QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

a quarterly report provided by

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CASES OF INTEREST BY TOPIC

By Richard P. Byrne
John D. McKenna

ADDITIONAL INSURED COVERAGE

Wilson Central School District v. Utica Mut. Ins. Co., 123 A.D.3d 920 (2d Dept. Dec. 17, 2014). Wilson Central School District commenced an action against Utica Mutual Insurance Company seeking a declaration that it was entitled to a defense by Utica as an additional insured under a commercial package policy issued to School Bus Service, Inc. relative to three underlying personal injury actions. The underlying actions arose out of assault and abuse incidents that allegedly occurred while District students were being transported to and from school baseball games. The plaintiffs in the underlying actions alleged that the baseball coaches, District employees who were present on the bus, failed to properly supervise the students and that the District failed to respond to multiple prior complaints of similar incidents. The Utica policy contained an additional insured endorsement which provided coverage, but only "[t]o the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured; or…[w]ith respect to property owned or used by, or rented or leased to, you." After Utica refused the District's tender on the ground that the events at issue did not arise out of School Bus Service's "ongoing operations", the District commenced its action and moved for summary judgment asserting that School Bus Service was responsible, at least in part, for the supervision of the students it transported, thereby implicating additional insured coverage. In rendering its decision, the Second Department stated that the language of the subject additional insured endorsement was unambiguous and clearly only covered the District's vicarious liability for the acts of School Bus Service. The Court reasoned that the underlying Complaints sought to hold the District liable only for its own independent acts and omissions and it was noted that School Bus Service was not referred to in any of the underlying Complaints. As such, the Second Department held that additional insured coverage under the Utica policy had not been triggered for the District as the claims did not arise out of School Bus Service's ongoing operations.

Frank v. Continental Cas. Co., 123 A.D.878, 999 N.Y.S.2d 836 (2d Dept. Dec. 17, 2014). White Plains Sportswear Corp., which procured a Commercial General Liability insurance policy from Continental Casualty Company, leased premises from Murray L. Frank. The Continental policy provided additional insured coverage for liability arising out of the ownership, maintenance, or the use of the leased premises. White Plains Sportswear, in turn, subleased

the property to another entity. On August 25, 2008, Gloria Colon allegedly slipped and fell due to a defective condition on the sidewalk outside of the premises and she commenced a lawsuit against Frank. After Continental refused to provide a defense in connection with Colon's personal injury action, Frank commenced a separate lawsuit against Continental, among others, seeking a declaration that Continental was obligated to defend and indemnify him as an additional insured. The Second Department noted that an insurer's duty to defend is triggered whenever the claims asserted give rise to a reasonable possibility of coverage and found that Frank's potential liability arose out of the ownership, maintenance, or use of the premises leased to White Plains Sportswear. Moreover, the Court found that Colon's claim arose out of the maintenance or use of the leased premises, as the sidewalk was necessarily used for access in and out of the leased building. Accordingly, the Second Department found that additional insured coverage for Frank under the Continental policy had been implicated.

LATE NOTICE

Mt. Hawley Ins. Co. v. Abraham Little Neck Dev. Grp., Inc., 2015 WL 867010 (E.D.N.Y. Feb. 27, 2015). In September 2008, Gilberto Diaz was injured while working as an employee of a subcontractor of Abraham Little Neck Development Group, Inc. Abraham was insured under a Commercial General Liability insurance policy issued by Mt. Hawley Insurance Company, which required Abraham to provide Mt. Hawley with notice "as soon as practicable of an 'occurrence' or an offense which may result in a claim." In November 2008, Diaz' attorney, Scott Zlotolow, notified Abraham in writing that Diaz had been injured at its construction site and requested that it forward the letter to its insurance carrier. Thereafter, Diaz' counsel followed up with Abraham as to the identity of its insurer to no avail. Diaz subsequently commended an action against Abraham and when Abraham defaulted, Zlotolow retained an investigator to uncover the insurance information. Five months later, the investigator called Abraham to see if it had answered the Complaint. Abraham claimed that this was the first time it was made aware of Diaz's suit. Abraham immediately notified its insurance broker who, in turn, notified Mt. Hawley. Mt. Hawley disclaimed coverage due to Abraham's non-compliance with the notice provision. Mt. Hawley then commenced an action seeking a declaration regarding the coverage owed under its policy in connection with Diaz suit. The United States District Court for the Eastern District of New York noted that while an injured party will not be charged vicariously with the insured's delay in notifying its insurer, when an injured person seeks to exercise his or her independent right to give notice to an insurer, he or she has the burden of proving that he or she acted diligently in attempting to ascertain the identity of the insurer and, thereafter, expeditiously notifying that insurer. The Court held that Diaz' efforts in attempting to ascertain the identity of Mt. Hawley were diligent. In this regard, the Court noted that while the letters alone were insufficient, Diaz' counsel also placed a number of calls to Abraham in order to ascertain the identity of Mt. Hawley as its insurance carrier. However, the Court stated that even when an injured party has acted diligently in ascertaining the identity of the insurer, the injured party must then expeditiously notify that insurer. In that regard, Diaz contended that two days after he learned of Mt. Hawley's identity from its declination, his counsel contacted the company by virtue of a recorded phone message left for the claims examiner for Mt. Hawley and later spoke with the claims examiner. The Court opined that while there was no dispute that Mt. Hawley knew of the occurrence and suit by the time Diaz' counsel spoke with the claims examiner, the plain language of the Insurance Law requires that the notice by the insured or the injured party be written. Accordingly, the Court held that although the notice requirement for an injured party is less rigid than that of the insured, neither the phone message nor the phone call to Mt. Hawley provided sufficient notice. As such, notice by Diaz' counsel was deemed insufficient.

