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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC:

ADDITIONAL INSURED COVERAGE

Town of Fort Ann v. Liberty Mut. Ins. Co., 69 A.D.3d 1261 (3rd Dep't January 28, 2010) On July 2, 2005, the Hadlock Pond Dam, owned by the Town of Fort Ann, failed after having been reconstructed by Kubricky Construction Corporation. The Town had two contracts, one with Heynan Teale Engineers for engineering services related to the dam project and another with Kubricky for the reconstruction work. After the dam's failure, numerous lawsuits ensued against the Town, which, in turn, sought a defense and indemnification from Steadfast Insurance Company, Heynan's insurer, and Liberty Mutual Insurance Company, Kubricky's insurer. Steadfast and Liberty Mutual both disclaimed any obligation to the Town asserting, *inter alia*, that the Town did not qualify as an additional insured under the terms of their respective policies.

Kubricky's policy with Liberty Mutual extended additional insured coverage to an entity when Kubricky's written contract to provide work for the entity required such coverage. Although the written contract between the Town and Kubricky required Kubricky to maintain additional insured coverage for the Town until the Town accepted the completed project, Liberty Mutual denied the existence of such coverage claiming that the same would only apply when Kubricky was engaged in ongoing operations at the project. The Appellate Division, Third Department, began its analysis by recognizing that "ongoing operations" is interpreted broadly in New York, and that "work may be considered as ongoing during a short lapse of time necessary to conduct tests designed to assure proper performance where such testing is an essential element of the work by the insured." While Kubricky had completed the major reconstruction of the dam one to two months prior to its failure, inspection of the project by the engineer, which was required before Kubricky's work was considered completed, had not yet occurred. As such, the Third Department found that the Town adequately established that it was an additional insured under the Liberty Mutual policy for purposes of the duty to defend.

The Steadfast policy provided that a client of Heynan would be an additional insured when "required by written contract executed and effective before the performance of 'your work' or 'covered operations.'" The written contract between Heynan and the Town, which was executed before Heynan's work on the project commenced, stated that "certificates of insurance will be furnished upon request naming the Town of Fort Ann…as additional insured." The Town, however, had not requested a certificate of insurance from Heynan until well after the dam failed. According to the Third Department, so long as a clear written intent to include an entity as an additional insured is manifested prior to the loss, the fact that certificates of insurance are not issued until after the loss does not compel the conclusion that such entity is not an additional insured. Moreover, the status of the Town as an additional insured was not made contingent upon the request for a certificate of insurance. As such, Steadfast was also under a duty to defend the Town as an additional insured.

LBC&C's INSURANCE INDUSTRY PRACTICE GROUP

LBC&C has extensive knowledge and experience in the insurance industry, and the wide array of services which it provides to the insurance community is a foundation of the Firm's practice. LBC&C is dedicated to achieving the goals of its clients in a professional, cost-effective and timely manner. The Firm's reputation for meaningful analysis, tough advocacy and creative solutions serves clients well for the regulatory and legal challenges which they face in the ever-changing national landscape of the insurance industry.

Insurance companies rely upon LBC&C to draft policies, render coverage opinions, act as monitoring counsel, advise excess carriers and reinsurers, litigate declaratory judgment and "bad faith" actions, and provide auditing services. These services are performed on a nationwide basis and LBC&C attorneys represent their clients' interests in litigation, arbitration and mediation throughout the country. Furthermore, because the law of insurance is evolutionary and dynamic, the Firm provides in-house seminars for underwriting, claims and marketing personnel on developing issues.

Should you have any comments, questions or suggestions in connection with the information provided in this newsletter please contact Richard P. Byrne, Esq., John D. McKenna, Esq. or Jillian Menna, Esq. at (516) 294-8844. You may also wish to visit the Firm's website at lbcclaw.com

Mondanock Construction, Inc. v. DiFama Concrete, Inc., 70 A.D.3d 906 (2d Dep't February 16, 2010) According to the Appellate Division, Second Department, when an underlying action is dismissed as against a named insured, the insurer that issued a policy of insurance to the named insured is relieved of its duty to defend any additional insured in that action.

