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CASES OF INTEREST BY TOPIC

ADDITIONAL INSURED COVERAGE

Pina v. Dora Homes, Inc., 2010 WL 2977409 (E.D.N.Y. July 22, 2010) Although New York law makes clear that Certificates of Insurance are normally not sufficient to establish coverage, an insurer that issues a certificate naming a particular party as an additional insured may be estopped from denying coverage where the party reasonably relies on the same to its detriment. The Eastern District held that this exception did not apply, however, where the Certificates of Insurance were issued after the underlying occurrence, and where the policy at issue contained no ambiguity as to the lack of additional insured coverage under its terms and provisions. As recognized by the Eastern District, "the doctrine of estoppel may not be invoked to create coverage where none exists under the policy."

APPLICABILITY OF EXCLUSIONS

SUS, Inc. v. St. Paul Travelers Group, 75 A.D.3d 740 (3d Dep't July 1, 2010) The plaintiff, SUS, Inc., owned and operated a restaurant in a building owned by New Prospect Properties, LLC. A fire completely destroyed the restaurant, including the building and its contents. At the time of the fire, SUS had a Commercial General Liability policy and a Businessowners Property Insurance policy issued by the defendant-insurers. New Prospect was named as an additional insured under the CGL policy, but not the Buisnessowners policy. In sum, both New Prospect and SUS brought suit against the defendant-insurers seeking recovery for the damage to the building caused by the fire. With respect to New Prospect's claims, the Appellate Division, Third Department, noted that although it was named as an additional insured under the CGL , the liability policy did not provide coverage for damage to property owned by the insured, but, rather, provided coverage for liability to third-parties. Since New Prospect was not a named insured under the Businessowners policy and its additional insured status under the CGL policy did not entitle it to any coverage for its first-party claims, the Third Department dismissed the claims asserted by New Prospect. With respect to SUS' claims, the Third Department held that the Businessowners policy did not provide coverage for damage to the building itself and, therefore, SUS' claims for any such damage were also dismissed. In this regard, the Businessowners policy provided coverage for "business personal property" and "building, meaning the building or structure described in the Declarations…if a Limit of Insurance is shown in the Declarations for that type of property." While the policy set forth a limit of insurance for "Business Personal Property" and other coverage extensions, such as accounts receivable and fine arts, no limit of insurance was shown for the building. In addition, according to the Third Department, the portion of the CGL policy providing coverage for "Damage to Premises Rented to You" was not applicable to SUS' first-party liability claim for damage to the building.

Redland Select Ins. Co. v. Washington, 2010 WL 2854440 (W.D.N.Y. July 19, 2010) Anstorm Cartage Company, a motor carrier, was hired by Gibraltar Steel Corporation, to haul steel coils. Willie Washington, a driver of a truck leased to Anstrom, picked up and delivered coils from Lackawanna, New York, to a Gibraltar location in Buffalo, New York. Washington was injured when the coils were being unloaded. Specifically, after Washington brought the load to Buffalo, Gibraltar employees unloaded the coils from the flatbed truck with a crane, as Washington watched from the back of the truck. As the crane lifted the last of the coils, the Gibraltar employee dropped the coil back onto the flatbed, causing Washington to be thrown into the air and then back to the trailer's surface. Washington, thereafter, commenced action against Anstrom, Gibraltar and others seeking damages for the injuries he sustained as a result of the accident. Redland Select Insurance Company, Anstrom's insurer, sent correspondence to Anstrom, with copies to Washington and Gibraltar's insurer, Zurich Insurance Company, disclaiming liability coverage for the accident. In a subsequent declaratory judgment action, the Western District held that there was no coverage under the Redland policy since the policy contained an exclusion for "bodily injury…resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered auto." In addition, on a separate basis, the Western District found that Redland was not obligated to provide coverage to Gibraltar. In this regard, even though the Redland policy provided coverage to "anyone else while using with your permission a covered 'auto' you own, hire or borrow", the policy excluded coverage to "anyone other than your employees, partners, a lessee or borrower, or any of their employees, while moving property to or from a covered 'auto.'"