POLLUTION EXCLUSION

Bayswater Development LLC v. Admiral Ins. Co., 2015 WL 1058437 (1st Dept. Mar. 12, 2015). Bayswater Development LLC and related entities sought coverage from its Commercial General Liability insurer, Admiral Insurance Company, and its excess liability insurer, American Empire Surplus Lines Insurance Company, in connection with claims arising out of damage purportedly caused by the use of drywall manufactured in China at various residences located in Florida. Both Admiral and American Empire raised the potential applicability of their policies' Pollution Exclusions to the Bayswater entities. The Bayswater entities thereafter commenced a declaratory judgment action against Admiral and American Empire. The First Department found that as the insured homes, the alleged damages, the resulting claims, and the pending litigation were Florida-based, Florida had a more significant relationship to the Bayswater entities' action than did New York. The Court then found that, under Florida law, neither the Admiral nor American Empire policies provided coverage for the Chinese drywall lawsuits, as Courts in Florida have consistently held that pollution exclusions such as those contained in the Admiral and American Empire policies preclude coverage for such claims. Accordingly, the Court held that neither Admiral nor American Empire was required to defend or indemnify the Bayswater entities in connection with the Chinese Drywall claims.

Broome County v. Travelers Indem. Co., 125 A.D.3d 1241 (3d Dept. Feb. 26, 2015). Travelers Indemnity Company issued an insurance policy which provided coverage for, among other things, a building in a government complex owned by the insureds. During the construction on a parking garage underneath the building, construction work caused silica dust to migrate up an elevator shaft and disperse into all of the floors in the building. Travelers disclaimed coverage and the insureds commenced an action seeking a declaration that the property damage resulting from the spread of the silica dust was a loss covered under the policy. Travelers moved for summary judgment on, *inter alia*, the ground that the policy's pollution exclusion precluded coverage and the insureds cross-moved. The pollution exclusion barred coverage for the "[d]ischarge, dispersal, seepage, migration, release or escape of 'pollutants'" and "pollutants" was defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste and any unhealthy or hazardous building materials (including but not limited to asbestos and lead products or materials containing lead)." The Third Department held that Travelers was entitled to summary judgment as the language of the pollution exclusion clearly precluded coverage for the damages claimed. In this regard, the Court stated that the record contained unrebutted evidence that silica dust can cause lung disease and respiratory problems, placing such dust within the policy definition of a pollutant as "unhealthy or hazardous building material[ ]", as well as a "solid…irritant or contaminant". The Third Department opined that the insureds' reliance on *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003), wherein the Court of Appeals relied on the fact that the terms describing the method of pollution – namely, discharge and dispersal – were "terms of art in environmental law" and referred to damage "caused by disposal or containment of hazardous waste", was unpersuasive. The Third Department reasoned that if the words "[d]ischarge, dispersal, seepage, migration, release or escape" are read as not encompassing short migratory events where the relevant contaminant remains on the insured's property and does damage to it, then the exclusion has no significance at all, especially to the portion of the definition of pollutants (not found in the *Belt Painting* exclusion) addressing "building materials" including asbestos and lead paint. Accordingly, the Court held that the only reasonable reading of the Travelers pollution exclusion precluded coverage for the claimed loss.

