LB&C

QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

A quarterly newsletter from L'Abbate, Balkan, Colavita & Contini, L.L.P. Volume V · Issue III · Fourth Quarter 2012

CASES OF INTEREST BY TOPIC

NOTICE

Prince Seating Corp. v. QBE Ins. Co., 99 A.D.3d 881, 952 N.Y.S.2d 606 (2d Dept. Oct. 17, 2012). Prince Seating Corp. obtained a Commercial General Liability insurance policy from QBE Insurance Company, which required that notice of an occurrence be given to QBE as soon as practicable. A personal injury action was instituted against Prince Seating and it subsequently sought coverage from QBE. In response, QBE disclaimed coverage on late notice grounds and Prince Seating then instituted a declaratory judgment action. QBE moved for summary judgment and Prince Seating opposed the same by arguing that it provided timely notice to its broker, Century Coverage Corp., pursuant to an agreement whereby Century would notify QBE of such claims. In affirming the trial court's decision, the Second Department found that Prince Seating raised a triable issue of fact with regard to whether its notice to Century was sufficient. Specifically, the Second Department noted that even if Prince Seating timely provided notice to Century, "absent some evidence of an agency relationship [between a broker and an insurer], even timely notice of an accident by an insured to a broker is not effective and does not constitute notice to the insurance company, as a broker is considered to be an agent only of the insured." Nevertheless, because the terminology of the notice provision was deemed ambiguous (on which entity notice is to be provided), the Court agreed that given that ambiguity, there was an issue of fact as to whether the contract should be interpreted to allow notice to the broker.

Albano-Plotkin v. Travelers Ins. Co., 2012 WL 6028873 (2d Dept. Dec. 5, 2012). On August 14, 2008, the infant plaintiff, while riding a bicycle in a Wal-Mart store, allegedly struck and injured Ines Torres. Approximately six months later, Torres commenced an action against the infant plaintiff and his mother, Rita Albano-Plotkin. Albano-Plotkin consulted with an attorney and learned that her Homeowners' insurance policy, which was issued by Travelers Insurance Company, might provide coverage for accidents occurring off the insured premises. After Albano-Plotkin notified Travelers of the accident, Travelers disclaimed coverage on the basis of late notice. Albano-Plotkin then commenced an action against Travelers for a judgment declaring that Travelers was obligated to defend and indemnify her and the infant plaintiff in the underlying action. The Second Department, in reversing the trial court's decision, stated that providing timely notice to an insurer is a condition precedent to recovery and, absent a valid excuse, the failure to satisfy the notice requirement vitiates coverage under the policy. The Court elaborated that in order to establish a valid excuse due to the insured's alleged ignorance of insurance coverage, the insured has the burden of proving "a justifiable lack of knowledge of insurance coverage" and "reasonably diligent efforts to ascertain whether coverage existed" upon receiving information "which would have prompted any person of ordinary prudence to consult either an attorney or an insurance broker." The Court held that while Travelers had established its prima facie entitlement to judgment as a matter of law by demonstrating that Albano-Plotkin had knowledge of the accident, Albano-Plotkin raised a triable issue of fact as to the existence of a reasonable excuse for her delay as she was unaware that the subject Homeowners' policy provided coverage for this type of incident.

TIMELY DISCLAIMER

State Farm Fire & Cas. Co. v. Raabe, 2012 WL 5503857 (2d Dept. Nov. 14, 2012). State Farm Fire and Casualty Company commenced a declaratory judgment action concerning its obligation to defend or indemnify Joseph Alessi in an underlying personal injury action arising from an altercation between Alessi, Sean Raabe, and Anthony Bisignano. The policy issued by State Farm is triggered by an "occurrence" which is defined as "an accident…which results in…bodily injury" and, in turn, the policy excludes coverage for bodily injury "(1) which is either expected or intended by an insured; or (2) which is the result of willful and malicious acts of the insured." Raabe moved for summary judgment contending that State Farm's failure to give written notice of its disclaimer to all interested parties in the underlying action acted as a waiver. State Farm opposed the motion arguing, *inter alia*, that it was not required to provide timely written notice to all interested parties as the acts complained of in the underlying

