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CASES OF INTEREST BY TOPIC

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DISCLAIMER OF COVERAGE

Pollack v. Scottsdale Ins. Co., 2016 WL 5928752 (2d Dept. Oct. 12, 2016). On January 11, 2009, Loreley Pereyra Pollack sustained injuries when she slipped and fell on snow and ice outside her residence in Staten Island, New York. The residence was part of a multi-unit condominium at which Florite Maintenance Corp. was under contract to provide snow removal services. Florite was insured under a general liability insurance policy issued by Scottsdale Insurance Company. The policy required Florite to provide the insurer with notice of an occurrence that could lead to a claim, as well as notice of a lawsuit based on a claim "as soon as practicable." By letter dated March 31, 2009, counsel for Pollack notified Florite of the occurrence, and Florite, in turn, notified Scottsdale. On April 3, 2009, Scottsdale's investigator communicated with Pollack's counsel regarding the claim and assigned an adjuster to investigate the circumstances of the occurrence. In March 2010, Pollack commenced a personal injury action against Florite, among others. Florite neither answered nor appeared in the underlying action and never forwarded the suit papers to Scottsdale. In September 2010, before seeking leave to enter a default judgment against Florite, counsel for Pollack notified Scottsdale of the underlying action by sending a copy of the Summons and Complaint, medical records, and authorizations to Scottsdale's claim representative. By letter dated September 20, 2010, addressed to Florite and copied to Pollack's counsel, Scottsdale disclaimed coverage due to Florite's failure to comply with the policy requirement to provide the insurer with notice of a lawsuit "as soon as practicable." A trial in the underlying action resulted in a jury verdict, *inter alia*, finding Florite partially at fault for Pollack's accident and a judgment was entered upon Florite in default on June 27, 2013 in the sum of approximately $3 million. On September 9, 2013, Pollack commenced suit against Scottsdale pursuant to Insurance Law § 3420(a)(2) to recover the amount of the unsatisfied judgment. Thereafter, Pollack moved for summary judgment on the Complaint and Scottsdale opposed the motion and cross-moved for summary judgment dismissing the Complaint, arguing that there was no coverage for the claim because Pollack had not provided Scottsdale with timely notice of the underlying action, as required by the policy. As the Scottsdale policy was issued prior to January 17, 2009, this case was decided on the earlier standard which did not require the insurer to establish prejudice. In rendering its decision, the Second Department first stated that where the required notice of suit is not provided by the

insured, but rather by the injured party, the insurer's disclaimer must address with specificity the grounds for disclaiming coverage applicable to the injured party as well as the insured, "because notice of an occurrence by the injured party constitutes prima facie compliance with the notice requirements of the policy and, if unchallenged, relieves the insured of its contractual duty to provide proper notice." Finding in favor of Pollack, the Court held that notice of the underlying action was not provided by Florite, but was provided directly by Pollack in September 2010. In its subsequent disclaimer, however, Scottsdale addressed only Florite's failure to provide notice of the underlying action, and did not directly address the notice provided by Pollack. While the disclaimer mentioned, in passing, Pollack's September 2010 notice of the underlying action, the insurer neither specifically stated whether it considered such notice to be untimely, nor disclaimed coverage as to Pollack based upon the notice she provided. Because this ground was not raised in its declination, Scottsdale was thus prohibited from relying upon it now. Accordingly, the Second Department held that Pollack established her prima facie entitlement to judgment as a matter of law under Insurance Law § 3420(a)(2).