Barney Greengrass, Inc. v. Lumbermans Mut. Cas. Co., 2010 WL 3069560 (S.D.N.Y. July 27, 2010) The Southern District was called upon to determine in this declaratory judgment action, *inter alia*, the applicability of a pollution exclusion, excluding coverage for losses caused by "any solid liquid…or contaminant, including smoke, vapors, soot, fumes…chemicals and waste…", with respect to third-party claims of negligence by a co-tenant, complaining of odors and smoke emanating from the vent of the insured-restaurant. In asserting the applicability of the pollution exclusion, the defendant-insurer emphasized the allegations in the underlying complaint of "smoke" and "exhaust" and, in the alternative, argued that even assuming that only "odors" were alleged, they would be considered pollutants and excluded. The Southern District recognized that under New York law, courts have demonstrated a general reluctance to apply pollution exclusions in cases that do not involve traditional environmental pollution. Insofar as "odors" were at issue, the Southern District held that such claims would, as a matter of law, not fall within the pollution exclusion, since reading the term "pollution" as encompassing "restaurant odors" would contradict "common speech" and the "reasonable expectations of a business person who has come to understand the standard pollution exclusions as addressing environmental-type harms".

With respect to the remaining claims, however, the Southern District held that to the extent the underlying damage alleged was the result of smoke and/or exhaust originating from the insured-restaurant's vent (which was unclear from the allegations in the underlying complaint at issue), these damages "probably *would* be excluded" by the pollution clause, which expressly listed "smoke" as a "pollutant". As such, the defendant-insurer was required to provide the insured-restaurant with a defense in the underlying action, but a determination as to the insurer's indemnity obligation was premature.

Howard & Norman Baker, Ltd., v. American Safety Cas. Ins. Co., 75 A.D.3d 533 (2d Dep't July 13, 2010) Plaintiff, a commercial landlord which was an additional insured under a Commercial General Liability policy issued by defendant American Safety Casualty Insurance Company to its tenant, was not entitled to coverage under the American Safety policy for an underlying action seeking damages for bodily injury to an employee of the tenant. In sum, the Appellate Division, Second Department, held that the policy's exclusion for "bodily injury to…an employee of any insured arising from and in the course of…employment by any insured", barred coverage. According to the Second Department, despite the policy language stating that the "insurance applies if each Named Insured were the only Named Insured", the exclusion's reference to "any insured" made it clear that the exclusion was not limited to injuries sustained by the landlord's employees. Since the injured claimant was an employee of the tenant, an insured under the American Safety policy, the injury was not covered.

Clark Moving & Storage, Inc. v. Selective Ins. Co. of America, 2010 WL 3420453 (W.D.N.Y. August 27, 2010) Under New York law, an insurer bears the burden of demonstrating that coverage under an insurance policy is excluded. Whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Moreover, if the intention of a coverage exclusion is not apparent from the language of the policy, it is the insurer's responsibility to make its intention clearly known. According to the Western District, the defendant-insurer failed to demonstrate that its policy intended to exclude losses, including mold damage, that resulted from accidental exposure to water as the result of a roof leak. Although the defendant-insurer's policy excluded coverage for property damage caused by "dampness, gradual deterioration and/or wear and tear", the Western District held that these terms were not akin to "wetness", "moistness" or "water" as the defendant-insurer claimed.

JTC Industries, Inc. v. The Travelers Indem. Co. of America, 2010 WL 3522252 (W.D.N.Y. September 7, 2010) The plaintiff, JTC Industries, a manufacturer of industrial rollers, brought suit against its insurer, Travelers Indemnity Company of America, seeking a declaration that Travelers was obligated to provide it coverage for property damage JTC sustained in connection with the manufacture of its rollers. Specifically, one of the materials used in the manufacturing process is known in the industry as "frit", a powder-like substance that is used to coat the rollers during the production process. Unknown to JTC, on two separate occasions, the frit it received from a supplier was contaminated, resulting in the manufacture of 11 defective rollers. JTC was also caused to shut down its production equipment to be decontaminated, resulting in production delays and lost business. Travelers denied coverage under the Businessowners Property Insurance Policy that it issued to JTC on the basis, *inter alia*, that the policy excluded coverage for losses attributable to property that was being "processed", "manufactured", or "worked upon", and also excluded coverage for losses attributable to contamination, or property damage as a result of faulty or defective materials. In response, JTC contended that the policy exclusion was ambiguous and that the damage to the rollers and its machinery was not attributable to the manufacturing process, but to the contaminated frit. According to the Western District, however, the policy exclusion, in clear and unmistakable language, provided that damage attributable to the manufacturing of property was excluded under the policy.