action were intentional, and thus, not entitled to coverage under the policy. The trial court denied the motion. Upon appeal, the Second Department stated that there is no statutory obligation to provide prompt notice of disclaimer pursuant to Insurance Law § 3420(d) when a claim does not fall within the Insuring Agreement of the policy as an insurer is not required to timely disclaim where no coverage truly exists. In affirming the trial court's decision denying Raabe's motion, the Second Department reasoned that State Farm raised triable issues of fact regarding whether the incident giving rise to the injury fell beyond the coverage terms of the policy.

APPLICABILITY OF EXCLUSIONS

Platek v. Town of Hamburg, 97 A.D.3d 1118, 948 N.Y.S.2d 797 (4th Dept. July 6, 2012). Frederick J. Platek commenced an action alleging that Allstate Indemnity Company breached its Homeowners' insurance policy by failing to provide coverage for water damage to the basement of his home after an abutting water main ruptured, flooding his property. Allstate disclaimed coverage pursuant to an exclusion in the policy denoted as "item 4," which provides that the policy does not cover losses caused by "[w]ater…on or below the surface of the ground, regardless of its source[,]…includ[ing] water…which exerts pressure on, or flows, or seeps or leaks through any part of the residence premises." Platek moved for summary judgment, seeking an Order declaring that the policy applied to his claimed loss, relying on an exception to item 4 which provides coverage for "sudden and accidental direct physical loss caused by fire, explosion or theft resulting from [item 4]." Platek averred that the exception to the exclusion applied because his claimed loss was caused by an "explosion" of the water main. The Fourth Department found that both interpretations of the policy were reasonable, and thus, the exclusion and exception were ambiguous and should be construed in favor of Platek. The Court reasoned that contrary to Allstate's contention, the relevant language of the insurance policy does not specify that the exception applies only to a secondary or ensuing loss or that the explosion must result from a loss to the insured's property caused by conditions set forth in item 4. Rather, the policy states that the exception applies where the loss to the insured's property was "caused by [an] explosion…resulting from [item 4]."

Wilner v. Allstate Ins. Co., 2012 WL 4513155 (2d Dept. Oct. 3, 2012). Allstate Insurance Company issued a Deluxe Plus Homeowners' policy which insured Judith Wilner's residence. During the coverage period, Wilner's property sustained extensive damage when, during a rain storm, a mudslide caused a retaining wall to collapse. Allstate disclaimed coverage for the damage based upon exclusionary language in the insurance policy for losses due to "[e]arth movement of any type, including, but not limited to…landslide, subsidence, mudflow, pressure, sinkhole, erosion, or the sinking, rising, shifting, creeping, expanding, bulging, cracking, settling or contracting of the earth." Wilner subsequently commenced an action against Allstate, *inter alia*, to recover damages for breach of the insurance contract. Allstate moved for summary judgment based on the policy's exclusionary language and Wilner opposed Allstate's arguments on the grounds that the retaining wall was damaged due to excessive rain and water from a clogged drain above the wall. In affirming the trial court's decision granting Allstate's motion, the Second Department stated that Allstate met its initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that the exclusion clearly and unambiguously applied to Wilner's property loss. The Court reasoned that the loss was attributable to landslide and mudflow which was expressly excluded from coverage under the policy.

