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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

A quarterly newsletter from L'Abbate, Balkan, Colavita & Contini, L.L.P. Volume VI · Issue III · Third Quarter 2013

CASES OF INTEREST BY TOPIC

ADDITIONAL INSURED COVERAGE

137 Broadway Associates, LLC v. 602 West 137th Deli Corp. d/b/a Nadal One Deli, 40 Misc.3d 1218(A) (Sup. Ct. N.Y. Co. July 26, 2013). 137 Broadway Associates, LLC, the owner of the property at 3379 Broadway in Manhattan, leased its premises to 602 West 137th Deli Corp. d/b/a Nadal One Deli. As part of the lease, Nadal One agreed to name 137 Broadway as an additional insured under its insurance coverage. Nadal One procured insurance from Leading Insurance Group Company, Ltd., but requested that an entity named Cromwell Associates (Nadal's former landlord)—and not 137 Broadway—be included as an additional insured under the policy. 137 Broadway and Nadal One were subsequently sued in connection with a trip and fall accident that occurred in the basement of the premises. 137 Broadway tendered its defense and indemnification to Leading which, in turn, denied coverage on the basis that 137 Broadway was not an additional insured under its policy. 137 Broadway then commenced a declaratory judgment action against Leading seeking a defense and indemnification relative to the underlying action. Thereafter, Leading moved to dismiss the DJ action and 137 Broadway cross-moved for summary judgment. In rendering its decision, the Court noted that "[w]hen the intent to cover a risk is clear and one party innocently, mistakenly, and unilaterally lists a nonentity as the additional insured, New York courts have held that it is appropriate to regard that mistake as a mutual mistake and to honor the intent of the contract rather than uphold the erroneous drafting…." In this regard, the Court stated that the Leading policy expressly covered the risk to the manager and lessor arising from their ownership, maintenance or use of the property and that 137 Broadway was the sole owner, manager, and lessor of the premises. The Court found that the clear intent of the policy was to insure risks associated with ownership of the premises as there was never a time when Cromwell could have benefitted from the policy as it was not affiliated with the premises. Moreover, 137 Broadway offered undisputed evidence that the mistake in naming Cromwell as an additional insured was innocent, based on Nadal One's prior landlord-tenant relationship with it. Accordingly, the Court held that the mistake of including Cromwell as an additional insured should be regarded as mutual, and therefore, 137 Broadway was entitled to additional insured coverage under the Leading policy.

333 Fifth Ave. Assocs., LLC v. Utica First Ins. Co., 107 A.D.3d 568 (1st Dept. June 20, 2013). 333 Fifth Avenue, LLC, the owner of a premises in Manhattan, leased a portion to SPN, Inc. Pursuant to the lease agreement, SPN was obligated to procure insurance coverage naming 333 Fifth Avenue as an additional insured. SPN obtained a Commercial General Liability insurance policy from Utica First Insurance Company; however, the policy did not contain an additional insured endorsement. Subsequently, Manuel Mendieta, an employee of SPN, commenced a lawsuit against 333 Fifth Avenue, among others, relative to injuries he sustained while working for SPN at the premises. Specifically, it was alleged that Mendieta borrowed an elevator key from a fellow tenant to access SPN's storage area in the basement and fell down the elevator shaft upon attempting to enter a cab which was not there. 333 Fifth Avenue then commenced a declaratory judgment action against Utica First, among others, seeking, *inter alia*, a declaration that it was entitled to a defense and indemnification as an additional insured under the Utica First policy. In turn, Utica First moved for summary judgment. In affirming the decision of the lower court, the First Department held that 333 Fifth Avenue was not entitled to additional insured coverage under the Utica First policy as the same did not contain any provisions providing such coverage, and the lease obligation on its own was insufficient to create additional insured coverage.

DUTY TO DEFEND

American Home Assur. Co. v. Port Authority of New York and New Jersey, 2013 WL 4734501 (Sup. Ct. N.Y. Co. Aug. 15, 2013). American Home Assurance Company commenced an action seeking a declaration as to the scope and nature of its rights and obligations under an insurance policy it issued in 1966 to The Port Authority of New York and New Jersey in connection with underlying asbestos claims arising out of the construction of the original World Trade Center. Specifically, American Home sought a declaration that it has no duty to defend or indemnify the Port Authority or its subcontractors as the limits of the policy had been exhausted. In granting the Port Authority's Motion for Partial Summary Judgment, the New York County Supreme Court stated that American Home was unable to point to any provision of its policy which provides for the termination of defense costs upon exhaustion of the liability limit. The Court also noted that although a policy may expressly limit its duty to defend, American Home was not able to show any such limitation and, therefore, the Court could not presume that such a limitation existed.

