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CASES OF INTEREST BY TOPIC

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ADDITIONAL INSURED COVERAGE

Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of New York, 127 A.D.3d 662 (1st Dept. Apr. 30, 2015). On December 12, 2006, Kel-Mar Designs, Inc., which had been retained by Walgreens Eastern Co., Inc. to act as a general contractor for a renovation project in Manhattan, subcontracted Arcadia Electrical Contractors to perform electrical work at the site. Arcadia was insured under a Commercial Package Policy issued by Harleysville Insurance Company of New York which provided additional insured coverage to Kel-Mar for "liability caused, in whole or in part, by the acts or omissions of [Arcadia]…in the performance of [Arcadia's] ongoing operations for the additional insured." During the policy period, one of Arcadia's employees was injured when he lost his footing on a stairway at the site. The employee subsequently commenced an action against Kel-Mar, among others. Kel-Mar then brought a declaratory judgment action against Harleysville seeking a declaration that it was entitled to additional insured coverage with respect to the claim of the Arcadia employee. The First Department held that the loss at issue resulted, at least in part, from the "acts or omissions" of the Arcadia employee while performing his work (*i.e.*, his loss of footing while on the stairway), regardless of whether the Arcadia employee was negligent or otherwise at fault for his mishap. As such, the Court determined that Kel-mar was entitled to additional insured coverage under the Harleysville policy relative to the underlying action.

TIMELY DISCLAIMER

Ira Stier, DDS, P.C. v. Merchants Ins. Grp., 127 A.D.3d 922 (2d Dept. Apr. 15, 2015). The plaintiff-insured procured a Business Owners Insurance Policy from Merchants Insurance Group to cover a single-family home which was utilized as a dental office. The policy provided coverage for loss of business resulting from a covered cause of loss, but excluded coverage for any loss caused by the enforcement of any ordinance or law regulating the construction, use, or repair of any property. In January 2007, vandals caused extensive damage to the dental office. On the morning of the incident, a building inspector with the Town of Poughkeepsie Building Department responded to the scene and discovered that the premises did not have a proper Certificate of Occupancy and issued an Order to Remedy Violation which indicated that the dental office would not be permitted to re-open until a Certificate of Occupancy was obtained. Eleven months later, the dental office re-opened. More than four years after the

date of loss, Merchants disclaimed coverage for the lost business income claim, asserting that as the dental office was closed due to the enforcement of a building code, coverage for the same was excluded under the policy. In affirming the lower court's decision, the Second Department stated that an insurer's delay in giving notice of disclaimer of coverage, even if unreasonable, does not estop the insurer from disclaiming coverage unless the insured has suffered prejudice from the delay. It was held that as the record did not evidence any such prejudice alleged by the insured, Merchants established *prima facie* that the disclaimer was effective. The Court further determined that the policy exclusion was applicable as the business income loss was caused by the enforcement of the town code.