IBA Molecular North America, Inc. v. St. Paul Fire & Marine Ins. Co., 2012 WL 4461855 (S.D.N.Y. Sept. 27, 2012). In 2001, an employee of Pharmacologic PET, LLC, the predecessor to IBA Molecular North America, was driving a company automobile during a crime spree and, while attempting to evade the police, struck a police officer with the company vehicle. The police officer and his wife sued Pharmacologic and the employee. IBA had coverage under an auto liability insurance policy, but the damages exceeded the limits of the same. As such, IBA commenced a declaratory action against General Star Indemnity Company, which had issued umbrella insurance coverage to Pharmacologic, and St. Paul Fire and Marine Insurance Company, which had issued a Commercial General Liability insurance policy to Pharmacologic for the excess damages. St. Paul moved for summary judgment arguing that the Auto exclusion in the CGL policy barred coverage for the claims. General Star, however, opposed the motion arguing that the exclusion did not apply because the negligent hiring of the employee is a "non-auto" theory of liability. In granting St. Paul's motion, the Southern District of New York stated that "New York's Second Department has held that an automobile exclusion applies to damages paid as a result of an automobile accident that occurred after the insured's negligent hiring resulting in the insured sending an unlicensed and intoxicated taxi driver to pick up a customer."

Bentoria Holdings, Inc. v. Travelers Indem. Co., 2012 WL 5256119 (N.Y. Oct. 25, 2012). Travelers Indemnity Company issued to Bentoria Holdings, Inc. a policy of insurance covering the "direct physical loss of or damage to" a building that it owned at 521 Court Street, Brooklyn, New York. The policy contained an Earth Movement Exclusion which precluded coverage for "[e]arth sinking (other than sinkhole collapse), rising or shifting, including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface…[a]ll whether naturally occurring or due to manmade or other artificial causes." Bentoria's building suffered cracks as a result of an excavation being conducted on an adjacent lot and sought coverage under the policy which Travelers denied, relying on the Earth Movement Exclusion. Bentoria then commenced a breach of contract action against Travelers. The Court of Appeals stated that by expressly precluding earth movement "due to manmade or artificial causes," the policy contradicts the idea that the intentional removal of earth by humans is not an excluded event as argued by Bentoria. In reversing the Order of the Second Department, the Court of Appeals (New York's highest court) held that the policy cannot reasonably be read to cover the damage on which Bentoria's claim was based.

EXCESS COVERAGE

Utica Mut. Ins. Co. v. Government Employees Ins. Co., 98 A.D.3d 502, 949 N.Y.S.2d 182 (2d Dept. Aug. 1, 2012). Utica Mutual Insurance Company commenced an action seeking a declaration that, *inter alia*, the Umbrella Policy it issued was excess to a Personal Umbrella Policy issued by GEICO in connection with an underlying personal injury action. In affirming the trial court's determination that the Umbrella Policy issued by Utica was excess to the one issued by GEICO, the Second Department found that "an insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies." The Second Department reasoned that the GEICO policy states that it is "excess over any insurance," without any reference to contribution, whereas the Utica policy states that it "is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis." Accordingly, since the Utica policy expressly negates contribution and the GEICO policy did not, the Second Department held that the GEICO policy must be exhausted before the Utica policy was implicated.

AUTO COVERAGE

Allstate Ins. Co. v. Reyes, 2012 WL 6171048 (N.Y. Sup. Ct. Dutchess Co. Dec. 10. 2012). Deborah Reyes was injured while waking past a vehicle owned by Michael Kazimer, which was parked in a No Parking zone in front of a gas station/convenience store, when a dog owned by Kazimer reached out of the rear window of the vehicle and bit her. Reyes subsequently forwarded correspondence to her Auto insurer, Allstate Insurance Company, advising it of a potential underinsured motorist claim. In response, Allstate disclaimed coverage on the basis that the claim did not arise out of the ownership, maintenance or use of an underinsured vehicle, but rather was the result of a dog bite. Reyes submitted a Demand for Arbitration and Allstate moved for an Order permanently staying the same. The Court stated that in order to constitute a cause of the injury, the use of the motor vehicle must be "closely related" to the injury, that the injury must result from the intrinsic nature of the motor vehicle and that the use of the automobile must do more than merely contribute to the condition which produced it. Based on the facts that Kazimer was transporting his dog in the vehicle, that was parked in a No Parking zone in front of a store, and that Kazimer permitted the rear window of his vehicle to remain open wide enough to allow the dog to reach out and bite Reyes, the Court found that Kazimer's conduct constituted the "use" of a vehicle as the term is utilized in the policy and denied Allstate's motion to permanently stay the Arbitration.