ADDITIONAL INSURED COVERAGE

Aspen Specialty Ins. Co. v. Ironshore Indem. Inc., 144 A.D.3d 606 (1st Dept. Nov. 29, 2016). Transel Elevator Inc. maintained and repaired three passenger elevators at a hotel owned by Alphonse Hotel Corp. pursuant to a written contract that contained an insurance procurement provision requiring Transel to name Alphonse as an additional insured on Transel's Commercial General Liability insurance policy, which Transel obtained from Ironshore Indemnity. The Ironshore policy provided additional insured coverage with respect to liability for bodily injury caused, in whole or in part, by the acts or omissions of its insured or the acts or omissions of those acting on its behalf. On October 12, 2012, Michael Patalano, an elevator repairman employed by Transel, allegedly sustained injuries while working at Alphonse's hotel. Patalano subsequently commenced a personal injury action against Alphonse, wherein he alleged that that he was injured while working for Transel at the hotel as he descended an interior flight of stairs that collapsed, causing him to fall and sustain injuries. By way of correspondence dated July 22, 2013, Alphonse tendered its defense and indemnification in connection with Patalano's action to Ironshore. Ironshore thereafter denied additional coverage on the following grounds: (i) that Patalano's accident occurred when he was descending an interior stairway, and therefore the incident was unrelated to Transel's work and did not arise out of Transel's acts or omissions; and (ii) that the Complaint in the Patalano Action alleged that Alphonse was solely negligent. Aspen Specialty Insurance Company, Alphonse's insurer, commenced a declaratory judgment action against Transel and Ironshore seeking a declaration that Ironshore was required to defend and indemnify Alphonse in connection with the Patalano action. In affirming the lower court's decision, the First Department noted that while the Ironshore policy provides coverage to additional insureds for "losses 'caused by' [Transel's] 'acts or omissions' or 'operations,' the existence of coverage does not depend upon a showing that [Transel's] causal conduct was negligent or otherwise at fault'". As such, the Court held that Alphonse was entitled to additional insured coverage relative to the Patalano action as he was the Named Insured's employee, and was injured when he lost his footing on the hotel stairway, which resulted from his "acts or omissions" while performing his work. The Court reasoned that, given the breadth of the duty to defend, the fact that Patalano fell in a stairway, and not in the elevator itself, during the course of his elevator repair work, did not change the result.

Cincinnati Ins. Co. v. Harleysville Ins. Co., 2016 WL 6213002 (W.D.N.Y. Oct. 25, 2016). J.T. Mauro Co., Inc. sub-subcontracted The Kimmel Company, Inc. to perform work at a job site. By way of the construction agreement, Kimmel agreed to indemnify and hold harmless Mauro and the owner of the site, as well as to provide them with additional insured status under its liability policy. Moreover, Kimmel was required to assume all the obligations required by Mauro in its contract with the general contractor, which included an obligation to name the general contractor as an additional insured. Thereafter, Jumall Little, an employee of Kimmel, was performing HVAC repairs on the roof of a building at the site when he fell through an open skylight. Little then commenced an action against