Endurance American Specialty Ins. Co. v. Utica First Ins. Co., 126 A.D.3d 651 (1st Dept. Mar. 31, 2015). Utica First Insurance Company issued a commercial liability policy to CFC Contractor Group, Inc. that provided additional insured status to those entities for which CFC was required to procure insurance coverage pursuant to a written contract or agreement executed prior to the date of loss. The policy also contained an employee exclusion which precluded coverage for all bodily injury claims to employees of any insured, or contractor hired or retained by any insured, during the course of employment. Jose Reyes was injured while performing work for CFC at a job site located in Forest Hills during the policy period. Reyes then commenced a personal injury action against the owners and Adelphi Restoration Corp., a contractor at the site. On November 14, 2011, Adelphi's insurer, Endurance American Specialty Insurance Company, through its third-party administrator, sought a defense and indemnification for Adelphi as an additional insured under the Utica policy. In response, on November 21, 2011, Utica disclaimed coverage pursuant to the employee exclusion. The declination was addressed to CFC and a copy was sent to Endurance's third-party administrator. Thereafter, Endurance, again through its third-party administrator, provided notice of the suit to Utica. Endurance's third-party administrator subsequently notified Utica that the denial of coverage was only received on behalf of CFC, not Adelphi. On January 29, 2013, Utica disclaimed coverage to Adelphi stating that it was not previously in a position to assess Adelphi's additional insured status as it had only received the contract between Adelphi and CFC on January 28, 2013. Endurance then commenced an action against Utica seeking a declaration that Utica was required to defend and indemnify Adelphi, and Utica moved to dismiss. In rendering its decision, the First Department stated that Utica's disclaimer of coverage by letter dated November 21, 2011 to CFC did not constitute a declination to Adelphi pursuant to Insurance Law § 3420. However, the Court stated that Utica's January 29, 2013 disclaimer to Adelphi was not unreasonably late in light of its uncontroverted statement in the disclaimer letter that it did not receive the written contract between CFC and Adelphi until January 28, 2013. The Court went on to find that Endurance's contention that the disclaimer was unreasonably late because the employee exclusion on which it was based was apparent from the face of multiple earlier tenders was unavailing. In this regard, Adelphi's additional insured status was conferred by a blanket additional insured endorsement, *i.e.*, for an entity that CFC was required by a written contract to name as an additional insured; Adelphi was not named in the policy, and was required to prove its status by providing a copy of its written contract with CFC. Accordingly, in affirming the decision of the trial court, the First Department held that as the CFC-Adelphi contract was necessary to determine Adelphi's additional insured status, Utica's declination to Adelphi was timely as it was issued one day after Utica received the contract.

BUSINESS INCOME

Bamundo, Zwal & Schermerhorn, LLP v. Sentinel Ins. Co., Ltd., 2015 WL 1408873 (S.D.N.Y. Mar. 26, 2015). Bamundo, Zwal & Schermerhorn, LLP ("Bamundo"), a law firm which leases office space in Manhattan, procured an insurance policy from Sentinel Insurance Company, Ltd. Under the relevant provisions of the policy, Sentinel agreed to pay for "the actual loss of Business Income you sustain when access to your 'scheduled premises' is specifically prohibited by order of a civil authority as the direct result of a Covered

Cause of Loss to property in the immediate area of your 'scheduled premises'" (the "Civil Authority Provision"). The policy provided that coverage for business income under the Civil Authority Provision "will begin 72 hours after the order of a civil authority," and that such coverage ends "at the earlier of (a) when access is permitted to your 'scheduled premises'; or (b) 30 consecutive days after the order of the civil authority." A Covered Cause of Loss was defined as a "risk of direct physical loss unless the loss is" excluded. The policy excluded payment of any "loss or damage caused directly or indirectly" by water, including flooding (the "Flood Exclusion"). On October 28, 2012, in anticipation of Hurricane Sandy and "weather conditions [that] are likely to cause heavy flooding [and] power outages," the Mayor of New York City issued Executive Order 163, which ordered the public to evacuate all homes and businesses located in Zone A, where Bamundo's office was located. On October 31, 2012, after recognizing that "a severe storm hit New York City…causing heavy flooding," the Mayor issued Executive Order 165, which continued the evacuation order in Order 163 and stated that the public may reoccupy buildings in Zone A "only upon [a] determination by the Department of Buildings that re-occupation is permitted." On December 21, 2012, a licensed engineer informed the Department of Buildings that Bamundo's building was "structurally sound" and "safe to occupy." Nevertheless, Bamundo did not reenter its office until January 4, 2013. As a consequence of the evacuation orders, Bamundo submitted an insurance claim to Sentinel for its loss of business income spanning almost the entire evacuation period. In response, Sentinel denied coverage, asserting that Bamundo "incur[ed] a business interruption as the result of flooding conditions." Bamundo responded to the denial of coverage by asserting that since the premises did not suffer any flood damage, it was entitled to coverage under the Civil Authority Provision. After Sentinel refused to reconsider its positon, Bamundo commenced an action against Sentinel seeking payment of its business income losses during the evacuation period and Sentinel moved and Barmundo cross-moved for summary judgment. In rendering its decision, the United States District Court for the Southern District of New York stated that it was undisputed that Hurricane Sandy flooded parts of Manhattan and that this flooding directly caused the Mayor to issue Order 165 and the subsequent evacuation orders that prohibited Bamundo from reoccupying its office until December 24, 2012. Therefore, the Court held that because access to Bamundo's office was "specifically prohibited" by the Mayor's evacuation orders, which were issued as a direct result of flooding of the immediate area of Bamundo's office in Zone A, the City's orders did not fall under the policy's definition of a Covered Cause of Loss and, thus, do not permit recovery for Bamundo's loss of business income under the Civil Authority Provision. The Court further stated that the business income Bamundo allegedly lost due to the October 28th Order, which was a preemptive evacuation based not on flooding but on the risk of future flood damage and power outages, was likewise not entitled to coverage. In this regard, coverage under the Civil Authority Provision did not become effective until 72 hours after the order of a civil authority. Based upon this provision, the earliest date on which Bamundo would be entitled to recover lost business income resulting from the October 28th Order would have been October 31. However, by that date, Order 163 had already been superseded by Order 165, which was clearly based on actual flooding in the vicinity of Bamundo's office. Accordingly, the Court held that Bamundo's lost business income was not covered by the policy.