HOMEOWNERS' COVERAGE

Dean v. Tower Ins. Co. of New York, 2012 WL 5256638 (N.Y. Oct. 25, 2012). The plaintiffs, Douglas and Joanna Dean, entered into a contract to purchase a home in February 2005; the closing was scheduled to take place on March 31, 2005, but was delayed until May 2005. The plaintiffs acquired a Homeowners' insurance policy from the defendant, Tower Insurance Company of New York, effective as of the closing date. The Tower policy provided coverage for "[t]he Dwelling on the 'residence premises' shown in the Declarations." Although, "Residence Premises" was defined as "[t]he one family dwelling where you reside," the term "reside" was not defined by the policy. After the closing, the plaintiffs discovered extensive termite damage to the house and Douglas Dean began the process of repairing the damage. Work on the house progressed over the course of the year following the closing, and the policy was renewed in March 2005. The work was substantially completed when a fire completely destroyed the house. The plaintiffs sought coverage from Tower which denied the same on the grounds that the dwelling did not qualify as a "residence premises" as the plaintiffs were not living there at the time of the loss. The plaintiffs then commenced an action for breach of the insurance contract against Tower and both parties ultimately moved for summary judgment. The trial court and Appellate Division found that the standard for determining residency for the purpose of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain. Douglas Dean claimed that between the date of the closing and the fire he was generally at the property five days a week between 4 p.m. and 10 p.m. He also stated that he would eat at the house every day and had slept there on several occasions. Therefore, the Court of Appeals (New York's highest court) held that there were issues of fact as to whether Douglas' daily presence in the house, coupled with his intent to eventually move in with his family, was sufficient to satisfy the insurance policy's requirements.

Azzatto v. Allstate Ins. Co., 2012 WL 4512907 (2d Dept. Oct. 3, 2012). Raymond Azzato purchased real property located in East Islip that was improved with a residence. Azzato then insured the subject dwelling with a landlord's package insurance policy he procured from Allstate Insurance Company. Azzato commenced this action to recover benefits under the policy after a fire occurred at the dwelling, alleging that Allstate had improperly denied his claim. Allstate moved, *inter alia*, for summary judgment dismissing the Complaint, contending that it had properly denied the claim as Azzato had submitted fraudulent evidence purporting to establish an inflated value of certain appliances that were allegedly located in the dwelling at the time of the fire. Allstate further contended that Azzato's fraud vitiated coverage, since his actions breached the concealment and fraud provision of the policy, which provided, in pertinent part, that Allstate "does not cover you or any other person insured under this policy who has concealed or misrepresented any material fact or circumstance, before or after a loss." The Second Department stated that "a key issue in determining whether a concealment and fraud provision of an insurance policy has been breached is whether the inaccurate proof of loss was created or submitted with 'a willful intent to defraud or to misrepresent the material facts.'" The Second Department found that Allstate established its *prima facie* entitlement to judgment as a matter of law by demonstrating that Azzato had submitted proof, in support of his claim concerning the cost of the appliances allegedly damaged in the fire, with significantly inflated valves.

BUSINESS INTERRUPTION COVERAGE

Rapid Park Industries v. Great Northern Ins. Co., 2012 WL 5458023 (2d Cir. Nov. 9, 2012). Rapid Park Industries and B.E.W. Parking Corporation leased and operated a parking garage in Manhattan. On April 18, 2008, the New York City Department of Buildings issued Rapid Park and B.E.W. a Summons for "failure to maintain" the garage, as well as an Order to Vacate. The garage was subsequently closed and padlocked by the Department of Buildings. On May 6, 2008, Rapid Park and B.E.W. filed a claim with their property insurers, Great Northern Insurance Company and Federal Insurance Company, pursuant to the business interruption coverage in their Business Owners' insurance policies. In turn, Great Northern and Federal denied the claim. Rapid Park and B.E.W. then sued the insurers for, *inter alia*, breach of contract. Great Northern and Federal moved for summary judgment arguing, among other things, that coverage was precluded under the policy exclusion for wear and tear, which provided, in relevant part: "This insurance does not apply to loss or damage caused by or resulting from Wear or Tear or deterioration. This Wear and Tear exclusion does not apply to ensuing loss or damage caused by or resulting from…water." Water was defined to include, in pertinent part: "water that…seeps or leaks through basements, foundations, roofs, walls, floors, ceilings of any building or structure." Rapid Park and B.E.W. opposed the motion