Village of Brewster v. Virginia Surety Co., Inc., 70 A.D.3d 1239 (3rd Dep't February 18, 2010) The complaints in the underlying lawsuits by residents against their village and the village's contractor alleged that the negligent performance of the contractor on behalf of the village caused a water main break, resulting in property damage to the residents' property. While the contractor's insurer denied the village's tender seeking defense and indemnification, the Appellate Division, Third Department, held that the contractor's insurer's duty to defend the village as an additional insured was triggered, since the allegations against the contractor in the underlying lawsuits, if ultimately proven to be true, would bring the claims within the ambit of the protection afforded by the insurer's coverage. The extrinsic facts alleged by the insurer, although supportive of its position that the claims may ultimately fall outside of its policy coverage, did not relieve it of its commitment to provide a defense.

Burlington Ins. Co. v. Utica First Ins. Co., 2010 WL 819763 (2d Dep't March 9, 2010) A construction contractor brought action against its subcontractor's commercial general liability insurer alleging that the insurer had duty to defend and indemnify it as an additional insured. The Appellate Division, Second Department, held that the contractor was not entitled to additional insured coverage, since at the time of the underlying accident, the contract had not been fully executed, as it was unsigned and had not been fully performed. According to the Second Department, there was nothing to support the plaintiffs' contention that the condition in the additional insured endorsement that the contract be "executed" prior to the bodily injury occurring could be satisfied by partial performance.

L&B Estates, LLC v. Allstate Ins., 2010 WL 979255 (2d Dep't March 16, 2010) Defendant Century 21 Achievers leased premises from the plaintiff L&B Estates, LLC. As required under the terms of its lease, Century 21 obtained from Allstate Insurance Company a commercial liability insurance policy naming L&B as an additional insured, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises shown in the Declarations as leased to Century. The Declarations set forth in the Allstate policy did not mention the sidewalk in front of the premises as having been leased to Century. In addition, L&B had its own insurance coverage with United National Specialty Insurance Company.

In November 2005, Tilma Coddett was injured when she tripped and fell as a result of an alleged defect in the sidewalk in front of the premises. In June 2006, notice of Coddett's claim against both L&B and Century 21 was tendered to Allstate, which did not immediately respond. In October 2006, Coddett instituted a lawsuit, and in May 2007, Allstate rejected the tender on behalf of L&B on the ground that it was not an additional insured under the Allstate policy, since Coddett's claim did not arise out of "the ownership, maintenance or use of that part of the premises shown in the Declarations as leased to [Century]." L&B thereafter instituted a separate lawsuit seeking a judgment declaring that it was entitled to a defense and indemnification from Allstate as an additional insured under the policy. According to the Appellate Division, Second Department, L&B established its prima facie entitlement to judgment as a matter of law against Allstate. The Second Department relied upon the fact that Administrative Code of the City of New York imposes liability on owners of commercial property for defects in sidewalks, and, as such, L&B's potential liability arose from its ownership of the premises.

APPLICABILITY OF EXCLUSIONS

Lattimore Road Surgicenter, Inc. v. Merchants Group, Inc., 70 A.D.3d 1495 (4th Dep't March 19, 2010) The Appellate Division, Fourth Department, held that the defendant-insurer was under no obligation to provide the plaintiff-insured with coverage for water damage to the plaintiff-insured's property. The damage resulted from water entering the plaintiff-insured's building via a sewer drain as a result of a ruptured water main. According the Fourth Department, the plaintiff-insured's contention, that the exclusion at issue was inapplicable because it only excluded sewer backups and overflows, was misplaced. The Fourth Department held that "[p]ursuant to the terms of the exclusion, there plainly is no coverage for loss stemming from 'water that backs up or overflows through a sewer,' irrespective of any other concurrent or subsequent contributing cause or event."