APPLICABILITY OF EXCLUSIONS

Lancer Indem. Co. v. JKH Realty Grp., LLC, 127 A.D.3d 1032 (2d Dept. Apr. 22, 2015). JKH Realty Group, LLC, the owner of a shopping plaza in Smithtown, purchased a Commercial General Liability insurance policy from the predecessor of Lancer Indemnity Company. The policy provided coverage for bodily injury "arising out of…[t]he ownership, maintenance or use of the premises…and operations necessary or incidental to those premises", and excluded coverage for claims "arising out of…[t]he ownership, maintenance or use of [a specified parking lot] or any property located on these premises; [or] Operations…necessary or incidental to the ownership, maintenance or use of those premises" (the "Parking Lot Exclusion"). During the policy period, an employee of one of the stores at the shopping plaza died after he fell through an allegedly

defective manhole cover in the paved area behind the building and drowned in the leaching pool below. Lancer disclaimed coverage based upon the Parking Lot Exclusion, then commenced this action for a declaration that it was not obligated to defend or indemnify JKH Realty in the underlying wrongful death action. JKH Realty moved, *inter alia*, for summary judgment and a declaration that the insurer was obligated to defend and indemnify it in the underlying action, and Lancer cross-moved for summary judgment declaring that it is not so obligated. In affirming the decision of the trial court, which granted JKH Realty's motion and denied Lancer's cross-motion, the Second Department noted that exclusions to coverage must be strictly construed and read narrowly, with any ambiguity construed against the insurer. The Court held that, even assuming that the Parking Lot Exclusion applied to the paved area in the rear of the building, JKH Realty demonstrated that the exclusion did not apply to the underlying claim. In this regard, as the allegedly defective manhole cover and leaching pool into which the decedent fell were part of the building's septic system, the decedent's claim arose out of operations necessary or incidental to the building—not out of the "ownership, maintenance or use" of the rear parking lot. Thus, when strictly construed, the Parking Lot Exclusion was found to not apply, and accordingly, it was determined that JKH Realty was entitled to a defense and indemnification relative to the underlying action.