If the policy language were to be construed as JTC suggested, the Western District noted that Travelers would be required to guarantee JTC's products and indemnify JTC for any imperfect roller that it manufactured as long as there were no errors or negligence involved in the process.

BAD FAITH

O.K. Petroleum v. Travelers Indem. Co., 2010 WL 2813804 (S.D.N.Y. July 25, 2010) The plaintiffs, corporations engaged in the regional distribution of gasoline and fuel oil, brought an action against the defendant-insurers, which provided Commercial General Liability, Commercial Auto and Umbrella coverage from 1989 to 2002. The plaintiffs sought damages based upon theories of bad faith and deceptive business practices, in light of the fact that the defendant-insurers would only pay between 11 and 13 percent of the defense costs incurred by the plaintiffs in defending an underlying action alleging the defective production of gasoline. According to the plaintiffs, the defendant-insurers materially misled and deceived them into believing that as policyholders, insurance defense costs and fees would be fully reimbursed. Plaintiffs also alleged that the defendant-insurers engaged in deceptive business practices by unilaterally imposing new contract conditions under the policies, whereby they would only pay a fraction of defense fees and costs.

With respect to the bad faith claim, the Southern District recognized that the plaintiffs were required to allege "more than an arguable difference of opinion between carrier and insured over coverage." Specifically, the plaintiffs were required to show "such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it." The Southern District held that the plaintiffs failed to meet the standard for pleading bad faith since they admitted to communications with other insurers, not parties to the present suit, wherein the other insurers either denied or reserved their rights. As such, the Southern District found that these "encounters with the…other insurers color this dispute as more of an arguable difference of opinion between carrier and insured over coverage than a showing of such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it." With respect to the plaintiffs' deceptive business practices claim, the Southern District noted that plaintiffs were required to establish that the deceptive conduct had a "broad impact on consumers at large." Although plaintiffs alleged that the practices it was complaining of were part of a "systemic program aimed at the policyholders generally having an impact on the insurance consumers at large", the Southern District found that the plaintiffs alleged no facts to support this speculative argument.

DISCLAIMERS

Hunter Roberts Const. Group, LLC v. Arch Ins. Co., 904 N.Y.S.2d 52 (1st Dep't July 1, 2010) In disclaiming coverage, the defendant-insurer asserted that the plaintiff-insured failed to notify it "as soon as practicable" of an underlying occurrence that took place 10 months prior to the notice given. According to the Appellate Division, First Department, this basis for the insurer's disclaimer would have been apparent upon examination of the tender letters provided as notice. Although the insurer claimed that it had difficulties in its investigation of the claim, causing it to disclaim coverage four months after receiving notice, the insurer failed to explain, given the facts made known to it by the tender letters, why anything beyond a cursory investigation was necessary to determine whether it had been provided with timely notice. Accordingly, the insurer's disclaimer was held ultimately unreasonable as a matter of law.

Liberty Ins. Underwriters Inc. v. Great American Ins. Co., 2010 WL 3629470 (S.D.N.Y. September 17, 2010) Under New York law, an insurer must give written notice of its intention to disclaim coverage as soon as reasonably possible. Reasonableness of delay is measured from the point in time when the insurer first learns of the grounds for the disclaimer of liability or denial of coverage. The Southern District recognized and reaffirmed that a disclaimer of coverage issued within a month after the insurer obtains sufficient facts to form the basis of the disclaimer is, as a matter of law, reasonable.