AUTOMOBILE LIABILITY COVERAGE

Progressive Cas. Ins. Co. v. Harco Nat'l Ins. Co., 2010 WL 465542 (4th Dep't February 11, 2010) Defendant Jason Webb borrowed a loaner vehicle from defendant Burdick Pontiac-GMC while his own vehicle was being repaired by the car dealership. His son, Justin Webb, was driving the loaner vehicle when he collided with a vehicle operated by Andrea Walker. Walker thereafter commenced the underlying action against Jason Webb and Burdick. The loaner vehicle was insured under a garage liability policy issued to Burdick by Harco National Insurance Company, and the Webb family was insured under a family motor vehicle policy issued by plaintiff, Progressive Casualty Insurance Company. The Harco policy contained what is commonly known as a "no liability clause", providing coverage to a customer of its insured only if the customer has no other available insurance or has other available insurance less than the compulsory or financial responsibility law limits where the covered auto is principally garaged. The Progressive policy, in turn, contained an "excess" clause, which stated that any insurance provided for a vehicle, other than a covered vehicle, would be excess over any other valid and collectible insurance. Progressive commenced suit seeking a declaration that Harco was obligated to provide primary coverage to defend and indemnify the Webb defendants in the underlying action, in response to which Harco counterclaimed.

The Appellate Division, Fourth Department, overturned the decision of the lower court and held that the Webb defendants were not entitled to coverage under the Harco policy. According to the Fourth Department, the lower court's reliance, in granting Progressive's motion, on the general rule that "in cases in which one insurance policy has a no liability clause and the other insurance policy has an excess clause…the no liability clause is not given effect", was in error, inasmuch as "an exception to the general rule arises [where] the no liability clause expressly provides that other available insurance includes both primary and excess insurance coverage. In that case, the no liability clause is given effect and the excess insurance carrier is the primary carrier." The Harco policy specifically provided that "other available insurance" included "primary, excess or contingent insurance" and it was undisputed that the liability limits contained in the Progressive policy exceeded the minimum statutory requirements. Thus, the Fourth Department held that the exception to the general rule applied, the no liability clause contained in the Harco policy was given effect, and Progressive was deemed the primary insurer for the Webb defendants.

RLI Ins. Co. v. Smiedala, 2010 WL 1169768 (4th Dep't March 26, 2010) Plaintiff RLI Insurance Company commenced this action seeking a declaration that it was not obligated to defend or indemnify defendants Michael J. Hale and Regional Integrated Logistics, Inc. in an underlying personal injury action and related third-party action under the commercial automobile insurance policy issued by plaintiff to Regional. The plaintiff in

the underlying action sought damages for injuries he allegedly sustained when the vehicle in which he was a passenger collided with a vehicle driven by Hale, and leased from defendants-third-party plaintiffs, Audi Financial Services and VW Leasing, Ltd. Hale, an employee of Regional, was driving to the bank at the time of the accident in the course of his employment. Audi/VW commenced a third-party action against Regional seeking contribution and/or indemnification for any liability arising from Hale's negligence under the doctrine of respondeat superior.

The Appellate Division, Second Department, concluded that RLI was required to defend and indemnify Regional in the underlying action, since the "Notice of Occurrence/Claim" submitted to RLI on March 29, 2007 constituted notice of the occurrence on behalf of both Hale and Regional, and RLI failed to provide a legitimate excuse for its 95 day delay in disclaiming liability or denying coverage. However, with respect to Hale, the Second Department further concluded that he was an insured under the RLI policy only if he was using, with Regional's permission, an automobile owned, hired or borrowed by Regional, and that it was undisputed that the automobile was not owned or hired by Regional. Considering "the plain language of the contract as it would be understood by an average or ordinary citizen", the Second Department found that only "an unnatural or unreasonable construction" of that provision would support an interpretation that Hale's personal vehicle was borrowed by Regional and then used by Hale with Regional's permission. Thus, given that Hale was not found to be an insured under the policy, RLI was not required to disclaim liability or deny coverage in a timely manner to Hale.

CHOICE OF LAW

Crucible Materials Corp. v. Certain Underwriters at Lloyd's London & London Market, 2010 WL 355693 (N.D.N.Y. February 2, 2010) In a case involving allocation of coverage, the Northern District of New York was called upon to determine, *inter alia*, which state's law to apply as between New York and Pennsylvania. The Northern District acknowledged that, under New York law, the first step in a choice-of-law analysis is to determine whether there is an actual conflict between the respective state laws under consideration. An actual conflict will exist so long as there is a material difference between the laws of the two states. A material difference between the laws of two states will only be considered a true conflict "if both jurisdictions' interests would be impaired by the application of the other's laws." In the event there is a true conflict, New York courts will then evaluate which state has the greater interest in the application of its law. When making this determination, a state's contacts must be weighed on a qualitative scale according to their relation to the policies and interests underlying the particular issue. Where the insured risk is located throughout a number of states, the following contacts must also be evaluated: (1) the place of contracting; (2) the place of negotiations; (3) the place of performance; (4) the location of the subject matter; and (5) the domicile, residence, nationality place of incorporation and place of business of the parties.