Lee & Amtzis, LLP v. American Guarantee and Liability Ins. Co., 2015 WL 1526003 (1st Dept. Apr. 7, 2015). Lee & Amtzis, LLP (the "Law Firm"), among others, commenced a declaratory judgment action against American Guarantee and Liability Insurance Company to determine whether certain transactions between the Law Firm and its client, Jane Kurtin, fell within the Insured's Status and Business Enterprise Exclusions to coverage in the lawyers' professional liability insurance policy with American Guarantee. Prior to the institution of the declaratory judgment action, Kurtin commenced an action against Astoria Station, LLP, the Law Firm, and both of the Law Firm's partners, Lee and Amtzis, individually in New Jersey, wherein she asserted claims for breach of contract, non-payment of two promissory notes which she held, and unjust enrichment based upon the non-payment of those notes. Kurtin also asserted claims for legal malpractice/negligence against the Law Firm and each of its partners. Relative to her malpractice/negligence claims, Kurtin alleged that when she entered into these loans, Lee was not only the managing member of Astoria Station, but that he was also a practicing attorney and partner of the Law Firm, which had the same address as Astoria Station. Following motion practice, Kurtin prevailed on her promissory note claims and the Court directed entry of a money judgment against Astoria Station. The Law Firm and the partners moved to dismiss the remaining malpractice/negligence claims, but the motion was denied. The parties subsequently agreed to stay the New Jersey action pending the resolution of the declaratory judgment suit. In the declaratory judgment action, the Law Firm and the partners sought an order that American Guarantee had a contractual duty to defend them against the malpractice/negligence claims asserted by Kurtin in the New Jersey action. As is relevant, the American Guarantee policy provided a "duty to defend any Claim based on an act or omission in the Insured's rendering or failing to render Legal Services for others, seeking Damages that are covered by this policy…." However, the policy excluded coverage for "any Claim based upon or arising out of, in whole or in part…the Insured's capacity or status as…an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise [and]…the alleged acts or omissions by any Insured, with or without any compensation, for any business enterprise…in which any Insured has a Controlling Interest". Upon reviewing the record, the First Department held that the Law Firm's activities on Kurtin's behalf were of a hybrid nature and, therefore, excluded from coverage. In this regard, the Court reasoned that it was undisputed that the Law Firm prepared the legal documents necessary to effectuate the loans, including the promissory notes. It was further undisputed that Lee was the managing member of Astoria Station and was the obligor on one promissory note and was the borrower on the other. The proceeds from these financial transactions were used in connection with Astoria Station's real estate development projects, which indirectly benefited Lee as the managing member of that enterprise. As such, the Court found that Lee was simultaneously serving two masters, Kurtin as a client of the Law Firm and Astoria Station, a company of which he was the principal. As

Kurtin's claim arose, in part, from the legal services the attorneys provided to her, as well as from Lee's status or activity for his company, Astoria Station, the Court determined that they were of a hybrid nature and, thus, squarely within the Insured Status and Business Enterprise Exclusions. Accordingly, it was held that neither the Law Firm nor the partners were entitled to coverage under the American Guarantee policy relative to Kurtin's New Jersey action. It was further noted that the arguments by the Law Firm and Amtzis that the exclusions to coverage do not apply to them because neither had any interest in Astoria Station were unavailing as that contention focused solely on the Insured Status Exclusion and ignored the Business Enterprise Exclusion, which excluded coverage for "the alleged acts or omissions by any insured, with or without any compensation, for any business enterprise…in which any Insured has a Controlling Interest". Because Lee was a partner in the Law Firm, by assuming dual roles of providing legal advice to a client, while simultaneously pursuing his own business interests, Lee placed himself, his law partner, and the Law Firm firmly within the exclusions under the policy.