POLLUTION COVERAGE

Colonial Oil Industries Inc. v. Indian Harbor Ins. Co., 2013 WL 3185430 (2d Cir. June 25, 2013). Colonial Oil Industries, Inc., which is involved the transportation, storage, and sale of fuel oil, received multiple oil deliveries which were unloaded into one of its above ground storage tanks that was already partially full. It was later discovered that the oil which was delivered was contaminated with polychlorinated biphenyl, a pollutant, which resulted in damages to Colonial in the form of lost oil, together with costs of the decontamination and remediation. Colonial sought coverage pursuant to a Pollution and Remediation Legal Liability Policy it procured from Indian Harbor Insurance Company. Specifically, the policy provided coverage for liability "resulting from any POLLUTION CONDITION", which was defined as "[t]he discharge, dispersal, release, seepage, migration or escape of POLLUTANTS into or upon land, or structures thereupon, the atmosphere, or any watercourse or body of water…." Following Indian Harbor's disclaimer of coverage, Colonial commenced a breach of contract action and both parties filed Cross-Motions for Judgment on the Pleadings. In rendering its decision, the Second Circuit noted that under New York law, insurance policies are read "in light of common speech and the reasonable expectations of a business person" and that when construing terms in the context of pollution exclusions, courts favor a commonsense, rather than literal approach. The Court then stated that the "reasonable expectations of a business person" in viewing the policy language would be that it is intended to provide coverage for environmental harm resulting from the disposal or containment of hazardous waste. The Second Circuit found that Colonial's damages did not fall within those parameters as they resulted from the unwitting introduction and transfer of polluted oil into the storage tanks. Accordingly, the Second Circuit concluded that the events giving rise to the action did not create a "pollution condition" and, therefore, the damages claimed did not implicate coverage under the Indian Harbor policy.

LATE NOTICE

Illinois Nat. Ins. Co. v. Zurich American Ins. Co., 107 A.D.3d 608 (1st Dept. June 27, 2013). Schiavone Construction Company, Inc./Granite Harbor Construction Company Inc. retained Hayward Baker, Inc. as a subcontractor for a construction project in Manhattan. Pursuant to the terms of the construction agreement, Hayward procured an insurance policy from Zurich American Insurance Company which named Schiavone as an additional insured. Robert Boyd, an employee of Hayward, was injured when a drilling rig fell on him while he was working at the construction site. Boyd then commenced a personal injury action against Schiavone, notice of which was first received on March 29, 2007 via a letter from counsel. Schiavone subsequently notified its insurer, Illinois National Insurance Company, which undertook an investigation of the claim. On June 29, 2007, Illinois National requested that Zurich defend and indemnify Schiavone as an additional insured relative to Boyd's lawsuit. In turn, Zurich denied coverage on the grounds of late notice. Illinois National then commenced a declaratory judgment action against Zurich and both parties subsequently moved for summary judgment. In affirming the ruling of the trial court, the First Department held that Zurich was required to defend and indemnify Schiavone. In this regard, the Court noted that the three-month delay in notifying Zurich of Boyd's claim was excusable given that Schiavone and Illinois National needed to investigate the claim to determine basic facts, such as where the claim occurred, the nature of the injury, and the insurer responsible for covering the claim.

