequential and punitive damages, which the United States District Court for the Southern District of New York dismissed as a matter of law. As to the claim that Scottsdale was liable for bad faith failure to settle the claim, the court stressed that an "essential element of any claim for bad faith refusal to settle" is that the insurer assumed the insured's defense and had "exclusive control" over the claim, which was not the situation here. The court also rejected the claim for

consequential damages under the New York Court of Appeals' *Bi-Economy* decision, stressing that this is not a case where the insurer engaged in a "bad faith delay of payment" or where it can be said that consequential damages fell within the "reasonable contemplation" of the contracting parties. Finally, the court dismissed the punitive damages claim, reasoning that punitive damages are only available to "vindicate a public right" where the conduct amounts to "criminal indifference to civil obligations". [*Scottsdale Ins. Co. v. McGrath*, 2021 U.S. Dist. LEXIS 134969 (S.D.N.Y July 19, 2021).]

MISCELLANEOUS

Court Holds Anti-Assignment Clause Not Enforceable As To Transfers Made After The Insured-Against Loss

Nokia was sued in thousands of asbestos-related bodily injury lawsuits arising out of the operations of certain legacy businesses of AT&T. In this declaratory judgment action, Nokia sought partial summary judgment to resolve whether Nokia (through its predecessor, Lucent) had the right, by assignment, to seek coverage under policies issued to AT&T for asbestos liabilities it inherited from AT&T. The Supreme Court, New York County, found that AT&T effectively assigned to Lucent (and therefore Nokia) its rights under the liability policies issued to AT&T in a Separation and Distribution Agreement. The court opined that the provisions of the agreement, taken together, reflected the intention of AT&T to give Lucent the right to avail itself of the insurance policies for liabilities assumed from AT&T. In turn, the court found that the anti-assignment clauses in the insurance policies did not raise triable issues of fact because, generally, under New York law "a no-transfer provision in an insurance contract is valid with respect to transfers that were made prior to, but not after, the insured-against loss." The court reasoned that "although insurers have a legitimate interest in protecting themselves against additional liabilities the insurer did not contract to cover, once the insured-against loss has occurred, there is no issue of an insurer having to insure against additional risk." [*Certain Underwriters at Lloyd's v. AT&T Corp.*, 2021 N.Y. Misc. LEXIS 2736 (Sup. Ct. N.Y. Cnty. May 19, 2021).]

Court Grants Summary Judgment To Insurer On Claim For Payment Of Adjusted Premium

American Empire Surplus Lines Insurance Company sued its insured for payment of a premium that was subject to an adjustment if a later audit revealed that the insured's actual gross receipts exceeded the initial estimate. American Empire initiated an audit which determined that the insured owed an additional $500,516 in premium. The United States District Court for the Eastern District of New York granted summary judgment to American Empire based upon the insurance policy, an audit statement, and an affidavit from an insurance company representative as to the additional amount owed. The court ruled that an agreement between the insured and a third-party as to the payment of the premium was irrelevant. The court also found that the insured's argument that the audit was defective was contradicted by the insured's own accountant who verified the accuracy of the audit. The court concluded that the insured owed American Empire the unpaid premium plus interest. [*American Empire Surplus Lines Ins. Co. v. B&B Iron Works Corp.*, 2021 U.S. Dist. LEXIS 185770 (E.D.N.Y. Sept. 28, 2021).]

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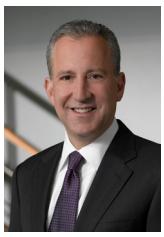

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