MISCELLANEOUS

Rokeach v. Hanover Ins. Co., 2015 WL 24000947 (S.D.N.Y. May 19, 2015). Rafer Rokeach d/b/a Double R Welding, Inc., operates a welding business in Uniondale. During the summer of 2011, Rokeach's property sustained a series of thefts wherein approximately $80,000 in metal and materials were stolen. Each theft was apparently carried out by the same people. After the thieves were arrested in July 2011, Rokeach reported his losses to his insurance carrier, Hanover Insurance Company, seeking reimbursement under the business owner's policy issued by Hanover. Hanover ultimately denied Rokeach's claim on the basis that the materials were stolen over time with several trips/occurrences, that each occurrence of theft was a separate claim subject to a separate deductible, and that based upon the load tickets provided by the police, the value of each load fell below the $1,000 policy deductible. The Hanover policy limits provided that "[t]he most [Hanover] will pay for loss or damage in any one 'occurrence' is the applicable Limit of Insurance shown in the Declarations." The policy also contained a Deductibles provision, which provided: "We will not pay for loss or damage in any one occurrence until the amount of loss or damage exceeds the Deductible [of $1,000]. We will then pay the amount of loss or damage in excess of the Deductible up to the applicable Limit of Insurance…." "Occurrence" was defined as "[o]ne cause, act, event, or series of similar, related causes, acts or events involving one or more persons". The United States District Court for the Southern District of New York held that the series of thefts suffered by Rokeach constituted "similar, related…acts involving one or more persons", thereby falling within the policy's definition of "occurrence". As such, if the defined term "occurrence" applied in the deductible provision, Rokeach could make a single claim for a single loss, subject to a $1,000 deductible. Hanover argued, however, that the term "occurrence" when used in the Deductibles provision was not subject to the policy definition and was instead subject to its usual meaning in a property policy as it was not set off by quotation marks, whereas it appeared in quotations in other places throughout the policy. Unpersuaded by Hanover's argument, the Court held that the meaning of the undefined term "occurrence" in the Deductibles provision of the policy was ambiguous. In this regard, the Court stated that there was a reasonable basis for a difference of opinion as to the term's meaning – particularly as to whether the term permits the aggregation of a series of separate, related events into a single "occurrence". As the term "occurrence" does not appear in quotations in the Deductibles provision of the policy, it was noted that the expansive meaning of the defined term "occurrence" did not necessarily apply in that context. However, the Court stated that it is not clear that the undefined term "occurrence" must be interpreted in a manner that would preclude the aggregation of multiple visits by a set of thieves into a single property into a single "occurrence" – indeed, a jury might determine that the term was meant to be understood in substantially the same way as the defined term. The Court concluded, therefore, that "[b]ecause the undefined term 'occurrence' is ambiguous, a finder of fact must determine its meaning, and a jury should determine whether the series of thefts should be understood a single occurrence,

subject to a single deductible, or multiple occurrences, subject to multiple deductibles."

L&D Service Station, Inc. v. Utica First Ins. Co., 127 A.D.3d 929 (2d Dept. Apr. 15, 2015). Utica First Insurance Company issued a business owner's insurance policy to L&D Service Station, Inc., the owner and operator of a gas station. Due to an alleged mechanical breakdown of an underground storage tank, gasoline was released from a tank at L&D's gas station, and L&D filed a claim for coverage with Utica. Utica denied the claim and L&D commend an action seeking a declaratory judgment that Utica was obligated to provide coverage under the Systems Breakdown Endorsement to the policy, which provided coverage for the cost of pollutant clean-up and removal caused by a "mechanical breakdown." Utica moved for summary judgment and a declaration, among other things, that the amount of coverage available to L&D pursuant to the terms of the subject insurance policy was limited to $100,000 as there was one occurrence causing the pollution. L&D opposed Utica's motion arguing, *inter alia*, that it was entitled to at least $200,000 in coverage: $100,000 for each of the two separate twelve-month periods that the policy was in effect from the date of the September 23, 2008 claim. The trial court denied as premature that branch of Utica's motion which was, in effect, for summary judgment determining that the outside amount of coverage available to L&D was limited to $100,000. In finding that it was not premature to determine the limit of coverage available under the policy, the Second Department held that the provision of the insurance policy at issue clearly and unambiguously provided for a maximum of $100,000 in coverage for cleanup and removal of the discharge of a pollutant caused by a "peril" that occurs in each policy period. As it was alleged that only one peril occurred, *i.e.*, the claimed mechanical breakdown of the underground storage tank which led to the release of the gasoline, coverage under the Utica policy was limited to a maximum of $100,000 relative to the pollution-cleanup.