APPLICABILITY OF EXCLUSIONS

120 Greenwich Development Assocs., L.L.C. v. Admiral Indem. Co. & TIG Ins. Co., 1:08-cv-06491-LAP (S.D.N.Y. Sept. 25, 2013). 120 Greenwich Development Associates, L.L.C. commenced a declaratory judgment action against its general liability insurer, Admiral Indemnity Company, among others, alleging breach of contract and seeking a declaration that Admiral owed 120 Greenwich a defense and indemnification relative to lawsuits arising out of injuries suffered by various individuals in the wake of the September 11, 2001 terrorist attacks. Specifically, the plaintiffs in the underlying actions allege that they suffered injuries related to their exposure to known and unknown toxic substances as a result of 120 Greenwich's failure to warn the underlying plaintiffs of the hazardous conditions at the premises or to provide them with proper protective and decontamination equipment. Admiral disclaimed coverage relative to the underlying actions pursuant to the policy's Pollution Exclusion, which precluded coverage for: "'[b]odily injury'…arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'". After the institution of the declaratory judgment action, 120 Greenwich moved for judgment on the pleadings and Admiral cross-moved asserting that because the claims in the underlying actions involved exposure to hazardous chemicals, they fall within the Pollution Exclusion and, as such, are not covered. The United States District Court for the Southern District of New York first noted that the underlying actions centered around allegations that the plaintiffs suffered various injuries related to exposure to toxic substances as a result of 120 Greenwich's failure to warn of the hazardous conditions and to provide proper protective and decontamination equipment. The Court stated that as the underlying actions sound in, among other things, New York Labor Law violations and negligence, the claims arguably trigger Admiral's duty to defend pursuant to the policy. As such, it was held that Admiral failed to carry its burden of establishing that all of the underlying claims were excluded under the Pollution Exclusion, and accordingly, Admiral had a duty to defend 120 Greenwich relative to the underlying actions.

Emerson Enterprises, LLC v. Hartford Accident & Indem. Co., 2013 WL 4753564 (2d Cir. Sept. 5, 2013). Emerson Enterprises, LLC, the owner of a parcel of land in Monroe County, New York, had leased its premises for industrial purposes to Clark Witbeck, Inc. from the early 1960s until 1992. Clark Witbeck's business involved distributing industrial tools and supplies, including liquid cutting and cooling fluids which contained polychlorinated biphenyls ("PCBs") and petroleum distillates. On October 27, 2000, well after Clark Witbeck had vacated the premises, a subsequent tenant was clearing brush behind the building when it discovered a dry well which contained a black, oily substance. Subsequent testing indicated that the material in the dry well contained PCBs, volatile and semi-volatile organic compounds, acetone, and petroleum. Upon being notified of the contamination, the New York Department of Environmental Conservation listed the property on the state's Registry of Inactive Hazardous Waste Disposal Sites, and arranged for the dry well to be removed in January 2002. The NYDEC then instituted proceedings against Emerson in connection with cleanup of the site. In response, Emerson commenced an action seeking, *inter alia*, a declaration that various insurance companies, which had allegedly issued general liability insurance policies to Clark Witbeck, were required to defend and indemnify Emerson relative to the proceedings brought by the NYDEC. The insurers moved for summary judgment asserting that the pollution exclusions contained within their respective policies precluded coverage in connection with the NYDEC's claim. In appealing the ruling of the United States District Court for the Western District for New York, Emerson argued that the subject claims were entitled to coverage pursuant to the "sudden and accidental" exception to the Pollution Exclusions. In that regard, although Emerson conceded that Clark Witbeck intentionally dumped the pollutants into the well, it argued that any overflow due to rainwater was unintended, unforeseen, and therefore "accidental". In affirming the decision of the Western District, the Second Circuit stated that New York courts which have construed this type of Pollution Exclusion have held that the unintended consequences of intentional discharges are not accidental. Accordingly, as the conduct resulting in the pollution was intentional, and only its consequences were unintentional, the Court held that any overflow was not accidental, and the Pollution Exclusions applied.

Harleysville Ins. Co. of New York v. Potamianos Properties, LLC, 108 A.D.3d 1110 (4th Dept. July 5, 2013). Potamianos Properties, LLC procured an insurance policy from Harleysville Insurance Company of New York to cover a commercial building in Syracuse. The Harleysville policy contained a Water Exclusion Endorsement which precluded coverage for damage caused by "[m]udslide or mudflow," as well as "[w]ater under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces; [or] [b]asements, whether paved or not." The endorsement applied "regardless of whether [the loss] is caused by an act of nature or is

otherwise caused." While the policy was in effect, Potamianos' building sustained damage when an underground water supply line ruptured. The water pressure resulting from the rupture, in combination with the soil adjacent to the structure being washed away, caused a large section of the building's concrete block foundation wall to collapse, thereby permitting water, mud, and debris to flow into and fill the building's basement. Potamianos subsequently provided notice to Harleysville which conducted an investigation and denied coverage for the loss. Thereafter, Harleysville commenced a declaratory judgment action and moved for summary judgment seeking a declaration that Potamianos was not entitled to coverage for the loss. In affirming the ruling of the lower court, the Fourth Department found that as the loss arose when the water from "under the ground" pressed on and flowed through the building's foundation walls into the basement, coverage for Potamianos under the Harleysville policy was precluded.