APPLICABILITY OF EXCLUSIONS

City of New York v. Western Heritage Ins. Co., 2015 WL 1003407 (E.D.N.Y. Mar. 6, 2015). In May 2010, John Battocchio was driving on the Hutchinson River Parkway in the Bronx when his vehicle collided with the rear of a dump truck owned by Dragonetti Brothers Landscaping Nursery and Tree Care, Inc. and being driven by Scott V. Paolino. Bottocchio died as a result of the accident, and his Estate subsequently commenced an action against Dragonetti and Paolino (collectively referred to as the "Insureds"). Prior to the incident, Western Heritage Insurance Company issued a Commercial General Liability insurance policy to Dragonetti. The policy contained an auto exclusion which precluded coverage for "[b]odily injury…arising out of the ownership, maintenance, use or entrustment to others of any…'auto'…owned or operated by or rented or loaned to any insured…. The exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the 'occurrence' which caused the 'bodily injury'…involved the ownership, maintenance, use or entrustment to others of any… 'auto'…that is owned or operated by or rented or loaned to any insured." In July 2010, Western Heritage was put on notice of the occurrence and, in August 2010, it disclaimed coverage pursuant to the auto exclusion. The Insureds subsequently commenced an action against Western Heritage seeking a declaration that they were entitled to coverage for the claim. Following the completion of discovery, Western Heritage moved for summary judgment on the ground that the auto exclusion unambiguously barred coverage relative to the underlying action and the Insureds cross-moved asserting that the exclusion did not apply or, at a minimum, was ambiguous. The United States District Court for the Eastern District of New York found that the first sentence of the exclusion was unambiguous, consistent with other Courts that have concluded that similar automobile exclusions are "clear and unambiguous and allow[ ] no opportunity for construction as a question of fact." The Court found that the first sentence of the exclusion plainly precluded coverage for the underlying action as Bottochio's Estate alleged bodily injury to Bottochio arising out of Paolino's operation of a dump truck. The parties also disputed the effect of the second sentence of the exclusion. Specifically, Western Heritage argued that the provision confirmed the scope of the first sentence of the exclusion: the exclusion applied even if the claim pled is one of negligent hiring or supervision. The Insureds, however, argued that because that paragraph lists "finite types of claims" that are excluded, it narrows the scope of the exclusion only to those claims expressly referenced and, therefore, would not apply to the allegations in the underlying action. The Court disagreed with the Insureds' interpretation of the language and stated that it unambiguously clarifies the breadth of the exclusion, and does not limit it. In this regard, the Court reasoned the meaning of the phrase "even if", to mean "despite the possibility that" or "no matter whether" and, accordingly, the second sentence provided that the exclusion applied regardless of the theory of negligence alleged. As such, the Eastern District held that the exclusion, as a whole, unambiguously precluded coverage in connection with the underlying accident. The Court did not, however, grant Western Heritage's Motion for Summary Judgment as it found an issue of fact as to whether its declination was timely.

Uvino v. Harleysville Worcester Ins. Co., 2015 WL 925940 (S.D.N.Y. Mar. 4, 2015). J. Barrows, Inc. ("JBI") was insured under a Commercial General Liability insurance policy issued by Harleysville Worcester Insurance Company, which contained work product exclusions that precluded recovery for damage to the insured's own work and for damage directly caused by the insured's defective work. Joseph and Wendy Uvino retained JBI to help with the construction of their home on Long Island. JBI and the Uvinos entered into an agreement whereby JBI would act as "Construction Manager" for the development of the Uvino's home. The Uvinos explicitly remained as the project's "General Contractor" and agreed to hold JBI harmless. Thereafter, the Uvinos fired JBI, claiming that it did material damage to their home by attempting to alter or fix the work of other contractors. JBI then sued the Uvinos to recover outstanding monies allegedly owed and the Uvinos counterclaimed and commenced a separate action against JBI. Harleysville agreed to defend JBI under a reservation of rights. The Uvinos'