Mauro, the general contractor, and the owner, among others, for personal injuries. Cincinnati Insurance Company, the insurer for Mauro, tendered the defense and indemnity of Mauro, the general contractor, and the owner to Harleysville Insurance Company, the liability insurer for Kimmel. Harleysville disclaimed coverage to the owner and the general contractor, following which Cincinnati commenced a declaratory judgment action and moved for summary judgment seeking a declaration that Mauro, the owner, and the general contractor are entitled to additional insured coverage under the Harleysville policy. Harleysville filed a cross-motion for summary judgment. The Harleysville policy contained two additional insured endorsements: (i) Endorsement CG 20 10, which provided that an additional insured includes the persons or organizations shown in the policy's Schedule; and (ii) Endorsement CG 20 33, which provided additional insured status to "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." In its cross-motion for summary judgment, Harleysville agreed that Mauro is an additional insured under the policy, but contended that it did not owe additional insured status to the owner or the general contractor under Endorsement CG 20 33 because neither entity was in contractual privity with Kimmel. In response, Cincinnati conceded that Endorsement CG 20 33 did not confer additional insured status, but that Endorsement CG 20 10 provides "automatic additional insured status to [the owner and general contractor]". Harleysville countered that Endorsement CG 20 10 applies only "to entities identified in the attached 'Schedule'" and because the Schedule was blank, the reader was referred to the Declarations Page for further instructions. With regard to additional insured status, the Declarations Page indicated that such was conferred to Owners, Lessees Or Contractors when required in a construction agreement with [Kimmel]. Although Harleysville conceded that Kimmel was contractually obligated to name Mauro and the owner as additional insureds, it asserted that the privity requirement set forth in Endorsement CG 20 33 must be read in conjunction with CG 20 10, or the privity requirement would be rendered meaningless. In finding the language of the Harleysville policy to be unambiguous, the United States District Court for the Western District of New York found that "Endorsement CG 20 33 clearly conferred additional insured status only upon persons or organizations for whom the insured is 'performing operations' as provided in a written agreement that requires the insured to add that person or organization as an additional insured to the policy", and that a plain reading of the Kimmel subcontract revealed that Kimmel agreed to name Mauro and the owner as additional insured parties. The Court further determined that the general contractor was not entitled to additional insured coverage under this endorsement because nowhere in the subcontract did Kimmel expressly agree to include the general contractor as an additional insured. In this regard, the requirement to procure additional insured coverage must be specifically stated in a construction contract before it can be interpreted as such. Under New York law, incorporation clauses in construction subcontracts, which incorporate by reference clauses of the prime contract into the subcontract, bind a subcontractor only to the prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor. It was noted that although it may have been contemplated by the parties, it was never expressly stated in the general conditions or the insurance requirements to the subcontract that the general contractor was entitled to additional insured status under Kimmel's liability insurance policy. As such, the Court held that the general contractor was not an additional insured under Endorsement CG 20 10 because it was not identified in the Schedule to the Harleysville policy and the Kimmel subcontract did not contain any requirement that the general contractor be provided with additional insured status.

Three Boroughs, LLC v. Endurance American Specialty Ins. Co., 143 A.D.3d 480 (1st Dept. Oct. 6, 2016). Three Boroughs, LLC retained Endurance American Specialty Insurance Company's insured to act as a general contractor at a construction project. Three Boroughs then sought coverage from Endurance as an additional insured relative to a personal injury action arising out of the work at the construction site. Endurance disclaimed coverage on the basis that Three Boroughs was not an additional insured under the policy and Three Boroughs instituted a coverage action against Endurance. Endurance then moved for summary judgment seeking

a declaration that Three Boroughs was not a named insured or additional insured under the policy Endurance issued to the general contractor, and Three Boroughs cross-moved for summary judgment. In rendering its decision, the First Department found that Endurance was entitled to summary judgment because it established that the blanket additional insured endorsement provided coverage to any person or organization that the insured was required by written contract to name as an additional insured, and that the contract between Three Boroughs and its general contractor did not contain such a requirement. Accordingly, it was held that Three Boroughs was not entitled to additional insured coverage under the Endurance policy. Moreover, the language on the Certificate of Insurance issued to Three Boroughs which stated that "this certificate is issued as a matter of information only and confers no rights upon the certificate holder [and that] this certificate does not amend, extend or alter the coverage afforded by the policies" was also deemed insufficient to establish additional insured status for Three Boroughs under the Endurance policy.