Soho Plaza Corp. v. Birnbaum, 2013 WL 3336719 (2d Dept. July 3, 2013). Jason and Christy Birnbaum contracted with Diamond Era Construction, Inc. to renovate a cooperative apartment in a building owned by Soho Plaza Corp. and managed by Dermer Management, Inc. Diamond procured a Contractors' Special Insurance policy from Utica First Insurance Company which named the Birnbaums, Soho, and Dermer as additional insureds. Henry Nolasco, an employee of Diamond, was allegedly injured while working at the Birnbaums' apartment and thereafter commenced a personal injury action against Soho and Dermer. The Birnbaums were subsequently named as third-party defendants. Soho, Dermer, and the Birnbaums then tendered requests for the defense of the main and third-party actions, respectively, to Utica First. Utica First, however, disclaimed coverage on, among other grounds, that the policy contained an exclusion for "bodily injury to any employee of any insured [i]f such claim…arises out of and in the course of his or her employment." Soho and Dermer then commenced a declaratory judgment action seeking, *inter alia*, a declaration that Utica First was obligated to defend and indemnify them relative to the underlying action. Utica First moved for summary judgment arguing that the employee exclusion clause precluded coverage relative to the underlying action. In affirming the decision of the trial court, the Second Department found that the plain meaning of the subject exclusion unambiguously excluded coverage for damage arising out of bodily injury sustained by an employee of any insured in the course of his or her employment. The Court noted that, contrary to the assertions of Soho and Dermer, the fact that the Additional Insured Endorsement to the Utica First policy contained specific exclusions did not eliminate the applicability of the exclusions contained in the main section of the policy. The Court reasoned that in construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement. As such, the Second Department found that Soho and Dermer were not entitled to coverage under the Utica First policy in connection with the underlying action.

AUTO

Allstate Ins. Co. v. Reyes, 2013 WL 4007514 (2d Dept. Aug. 7, 2013). Deborah Reyes was injured while walking 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 then commenced an action against Kazimer, which GEICO, the insurer of Kazimer's vehicle, later settled for the limits of its policy. Reyes then sought to recover under the supplementary uninsured/underinsured motorists endorsement contained in an auto insurance policy she procured from Allstate Insurance Company. 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. In reversing the decision of the trial court, the Second Department stated that to satisfy the requirement that an alleged accident arose out of the "ownership, maintenance or use of" a motor vehicle, the same must have arisen out of the inherent nature of the automobile and further that the automobile must not merely contribute to the condition which produces the injury, but must produce the injury in and of itself. In that regard, the Court held that Reyes' injuries did not result from the inherent nature of Kazimer's vehicle nor did the vehicle itself produce the injuries. Instead, the injuries were caused by Kazimer's dog and the vehicle merely contributed to the condition which produced the injury—namely the location. As such, the Second Department determined that the request for an Order permanently staying the arbitration should have been granted.