DIRECT ACTIONS

Jimenez v. New York Central Mut. Fire Ins. Co., 2010 WL 732014 (2d Dep't March 2, 2010) Under New York law, a plaintiff may only commence a direct action against an insurer to recover on an unsatisfied judgment at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured and upon the insurer. The Appellate Division, Second Department, found that although the plaintiff met her prima facie burden of establishing that she satisfied this condition precedent by submitting an affidavit of service attesting that a copy of the judgment in the underlying personal injury action, with notice of

entry, was mailed to New York Central Mutual Fire Insurance Company, a hearing was required on the issue of service, since New York Mutual rebutted the presumption of proper service. Specifically, New York Mutual submitted the affidavit of a claims manger denying that it received a copy of the underlying judgment prior to the commencement of the direct action. In addition, where New York Mutual was entitled to disclaim coverage because of the almost two-year delay in receiving notice of the commencement of the plaintiff's underlying negligence action against its insured, a triable issue of fact existed as to the timeliness of New York Mutual's disclaimer. Furthermore, the Second Department determined that New York Mutual was not precluded from litigating the merits of the underlying action, since it did not receive notice of the commencement of the underlying negligence action until after the entry of judgment against its insured. Under the circumstances, New York Mutual did not have "a full and fair opportunity to contest the decision now said to be controlling."

DISCLAIMERS

Scott McLaughlin Truck & Equipment Sales, Inc. v. Selective Ins. Co. of Am., 68 A.D.3d 1619 (3rd Dep't December 31, 2009) The Appellate Division, Third Department, held that an insurer's 60 day delay in disclaiming coverage based upon late notice was untimely as a matter of law where the insurer failed to show that the delay in disclaiming was reasonably related to its completion of a thorough and diligent investigation.

NGM Ins. Co. v. Blakely Plumbing, Inc., 593 F.3d 150 (2d Cir. February 1, 2010) Under New York Insurance Law §3402(d), an insurer must provide notice of disclaimer of liability or denial of coverage where there is no coverage by reason for exclusion; however, no such notice is required where coverage is not available under the policy in the first instance.

Mid City Const. Co., Inc. v. Sirius Am. Ins. Co., 70 A.D.3d 789 (2d Dep't February 9, 2010) The defendant, Finaly General Contracting Corp., established its prima facie entitlement to judgment as a matter of law on its cross-claim for declaratory judgment relief against the defendant Sirius America Insurance Company by demonstrating that Sirius did not disclaim coverage as soon as was reasonably possible. Specifically, Finaly demonstrated that Sirius had sufficient knowledge of facts entitling it to disclaim coverage by June 10, 2005, at the latest, and that Sirius did not disclaim until August 3, 2005. In opposition, Sirius failed to raise a triable issue of fact as to whether it sent an earlier disclaimer letter on June 21, 2005, by certified mail, return receipt requested. Generally, proof that an item was properly mailed gives rise to the rebuttable presumption that the item was received by the addressee. The presumption may be created by either proof of actual mailing, or proof of standard office practice or procedure designed to ensure that items are properly addressed and mailed. Sirius offered no evidence as to its standard office practices for mailing disclaimers, and the affidavit of a claims representative was insufficient to raise a triable issue of fact, since he did not have personal knowledge of the mailing of the disclaimer letter. According to the Second Department, the certified mail receipt, standing alone, was insufficient to raise a triable issue of fact as to actual mailing.

LIFE INSURANCE

Fidelity National Title Ins. Co. v. Regent Abstract Services, Ltd., 70 A.D.3d 447 (1st Dep't February 9, 2010) The Appellate Division, First Department, held that a life insurance policy, which had lapsed for nonpayment of premiums, was not revived by the mailing of overdue premium payment prior to the insured's death, where the payment was not received before insured's death, and the policy expressly required that the

insured be alive at the time the insurer received a past due premium for the policy to be reinstated.