case proceeded to trial and a jury found JBI liable for damage to the home and awarded them general damages, consequential damages, and damages for the breach of JBI's fiduciary duty. Shortly thereafter, Harleysville disclaimed coverage to JBI for the award. The Uvinos subsequently initiated a declaratory judgment action seeking a determination that Harleysville must indemnify JBI for the underlying judgment. The Uvinos moved for partial summary judgment and Harleysville cross-moved. Harleysville argued that JBI fulfilled a role functionally equivalent of a general contractor because the scope of its work as a construction manager consisted of reviewing and devising plans for all aspects of the project. As such, it contended that the entire project should be deemed JBI's work product with the damages excluded under the Harleysville policy. The United States District Court for the Southern District of New York, however, disagreed with Harleysville's interpretation of the agreement, finding that the language and limits of the contract made it clear that JBI did not take on the role of general contractor. In this regard, it was specifically stated that the Uvinos would act as the project's general contractor and that the Uvinos would indemnify JBI from any responsibility as the general contractor. As the Court found that JBI did not act as the general contractor, it noted that some of the damages alleged may fall within the scope of coverage under the Harleysville policy. As such, the Court directed the Uvinos to proceed with an allocation proceeding as to the extent of the covered damages.

Platek v. Town of Hamburg, 2015 WL 685726 (Ct. of App. Feb. 19, 2015). On September 7, 2010, a subsurface water main abutting the property of the Plateks ruptured, causing water to flood into and severely damage their home's finished basement. The Plateks immediately made a claim under their homeowners' insurance policy, which was issued by Allstate Indemnity Company. On September 9, 2010, Allstate disclaimed coverage based upon an exclusion which precluded coverage for property damage caused by water. Specifically, the policy provided that Allstate does "not cover loss to the property…consisting of or caused by….[w]ater…on or below the surface of the ground, regardless of its source[, including] water…which exerts pressure on, or flows, seeps or leaks through any part of the residence premises." However, the exclusion contained an exception for certain sudden and accidental direct physical loss, including explosion. The Plateks then commenced an action against Allstate and moved for summary judgment seeking, *inter alia*, a declaration that the policy covered their loss. The Plateks asserted that because they had "sustained water intrusion loss" caused by "an explosion of the…water main," their claim was entitled to coverage as it falls within the exception to the water loss exclusion. The Court of Appeals noted that as the loss occurred when water from a burst main flowed on to the Plateks' property, the loss clearly fell within the water loss exclusion. With regard to the applicability of the exception, the Court stated that the same was properly characterized as an ensuing loss provision, which provides coverage when a covered peril arises and causes damage as a result of an excluded peril. The Court indicated that the historical origins and purpose of an ensuing loss provision dictate that the provision "at least requires a new loss to property that is of a kind not excluded by the policy…[it does not] resurrect coverage for an excluded peril". In finding that the loss did not fall within the purview of the exception, the Court stated that the Plateks' expert opined that the loss was caused due to "highly pressured water" that exerted internal water pressure on the walls of a pipe buried of the Plateks' property – not, as the Plateks contended in their claim for coverage, by an explosion resulting from subsurface water "exert[ing] pressure on…any part of the residence premises".

PERSONAL AND ADVERTISING INJURY

General Star Indem. Co. v. Driven Sports, Inc., 2015 WL 307017 (E.D.N.Y. Jan. 23, 2015). General Star Indemnity Company issued a Commercial Lines policy to Driven Sports, Inc., the seller of a pre-workout energy supplement. The policy covered, *inter alia*, liability Driven incurred because of personal and advertising injury, but, pursuant to a Failure to Conform Exclusion, precluded coverage for "'[p]ersonal and advertising injury' arising out of the failure of goods, products or services to conform with any statement of quality of

performance made in your 'advertisement'". In December 2013, Driven was sued in three separate actions alleging that its supplement contains an illegal and potentially dangerous methamphetamine analog. Driven sought coverage under the Gen Star policy. Gen Star agreed to provide a defense to Driven in all three of the underlying actions, subject to a reservation of rights, including the right to recoup any amounts paid in the defense of the actions, if it were determined that the policy did not require coverage. The policy did not, however, address whether Gen Star could seek recoupment. Instead, it simply stated that Gen Star "will pay, with respect to any claim we investigate or settle or any 'suit' against any insured we defend:…[a]ll expenses we incur." Thereafter, Gen Star filed an action seeking a declaration that it had no duty to defend or indemnify Driven in connection with the underlying actions. The United States District Court for the Eastern District of New York found that the underlying lawsuits against Driven were excluded from coverage pursuant to the policy's Failure to Conform Exclusion. In this regard, the Court reasoned that the underlying lawsuits alleged that Driven's advertisements (i) made a statement of quality about the supplement, namely, that it contained only natural ingredients, and (ii) the supplement failed to conform with those statements, because it actually contained an illegal and potentially dangerous methamphetamine analog. As such, the Court concluded that the injuries claimed "arose out of" the supplement's failure to conform with the statements of Driven, and thus fell squarely within the Failure to Conform Exclusion. The Court declined to award recoupment as a remedy, stating that the New York Court of Appeals would find recoupment to be inappropriate under the circumstances.