MISCELLANEOUS

Quaker Hills, LLC v. Pacific Indem. Co., 2013 WL 4558688 (2d Cir. Aug. 29, 2013). Quaker Hills, LLC procured a fire insurance policy from Pacific Indemnity Company which provided $14,388,000 of coverage on a custom-built home. The policy, however, included a thirty-eight percent apportionment-of-loss clause, which provided, in relevant part, that in the event of a covered loss, Pacific Indemnity would "pay 38% of the amount of the covered loss remaining after the application of the base or special deductible....The remaining 62% of a covered loss…is the amount apportioned to you." The apportionment-of-loss clause was reportedly included in the policy to reduce Quaker Hills' premium from approximately $50,000 to $20,000. The policy also contained "Extended Replacement Cost" coverage, pursuant to which Pacific Indemnity would pay all reconstruction costs "even if this amount is greater than the amount of coverage for your house shown in your Coverage Summary." However, coverage under the Extended Replacement Cost provision was limited to the amount shown in the Coverage Summary "[i]f [Quaker Hills] cannot repair, replace or rebuild [the] house because your primary mortgage or its assignees has recalled your mortgage…." While the Pacific Indemnity policy was in effect, the insured house was destroyed in a fire. Quaker Hills subsequently submitted a claim to Pacific Indemnity seeking more than $26.5 million in losses and extended replacement costs. Pacific refused to pay extended replacement costs or more than thirty-eight percent of the $14,388,000 stated loss coverage. Thereafter, Bank of America, which held the mortgage to the insured property, commenced a foreclosure action with respect to the home. Quaker Hills then instituted an action against Pacific Indemnity alleging that Pacific Indemnity breached its insurance contract by refusing to pay the full stated amount of the loss coverage (*i.e.*, $14,388,000) and the replacement costs. Quaker Hills moved for summary judgment asserting, *inter alia*, that the apportionment-of-loss clause is unenforceable in New York State as it does not conform to the minimum requirements imposed by New York law as reflected in the State's Standard Fire Insurance Policy. In opposition, Pacific Indemnity argued that apportionment-of-loss clauses are analogous to enforceable co-insurance clauses and that, in any event, Quaker Hills had insisted on the inclusion of the clause in order to reduce the policy premium. Pacific Indemnity further argued that Quaker Hills was not entitled to replacement costs as it had not been able to rebuild the house because its mortgage on the property had been recalled. The Second Circuit upheld the Southern District's dismissal of Quaker Hills claim for extended coverage reasoning that the bank's commencement of the foreclosure constituted a "recall" of the mortgage within the meaning of the policy, which, under the terms of the subject insurance policy, relieved Pacific Indemnity of the obligation to pay such costs. However, in regard to the apportionment-of-loss clause, the Second Circuit certified the following questions to the New York Court of Appeals: (1) In an insurance policy that provides a stated dollar amount of loss coverage in the event of a fire, does a policy clause that, in exchange for a reduction in the premium charged, limits the insurer's liability to a percentage of any loss violate New York Insurance Law?; (1)(a) If such a clause violates New York Insurance Law, is the clause void, or is it voidable or subject to principles of waiver or estoppel?; (2) If such a clause is in general permissible under New York Insurance Law, is it enforceable where there has been a total loss of the subject property?; (3) If such a clause is in general permissible under New York Insurance Law, is there a limit on the percentage of liability that can be apportioned to the insured? A decision is awaited.

Mon Chong Loong Trading Corp. v. Travelers Excess & Surplus Lines Company, 2013 WL 3326662 (S.D.N.Y. June 27, 2013). Travelers Excess & Surplus Lines Company issued an All Risks insurance policy to Mon Chong Loon Trading Corp. ("MCL"), which covered losses incurred between May 11, 2011 to May 11, 2012. Numerous other related corporate entities were also included as Named Insureds to the Travelers policy. The policy contained a "Concealment, Misrepresentation or Fraud" provision, which provides, in relevant part: "This policy is void in any case of fraud by the Insured as it relates to this policy at any time. It is also void if the Insured or any other person or entity insured under this policy, at any time, intentionally conceals or misrepresents a material fact concerning: (1) This policy; (2) The Covered Property; (3) The Insured's interest in the Covered Property; or (4) A claim under this policy." As a result of Hurricane Irene, which struck the eastern seaboard in August 2011, four of the covered properties under the policy sustained damage. Soon thereafter, the affected entities filed Proofs of Loss with Travelers. Over the course of the next six months a number of misfortunes befell another Covered Property located in Pennsylvania, and the insured again submitted Proofs of Loss for the same. On August 10, 2012, Travelers wrote to the insured to inform it that all of the insurance claims submitted under the policy were void due to the alleged concealment, misrepresentation, and fraud with respect to, *inter alia*, damages sustained by one of the Covered Properties in Hurricane Irene. MCL then commenced an action against Travelers for breach of contract. Travelers subsequently moved for summary judgment on its affirmative defense that the insured's alleged violation of

the Fraud Provision voided the policy as to all Named Insureds and Covered Properties. In interpreting the subject Fraud Provision, the United States District Court for the Southern District of New York stated that the clause was clear and unambiguous and admits of only one meaning: that "[i]f any Insured commits fraud of the sort specified in the [p]olicy, it is void in its *entirety* and thus '[o]f no legal effect' as to *all* Insureds and *all* claims" (emphasis in original). In rendering its decision, the Court relied on the Eighth Circuit's decision in *McCullough v. State Farm Fire & Cas. Co.*, 80 F.3d 269 (8th Cir. 1996) which held, in interpreting a similar provision "that the entire policy would be immediately void if [the insured] committed fraud against [the insurer]." Accordingly, the District Court held that if the insured did, in fact, commit fraud under the policy, that Travelers could void the policy in its entirety.

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