DUTY TO DEFEND AND INDEMNIFY

Mount Vernon Fire Ins. Co. v. Munoz Trucking Corp., 2016 WL 5793402 (S.D.N.Y. Sept. 20, 2016). Mount Vernon Fire Insurance Company commenced an action against its Named Insured, Munoz Trucking Corp., seeking a declaratory judgment that it was not obligated to defend or indemnify Munoz in an underlying lawsuit arising out of an automobile accident. Specifically, the underlying claimant complained that Munoz was negligent and reckless in "the ownership, oversight, supervision, selection, maintenance, operation, control and/or direction of a dump truck that was being used in a construction project relative to the Second Avenue subway tunnels." It was further alleged that the dump trucks traveling to and from the construction project were required to adhere to designated truck routes, but that Munoz's truck did not stay on the designated truck route and that, as a result, Munoz's dump truck struck the claimant's wife ultimately causing her death. On or about February 4, 2011, Munoz tendered its defense and indemnification to Mount Vernon, which issued a Commercial General Liability insurance policy to Munoz, and, in turn, on March 15, 2011, Mount Vernon issued a disclaimer citing, *inter alia*, the Auto Exclusion, which precludes coverage for accidents arising out of the operation of an auto by the insured. Subsequent to the institution of Mount Vernon's coverage litigation, it moved for summary judgment. With regard to Mount Vernon's duty to defend Munoz, the United States District Court for the Southern District of New York found that the Mount Vernon policy did not provide for a defense in the underlying action. In that regard, the Court stated that the policy excludes coverage for "'Bodily Injury' or 'property damage' 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…." It was reasoned that the underlying Complaint clearly alleged that the death of the claimant's spouse arose out of the use of an auto owned and/or operated by Munoz. The Court was unpersuaded by Munoz's argument that the truck was, in fact, owned and operated by another defendant and that the person operating the truck was the sole employee of that defendant. It noted that the underlying Complaint contained allegations the truck was owned by Munoz and that the person operating the truck at the time of the accident was an employee of Munoz. As such, the Court found that the allegations in the Complaint placed the incident solely and entirely within the Auto Exclusion and thus, Mount Vernon's duty to defend Munoz had not been triggered. Munoz also unsuccessfully argued that the Auto Exclusion did not apply because certain of the allegations against Munoz related to conduct outside the use or operation of a vehicle – specifically, those allegations relating to the failure to follow the truck routes. The Court stated that the Auto Exclusion fully precludes defense coverage so long as the occurrence that caused the accident involved the ownership or operation of an auto by the insured and the mere fact that an insured could be found liable on an independent theory of recovery does not alter the operative acts giving rise to the accident (*i.e.*, the use of Munoz's vehicle). Turning to the question of whether Mount Vernon had a duty to indemnify Munoz, the Southern District held that the same was not ripe for adjudication because the underlying action was still pending and there was a possibility that it could be determined that the dump

truck was neither owned nor operated by Munoz, thereby removing the claim from the Auto Exclusion.

PROPERTY DAMAGE

IPA Asset Management, LLC v. Certain Underwriters at Lloyd's London, 2016 WL 5928867 (2d Dept. Oct. 12, 2016). On May 7, 2010, real property located in Pleasant Valley, New York, which was partially owned by IPA Asset Management, LLC was damaged in a fire. On May 17, 2010, IPA provided notice of the loss to its insurer, Certain Underwriters of Lloyd's London. By way of correspondence dated August 10, 2011, Lloyds disclaimed coverage on the grounds that the property was not insured at the time of the loss and that the property was not owned by IPA. In its declination, Lloyd's explained that the property was not listed on the policy schedule at the time of the loss and that it was improperly added to the policy schedule subsequent to the fire and misrepresented to be newly acquired property as of April 26, 2010. Thereafter, IPA commenced an action against Lloyds, among others, *inter alia*, for the reformation of the insurance policy. IPA alleged that, should it be determined that the property was not listed on the policy, or that IPA was not named as an insured to the policy, that it was by mutual mistake or inadvertence. In response, Lloyds moved for summary judgment dismissing the Complaint. The Second Department held that contrary to Lloyd's contention, the evidence established that, by way of an endorsement dated June 15, 2010, the property at issue was added to the policy retroactive to April 26, 2010 pursuant to the newly acquired or constructed property provision of the policy, which provided automatic coverage for certain newly acquired properties. The Court stated that, accordingly, in order to establish its prima facie entitlement to judgment as a matter of law, Lloyds had the burden of demonstrating that an exclusion to coverage applied or that it was entitled to rescind the policy based upon a material misrepresentation. As Lloyds did not contend that a policy exclusion applied, the Court stated that in order to establish its right to rescind the insurance policy, Lloyds must demonstrate that the insured made a material misrepresentation which, if disclosed, would have prevented Lloyds from issuing the policy. After reviewing the evidence proffered, it was held that Lloyds failed to establish that IPA made a material misrepresentation as a matter of law as to whether the property was newly acquired as of April 26, 2010 and, thus, Lloyds' Motion for Summary Judgment dismissing the Complaint was denied.