MISCELLANEOUS

Spandex House, Inc. v. Travelers Property Cas. Co. of America, Inc., 2015 WL 509678 (S.D.N.Y. Feb. 6, 2015). After Spandex House, Inc. was sued in connection with a third-party action, it provided timely notice and tendered its defense and indemnification to its Commercial General Liability insurer, Travelers Property Casualty Company of America, Inc. Travelers disclaimed coverage and Spandex House commenced an action against Travelers for breach of contract, breach of the implied duty of good faith and fair dealing, and sought a declaratory judgment that Travelers had a duty to defend it in connection with the third-party action. Travelers moved to dismiss Spandex House's claim for breach of the implied duty of good faith and fair dealing on the basis that it was wholly duplicative of the breach of contract claim and, therefore, not legally cognizable under New York law. Spandex House opposed the motion arguing that such claim is cognizable and that an insured is "at least entitled to try to prove bad faith in such circumstances." In rejecting Spandex House's argument, the United States District Court for the Southern District of New York stated that New York law does not provide an independent claim for breach of the implied covenant of good faith and fair dealing. In this regard, the Court noted that breach of the duty of good faith and fair dealing "is merely a breach of the underlying contract, and a claim for breach of the implied covenant will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of covenant of an express provision of an underlying contract." The Court further stated that a claim for breach of the duty of good faith "can only survive a motion to dismiss if it is based on allegations that differ from those underlying an accompanying breach of contract claim."

Logan Bus Co., Inc. v. Discover Property & Casualty Ins. Co., 123 A.D.3d 777 (2d Dept. Dec. 10, 2014). Logan Bus Company, Inc. commenced a declaratory judgment action against Discover Property & Casualty Insurance Company seeking a declaration that it was obligated to defend and indemnify Logan Bus in an underlying action wherein the plaintiff alleged that she was sexually assaulted by a student on a school bus that was owned and operated by Logan Bus. Discover issued a business automobile insurance policy to the New York City Department of Education on which Logan Bus was included as an additional named insured. The policy contained an "Abuse or Molestation Liability" endorsement, which provided, in pertinent part: "We will pay those sums that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury' to any person arising out of 'abuse or molestation'….The 'abuse or molestation' must be caused by one of your 'employees' or volunteer workers

or arise out of your failure to properly supervise." Moreover, "abuse or molestation" was defined as "(a) [t]he actual or threatened abuse or molestation by one of your 'employees' or 'volunteer workers' of any person while in the care, custody, or control of any 'insured', or (b) [t]he negligent employment, investigation, supervision, reporting to the proper authorities or failure to so report or retention of a person for whom any 'insured' is or ever was legally responsible and whose conduct would be covered [in (a) above]." Logan Bus moved for summary judgment arguing that the "Abuse or Molestation Liability" endorsement provided coverage for sexual assaults committed by third parties, because it does not affirmatively preclude such coverage and provided coverage for sexual abuse or molestation, in fact, caused by the insured's "failure to properly supervise." The trial court denied Logan Bus' motion and Logan Bus appealed. In affirming the trial court's decision, the Second Department held that Logan Bus failed to establish its prima facie entitlement to a judgment that Discover was obligated to defend and indemnify it in the underlying action. In this regard, the Court reasoned that the clear an unambiguous terms of the "Abuse or Molestation Liability" endorsement limited coverage to acts perpetrated by "employees" or "volunteer workers". Since Logan alleged that the subject incident was perpetrated by a student, it did not fall within the purview of the endorsement and, thus, Logan Bus was not entitled to coverage relative to the underlying action.

Richard P. Byrne is a Partner in the law firm of L'Abbate, Balkan, Colavita & Contini, L.L.P.

Contact:
rbyrne@lbcclaw.com
516-837-7317

John D. McKenna is a Partner in the law firm of L'Abbate, Balkan, Colavita & Contini, L.L.P.

Contact:
jmckenna@lbcclaw.com
516-837-7370

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