NOTICE

Ponok Realty Corp. v. United Nat'l Specialty Ins. Co., 69 A.D.3d 569 (2d Dep't January 5, 2010) The Appellate Division, Second Department, recognized that there are circumstances, such as a reasonable belief in non-liability, that may exist explain the insured's delay in giving notice. In general, the existence of a good faith belief that the injured party would not seek to hold the insured liable, and the reasonableness of such belief, are questions of fact for the fact-finder and the burden of demonstrating the reasonableness of the excuse lies with the insured. However, summary judgment may be awarded to the insurer if, construing all inferences in favor of the insured, the evidence establishes, as a matter of law, that the insured's belief in non-liability was unreasonable or in bad faith.

Assunta, Inc. v. Penn-American Ins. Co., 2010 WL 93459 (N.D.N.Y. January 7, 2010) The Northern District of New York held that an insured's delay of thirty-nine days in providing notice of an occurrence to its commercial general liability insurer was unreasonable as a matter of law, since, *inter alia*, the insured proved no explanation, excuse or mitigating factors to justify the delay, nor did the insured make a showing that "a reasonable business person would have made the same decisions under the same circumstances."

Hanson v. Turner Construction Co., 70 A.D.3d 641 (2d Dep't February 2, 2010) The Appellate Division, Second Department, held that Turner Construction Company's delay of two months in providing notice to its insurer as additional insured was untimely as a matter of law, where Turner possessed contemporaneous knowledge of the accident and that the injured plaintiff sought treatment at a medical facility for an injury to his back immediately following the accident. Moreover, the fact that Turner provided a copy of the accident report it prepared to, among others, its "insurance company department", was inconsistent with Turner's claim of having a good faith belief in non-liability.

Lehigh Construction Group, Inc. v. Lexington Ins. Co., 70 A.D.3d 1430 (4th Dep't February 22, 1010) The Appellate Division, Fourth Department, held that a contractor's assumption that other parties would bear ultimate responsibility of employee's injuries was an insufficient excuse for failing to provide its insurer with timely notice that an underlying personal injury had been commenced, and thus the insurer was not required to defend or indemnify the contractor in the underlying action as an additional insured.

SUBROGATION

Travelers Prop. Cas. Co of Am. as subrogee of Hackley School v. Global Systems, Inc., 2010 WL 1240974 (2d Dep't March 30, 2010) The plaintiff, Travelers Property Casualty Company of America, issued a policy of fire hazard insurance to the Hackley School. On August 4, 2007, the school sustained substantial property damage as a result of a fire, which losses were covered by the Travelers policy. Subsequently, Travelers commenced an action, as subrogee of the school, against the schools' alarm monitoring company to recover damages for breach of contract, negligence, breach of implied warranty, and strict products liability. The alarm monitoring company moved to dismiss the complaint based upon paragraph 3 of the alarm monitoring service agreement in which the school acknowledged and agreed that the alarm monitoring company was not an insurer and that the school was required to obtain insurance covering personal injury, including death, and real or personal property loss or damage in, about or to the

premises. Further, pursuant to paragraph 5 of the agreement, the school released and discharged the alarm monitoring company from and against all hazards covered by insurance. Moreover, the parties to the agreement agreed "that no insurance company…shall have…any right of subrogation."

Contrary to the plaintiff's contention, the Appellate Division, Second Department, held that the waiver of subrogation clause expressly released and discharged the alarm monitoring company from and against all hazards covered by the school's insurance, and barred Travelers from seeking the return of any proceeds paid to the school under its policy. In addition, contrary to the plaintiff's contention, "[a] distinction must be drawn between contractual provisions which seek to exempt a party from liability to persons ... whose property has been damaged and contractual provisions ... which in effect simply require one of the parties to the contract to provide insurance for all of the parties." Thus, while an exculpatory clause in an agreement will not protect a defendant from liability for gross negligence, a waiver of subrogation clause which releases and discharges a company from and against all hazards covered by insurance clearly precludes an insurer, as subrogee, from seeking return of any proceeds covered by insurance notwithstanding any claim of gross negligence. Accordingly, the waiver of subrogation clause at bar conclusively established a defense to the plaintiff insurer's claims against the alarm monitoring company.