RESCISSION

Joseph v. Interboro Ins. Co., 144 A.D.3d 1105 (2d Dept. Nov. 30, 2016). Prior to purchasing residential property located in Brooklyn, the plaintiffs were informed by their mortgage broker that they needed insurance in order to close. Thereafter, the mortgage broker, on the plaintiffs' behalf, contacted an insurance broker to procure a homeowners' insurance policy based upon representations the plaintiffs made in their loan application that they would occupy the premises as their primary residence. Based upon the information provided by the mortgage broker, the insurance broker completed an application for insurance, which indicated that the premises would be occupied by the plaintiffs as their primary residence. The plaintiffs signed the application and, subsequently, on the date of closing, a homeowners' insurance policy was issued by Interboro Insurance Company. After a fire occurred at the premises, Interboro discovered that the plaintiffs did not occupy the premises as their primary residence and rescinded the policy, contending that the plaintiffs, through a material misrepresentation, induced Interboro to issue a policy that it normally would not have issued. The plaintiffs then commenced an action against Interboro, among others, and Interboro moved for summary judgment dismissing the Complaint. The Second Department stated that the trial court properly granted Interboro's motion finding that Interboro established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiffs' application for insurance contained a misrepresentation regarding whether the premises would be owner occupied and that it would not have issued the subject policy if the application had disclosed otherwise. The Court held that the plaintiffs failed to raise a triable issue of fact in opposition. In this regard, the plaintiffs admitted that at the time the application was completed, they did not intend to occupy the premises. Thus, contrary to the plaintiffs' contentions, although the application was completed prior to closing and prior to the inception of the policy, the

representation therein that the premises was an owner-occupied primary residence established, in effect, a material misrepresentation of a then existing fact that the premises would be owner occupied, which was sufficient for rescission under Insurance Law § 3105.

WAIVER/ESTOPPEL

Si Meat Village, Inc. v. Amguard Ins. Co., 2016 WL 5349766 (E.D.N.Y., Sept. 23, 2016). Si Meat Village, Inc. sought coverage under an insurance policy it procured from AmGuard Insurance Company for property damage and lost income due to a fire. When AmGuard refused to provide coverage, Si Meat commenced an action against it and AmGuard moved for summary judgment. The policy at issue included a "protective safeguards endorsement", which required Si Meat to maintain an automatic fire alarm on the premises. The policy explicitly excluded losses due to fire "if, prior to the fire, [the policyholder f]ailed to maintain any protective safeguard listed in the Schedule above, and over which [the policyholder] had control, in complete working order." It was undisputed that there was no fire alarm at the premises. The application for coverage, submitted by the insurance broker, represented that there was a fire alarm at the premises. In addition, AmGuard had commissioned two inspections of the premises, one shortly after the policy was issued and a second when it came up for renewal. Raymond Hagemann, an independent contractor, conducted both inspections. During each inspection, he asked Si Meat's principal, Ziad Abdeldayum, if there was a working fire alarm on the premises and was told that there was. Hagemann did not independently verify Abdeldayum's representations. He stated at his deposition that he had "no specific intention to look" for a fire alarm, and that he did not remember seeing any alarm equipment on the premises. He further stated that "the existence of [such] equipment doesn't necessarily mean that the equipment is functional, is turned on, is operational." While Si Meat conceded that its failure to maintain a fire alarm at the premises was a material breach of its warranty in the protective safeguards endorsement, it asserted that AmGuard either waived the protective safeguards endorsement or that it was estopped from relying on it. Si Meat based its theories on the contention that Hagemann negligently inspected the premises and that a reasonably competent inspection would have revealed the lack of a fire alarm. With regard to waiver, the United States District Court for the Eastern District of New York noted that waiver is the voluntary and intentional relinquishment of a contract right and that it requires full knowledge of the facts upon which the existence of the right depends. As Si Meat did not claim that AmGuard had actual knowledge that there was no fire alarm on the premises and as Hagemann's failure to learn the true state of affairs was not an adequate substitute for actual knowledge, the Court held that AmGuard had not waived its right to rely on the protective safeguards endorsement. Turning to Si Meat's contention that AmGuard was estopped from relying on the protective safeguards endorsement, the Court reiterated the well settled principle that estoppel arises where an insurer acts in a manner inconsistent with a lack of coverage, and the insured reasonably relied on those actions to its detriment. The Court stated that "negligence in not making further inquiry" is "not the equivalent of knowledge" and that something "tantamount to notice" is required. Otherwise, an insurer is entitled to rely on the insured's representations and further inquiry by the insurer is optional. The Court was unpersuaded by Si Meat's contentions that AmGuard did not undertake "further inquiry" in the form of inspections, and thus that it should be charged with knowledge of what those inspections would have revealed had they been competently performed. In that regard, the Court reasoned that the principle relied upon by Si Meats has been limited to those situations wherein the action taken is for the benefit of another and not in furtherance of the interest of the one who assumes to act. As it is generally understood that an insurer conducts inspections for its own benefit and not that of the insured, Si Meats could not rely on the inspection to absolve it of its own responsibility to comply with the protective safeguards endorsement. Accordingly, the Eastern District held that AmGuard was not estopped from relying on the protective safeguards endorsement.