Castlepoint Ins. Co. v. Jaipersaud, 127 A.D.3d 401 (1st Dept. Apr. 2, 2015). Castlepoint Insurance Company commenced a declaratory judgment action against its insureds, Sewnarine and Dhanadi Jaipersaud, relative to an underlying personal injury action. Castlepoint then moved for summary judgment seeking a declaration that it had no duty to defend or indemnify the Jaipersauds relative to the underlying action because the insurance policy it issued to the Jaipersauds provided coverage for a one- or two-family home and the Jaipersauds used the insured premises as a three-family dwelling. In reversing the decision of the lower court, the First Department held that Castlepoint demonstrated *prima facie* through the insured's admission in a statement to Castlepoint's investigator and the investigator's inspection of the premises regarding its structural configuration that the insureds' home was a three-family dwelling, rather than a two-family dwelling as covered by the Castlepoint policy and as represented in the application for insurance. Accordingly, the First Department held that Castlepoint had no duty to defend or indemnify the Jaipersauds relative to the underlying personal injury action. It was noted that while it was unnecessary to determine whether the misrepresentation on the insurance application vitiated the policy, Castlepoint's underwriting guidelines and the affidavit of the underwriter indicated that the policy would not have been written if Castlepoint had known that the premises was, in fact, being used as a three-family home.

Triple Diamond Café, Inc. v. Those Certain Underwriters at Lloyd's London, 124 A.D.3d 763 (2d Dept. Jan. 21, 2015). On the morning of April 1, 2010, the bar and lounge known as The Rare Olive in Huntington was broken into and, soon thereafter, consumed by fire. Triple Diamond Café, Inc., the owner of the business, immediately notified its insurer, Underwriters at Lloyd's, of the loss. Lloyd's subsequently denied coverage on the basis that Triple Diamond failed to comply with a policy condition, which constituted a material breach of the policy, barring coverage for the loss. Specifically, the Declarations page to the policy contained the provision "Warranted Automatic extinguishing system and hood and duct cleaning, central station fire and burglar alarms will be [f]ully operational throughout the period of the policy," and Lloyd's investigation confirmed that the alarm system was not activated at the time of the loss. Triple Diamond commenced an action against Lloyd's alleging

breach of contract. After issue was joined and discovery completed, Lloyd's moved for summary judgment seeking the dismissal of the Complaint on the ground that Triple Diamond's breach of the policy warranty barred coverage for the loss. In opposition, Triple Diamond contended that the provision on the Declarations page did not constitute a warranty and, in any event, the term "fully operational" either did not require that the alarm be actually set and activated or, in the alternative, was ambiguous and must be construed in its favor. The Second Department first noted that Insurance Law § 3106(a) provides: "In this section warranty means any provision of an insurance contract which has the effect of requiring, as a condition precedent of taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract". The Court stated that the provision in the "special conditions" section of the Declarations page "[w]arrant[ing that a]…burglar alarm[] will be [f]ully operational throughout the period of the policy" meets the definition of warranty pursuant to the Insurance Law, since requiring Triple Diamond to have a fully operational burglar alarm would be significant to Lloyd's risk of liability under the insurance policy. Contrary to Triple Diamond's contention, the Court found that there was no requirement that the warranty be set forth in any particular manner, as long as its effect was to create a condition precedent to the insurer's liability. Indeed, the use of the term "warranted" at the beginning of the subject provision established that the provision was a warranty as defined by the Insurance Law. As such, the Court held that the provision contained in the Declarations page constituted a warranty as a matter of law. It was further held that the term "fully operational" required the burglar alarm to be operational and that the language was not ambiguous. The Court reasoned that in the context of an insurance policy, the statement that an insured have a fully operational security system logically requires that the system be actually utilized by the insured to prevent or mitigate the risk the insurer takes by writing the policy, and interpreting the term as Triple Diamond suggests would reduce the provision to a nullity, giving it no comprehensible meaning. Hence, in context, the only reasonably meaning to be assigned to the term "fully operational" required that the alarm system be activated and in use. Accordingly, the Court affirmed the lower court's decision granting Lloyd's Motion for Summary Judgment dismissing the Complaint.

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