CHOICE OF LAW

Continental Cas. Co. v. American Home Assur. Co., 2010 WL 2926224 (S.D.N.Y. July 22, 2010) Under New York's "center of gravity" or "grouping of contacts" approach to choice-of-law questions in insurance contract cases, courts are required to apply the law of the state with the most significant relationship to the transaction and the parties. Where the location of the risk cannot be confined to one state because the policy at issue covers the policyholder for potential risks in multiple states, consideration of the governing interests of competing jurisdictions weighs in favor of applying the law of the insured's domicile. Based upon the foregoing, the Southern District applied Pennsylvania law over New York law to a coverage dispute, holding that the commercial activities performed by the insured outside of Pennsylvania failed to raise a

genuine issue of fact regarding the insured's domicile in Pennsylvania. According to the Southern District, there were no interests identified on the part of New York that would outweigh Pennsylvania's interest in regulating an insurance contract brokered and negotiated in Pennsylvania, by a Pennsylvania branch of a New York insurance company, insuring a Pennsylvania domiciliary. The Southern District went on to note that "New York's extensive role in regulating [the insurance company's] parent company, AIG, following that company's difficulties in 2008 is an insufficient counterweight: whereas the near-collapse of AIG had a significant impact on New York's financial industry, the interpretation of the [insurance policies at issue] will merely resolve whether a New York insurance company is liable, based on policies insuring a Pennsylvania domicile, to an Illinois insurance company for a portion of a settlement paid to a Tennessee resident on behalf of an Ohio corporation domiciled in North Carolina."

DIRECT ACTIONS

U.S. Underwriters Ins. Co. v. Ziering, 2010 WL 3419666 (E.D.N.Y. August 27, 2010) The Eastern District confirmed that under New York law, claimants may only bring a direct action against an insurer if he/she first obtains a judgment against the tortfeasor-insured, serves the insurance company with a copy of the judgment and awaits payment for thirty days. Having failed to obtain a judgment in the underlying action, the Eastern District held that the claimant lacked standing to seek a judgment – declaratory or otherwise – against U.S. Underwriters Insurance Company and denied the claimant's motion for leave to amend her pleadings to add claims against U.S. Underwriters.

Cirone v. Tower Ins. Co. of N.Y., 2010 WL 3632360 (1st Dep't September 21, 2010) Assignees of insured were estopped from asserting the insured's bad faith claims against the defendant-insurer for its refusal to settle the assignees' personal injury action within its policy limits. As explained by the Appellate Division, First Department, it was of no moment that the assignees had previously brought a declaratory judgment action against the insurer as injured parities, or that that assignees were relying upon their own notice to the insurer as opposed to the notice provided by the insured, the defendant-insurer's late notice defense against its insured was equally applicable against the plaintiff-assignees, since the assignees were suing solely in their capacity as assignees of the insured.

NOTICE

Spentrev Realty Corp. v. United Nat'l Specialty Ins. Co., 2010 WL 2816598, 28 Misc.3d 1211(A) (N.Y. Sup. Kings County, July 19, 2010) New York Insurance law 3420(a)(3) requires insurers to accept notice of claims from injured parties. The reasonableness of an injured party's notice from a late notice perspective is subject to a less rigid standard than that required of insureds. The sufficiency of notice by an injured party is governed not by mere passage of time, but by the means available for such notice. According to the Court, the efforts taken by claimant, four certified letters, an unspecified number of telephone calls to the insured requesting the identity of his insurer, and an Order to Show Cause directing the insured to reveal his insurer, were insufficient to excuse the three-month delay in notifying the insurer. The Court noted that the claimant did not make any attempt to independently ascertain the identity of the insurer. The claimant's pre-suit letter to the insured only requested that the insured notify its insurer. It did not request that the insured provide the identity of its insurer. Although the Court acknowledged that the claimant diligently pursued his underlying personal injury action, he did not satisfy the due diligence requirement for independent notice pursuant to Insurance Law 3420.