SUBROGATION

Grinage v. Durawa, 144 A.D.3d 1506 (4th Dept. Nov. 10, 2016). Plaintiff commenced an underlying

negligence action against defendants to recover damages for injuries he sustained in a motor vehicle collision. During the pendency of the underlying action, plaintiff's no-fault insurance carrier, ACA Insurance Company, paid plaintiff additional personal injury protection ("APIP") benefits pursuant to plaintiff's insurance policy with ACA. Defendants' insurance carrier offered to settle plaintiff's claims for the $100,000 limit on defendants' no-fault insurance policy. Plaintiff accepted the offer and sought a declaration that ACA's subrogation rights were limited to that portion of the settlement funds allocable to the category of damages for which APIP benefits are meant to compensate, *i.e.*, extended economic loss. ACA did not oppose the Supreme Court adjudicating the dispute over its subrogation rights but contended that plaintiff owed it $37,529.27, which represented the full amount of the benefits paid. The Supreme Court then issued an Order directing plaintiff to pay ACA the full amount it sought. On appeal, plaintiff contended that under the "made whole" rule, ACA had no right of subrogation because plaintiff's damages exceeded the amount of the settlement. In rendering its decision, the Fourth Department noted that the "made whole" rule requires that if "the sources of recovery ultimately available are inadequate to fully compensate the insured for its losses, then the insurer – who has been paid by the insured to assume the risk of loss – has no right to share in the proceeds of the insured's recovery from the tortfeasor". The Court agreed that the lower court was incorrect in refusing to apply the rule; however, it was unclear whether the settlement made plaintiff whole. Moreover, the Court further agreed with plaintiff's contention that the trial court erred in directing plaintiff to reimburse ACA the full amount of benefits paid without making a determination as to what portion of the settlement represented plaintiff's pain and suffering. In this regard, the purpose of subrogation is to prevent a double recovery by the insured and to force the wrongdoer to bear the ultimate costs. ACA had no right to recoup its losses from damages attributable to plaintiff's pain and suffering as the insurance policy provided that "[i]n the event of any payment for extended economic loss, [ACA] is subrogated to the extent of such payments to the right of the person to whom, or for whose benefit, such payments were made." As such, ACA's right of subrogation only existed as to plaintiff's claim for extended economic loss. The Court found that it was unclear what portion of the $100,000 settlement represented plaintiff's recovery for extended economic loss, or whether such amount exceeded the benefits paid. Accordingly, the Fourth Department reversed the judgment and remitted the matter to the trial court for a determination whether plaintiff's damages exceeded the amount of the settlement and, if not, what portion of the of the settlement was attributable to plaintiff's extended economic loss and what portion is attributable to his pain and suffering, and to enter a judgment declaring the rights of the parties in accordance therewith.