asserting that their loss fell within the exception to the Wear and Tear exclusion as the deterioration of the garage was originally caused by water seeping into the garage. In affirming the ruling of the District Court which granted summary judgment in favor of Great Northern and Federal, the Second Circuit found that the water damage "was not 'ensuing,' in the sense of that it was a separate, subsequent event that occurred due to the deterioration." Instead, the Second Circuit reasoned that the water damage was directly related to the original excluded risk, which New York courts keep distinct from the ensuing loss exception.

MISCELLANEOUS

Hasbani v. Nationwide Mut. Ins. Co., 98 A.D.3d 563, 949 N.Y.S.2d 489 (2d Dept. Aug. 8, 2012). In 2008, Nationwide Mutual Insurance Company issued a personal umbrella policy to Victor Hasbani. The policy provided that it would pay damages in excess of the "retained limit," which was defined as "the total amount of the limit of liability of the Required Underlying Insurance." The policy's declaration page listed several "Required Underlying Insurance Coverages," including an Auto liability policy issued by GEICO, under Policy No. 40819642258. While the Nationwide policy was in effect, Sylvia Safina-Hamadani was involved in an automobile accident while operating a vehicle owned by Hasbani, and a personal injury action was commenced against him. Nationwide denied coverage because the vehicle which was involved in the accident was not covered by GEICO Policy No. 40819642258 but, rather, under a different policy issued by GEICO. Hasbani subsequently commenced a declaratory judgment action seeking coverage from Nationwide. Both Hasbani and Nationwide moved for summary judgment and the trial court granted Hasbani's motion. In reversing the trial court's decision, the Second Department stated that Nationwide met its initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that the GEICO policy under which the subject vehicle was insured was not listed as one of the "Required Underlying Insurance Coverages" in the Nationwide policy, so that the vehicle was not entitled to coverage. The Court reasoned that, contrary to Hasbani's contentions, the provisions of the Nationwide policy were clear and unambiguous, and did not apply to any and all automobile accidents and liabilities, including those outside of the "Required Underlying Insurance Coverages" identified in the policy.

Ural v. Encompass Ins. Co. of America, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. July 5, 2012). On February 10, 2006, a water pipe burst on the second floor of Thomas Ural's home, causing extensive water damage. The home was covered by a Homeowners' insurance policy issued by Encompass Insurance Company of America ("Encompass"). Following the damage, Ural filed a claim with Encompass. However, after a year of attempting to negotiate a settlement, and receiving what he considered inadequate offers and improper mold remediation efforts from Encompass, Ural commenced an action alleging, *inter alia*, that Encompass violated New York General Business Law § 349 as it engaged in deceptive business practices through a general policy of denying, delaying and defending against such claims with respect to him and other similarly situated insureds in order to force him and other insureds into inadequate claim settlements. Encompass moved to dismiss Ural's Complaint for failure to state a cause of action. The Second Department stated that in order to state a cause of action under § 349, the Complaint must allege that the defendant engaged in a deceptive act or practice, that the challenged act or practice was consumer-oriented, and that the plaintiff suffered an injury. In reversing the trial court's decision to grant Encompass' Motion to Dismiss, the Second Department stated that the general practice of inordinately delaying the settlement of insurance claims against insureds constituted a cognizable cause of action to recover damages for unfair practices under General Business Law § 349.

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., or John D. McKenna, Esq.at (516) 294-8844. You may also wish to visit the Firm's website at lbcclaw.com