St. James Mechanical, Inc. v. Royal & Sun Alliance, 2010 WL 3212037 (E.D.N.Y. August 9, 2010) Under New York law, an insured will be excused for failing to satisfy the notice requirements of an insurance policy where it can show it had a good faith belief in non-liability for an accident. At issue is not whether the insured believes it will ultimately be found liable for an injury, but whether they have a reasonable basis for a belief that no claim will be asserted. In determining the reasonableness of an insured's belief in non-liability, courts commonly look to whether, and to what extent, the insured inquired into the circumstances of the accident and evaluated its potential liability. Specific to the matter before the Eastern District, and as recognized by it, New York law holds that a insured-contractor's belief in non-liability is neither objectively nor subjectively reasonable where it has agreed in a contract to fully indemnify another party for any liabilities incurred on a construction project. As such, the Eastern District held that the plaintiff-insured could not be found to have had a reasonable belief that no claim would be asserted against it where it contracted to perform construction work with the owner of a premises, pursuant to which it contractually agreed to indemnify the owner for claims and losses of any person "directly or indirectly" employed to perform work on the project.

Hermany Farms, Inc. v. Seneca Ins. Co., Inc., 2010 WL 3632456 (1st Dep't September 21, 2010) The Appellate Division, First Department, held that the insured did not have a good faith, reasonable belief in non-liability, as required to excuse the insured from its violation of the timely notice requirement under its insurance policy, where a worker employed by the insured's distributor fell off a platform while on the insured's premises, an employee of the insured knew that the accident occurred and the insured's principal reviewed a workers' compensation claim form that was prepared by the distributor's bookkeeper, stating that the worker had stepped backwards off a platform.

MISCELLANEOUS

The City of New York v. Lexington Ins. Co., 2010 WL 3466611 (S.D.N.Y. August 27, 2010) The City of New York brought an action against Lexington Insurance Company seeking a declaration that Lexington was obligated to reimburse the City, an additional insured under a Commercial General Liability policy issued to the West Indian Carnival Association, for amounts that the City paid in settling a bodily injury claim asserted against a New York City police officer. The City claimed that Lexington was responsible for the settlement amount paid on behalf of the officer because it fell within the scope of the City's coverage under the Lexington policy as "sums [the City] became legally obligated to pay as damages because of 'bodily injury.'" The City alternatively claimed that the officer was an insured under the policy by virtue of his employment. In turn, Lexington contended that the payments made by the City on behalf of the officer fell outside of the scope of coverage as it was not "because of 'bodily injury'" but, rather, paid in fulfillment of a contractual obligation to indemnify the officer, and therefore excluded under the terms of the policy. Lexington further asserted, in the alternative, that the officer failed to give timely notice of the occurrence and the claims in the underlying action. While acknowledging that the Lexington policy excluded coverage for liability assumed in a "contract or agreement", the Southern District held that the City's obligation to indemnify the officer arose under a statutory obligation, specifically, New York General Municipal Law section 50-k(3), and not a written contract of indemnification. Therefore, the amounts paid by the City on behalf of the officer were covered under the Lexington policy, not falling within the contractual liability exclusion. With respect to Lexington's late notice argument, the Southern District held that even if the City's payment on behalf of the officer was not independently covered under the terms of the policy, the notice the City provided sufficiently complied with the policy's requirements.

400 15th Street, LLC v. Promo-Pro, Ltd., 2010 WL 3529466 (N.Y. Sup. Kings County, September 10, 2010) Plaintiff, 400 15th Street, owner of an 18 unit condominium complex in Brooklyn, New York, brought an action against Promo-Pro, Ltd., a contractor hired to perform construction work on the complex, and Colonial Surety Company, seeking to recover on a performance bond issued by Colonial to Promo-Pro for property damage caused to adjacent properties as a result of the construction. The Court held that the plaintiff's losses resulting from the damage to the adjacent properties was not recoverable under Colonial's performance bond, since they were costs associated with third-party property damage claims, not related to the completion of the contract between 400 15th and Promo-Pro. The Court held that the claims should be directed to the defendant's liability insurers and recognized that a surety's performance bond and an insurer's Commercial General Liability policy provide two different scopes of coverage. A performance surety is to be held liable, upon the default of its principal, for the costs of completing a contract or conforming the principal's defective work to the terms of a contract, whereas a Commercial General Liability policy is liable for accidental damage caused by the insured to property owned by third-parties.

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