MISCELLANEOUS

Albert Frassetto Enterprises v. Hartford Fire Ins. Co., 144 A.D.3d 1556 (4th Dept. Nov. 10, 2016). Albert Frassetto Enterprises commenced an action seeking to recover lost rents from Hartford Fire Insurance Company under an insurance policy providing coverage for, among other things, special business income ("SBI") losses due to the interruption of Albert Frassetto's business operations arising from a covered occurrence of direct physical loss of or damage to Albert Frassetto's property. Hartford moved for summary judgment dismissing the Complaint and the trial court denied the motion. On appeal, the Fourth Department reversed the lower Court decision finding that Hartfort met its burden on the motion by establishing that the only fair construction of the policy is that the two-year limitation period contained in the "Property Choice Coverage Part" is a condition that unambiguously applies to the entire coverage part, which includes the SBI coverage form under which Albert Frassetto sought recovery, and that it was undisputed that Albert Frassetto failed to commence its action within two years of the covered occurrence of property loss or damage. Contrary to Albert Frassetto's contention, the Fourth Department concluded that the policy period provision, which provides that "[i]n this [c]overage [p]art, [Hartfort] only cover[s] direct physical loss or direct physical damage which occurs during the policy period," was entirely consistent with the coverage afforded under the SBI coverage form, which provides that Albert Frasseto's claim would be paid for SBI losses "incur[red] due to the necessary interruption of [its] business operations during the [applicable period] due to direct physical loss

of or direct physical damage caused by or resulting from" a covered occurrence. It was reasoned that indeed, "'[t]he purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against'". The Court held that the only fair construction of the Hartford policy language is that the SBI coverage form provides coverage for losses incident to the direct physical property damage or loss, *i.e.*, "expense[s] ancillary to and resulting from the covered casualty," not separate and distinct coverage falling outside of the coverage part to which the two-year limitation period condition applies. As such, the Court reversed the trial court's decision and found that Hartford's motion should have been granted and that Albert Frassetto's claim for SBI losses under the subject policy was time-barred by the contractual limitation period to the Hartford policy.

Petroterminal De Panama v. Houston Cas. Co., 2016 WL 4703898 (2d Cir. Sept. 8, 2016). Petroterminal de Panama, S.A., which owns and operates oil transport and storage facilities in Panama, procured two insurance policies: (i) one for "Marine Liabilities" (the "Primary Policy") and (ii) the other for "Bumbershoot Liabilities" (the "Excess Policy"). The Primary Policy provided that it will "pay on behalf of [Petroterminal], any…sums as [it] may be liable to pay as the result of an accident…in connection with [Petroterminal's operations],…including liability…[f]or any accident or occurrence…in connection with [operating] pipelines from the terminals." It also covered "all costs…in connection with any claim [t]hereunder." The Primary Policy excluded coverage for "[l]iability arising from delay, loss of market and/or consequential loss therefrom" and "[l]oss…resulting from…seizure [or] confiscation by order of any government or public authority". The Excess Policy provided that it will "pay on behalf of [Petroterminal liabilities] which are covered in [the] underlying policies [for] [a]ll…sums which [Petroterminal] shall become legally liable to pay as damages on account of…property damage," defined as "physical loss of or direct physical damage to or destruction of tangible property." "Damages" was defined to include "all…fees…for…lawyers…paid as a consequence of any occurrence covered [t]hereunder." Coverage for liability "resulting from…capture, seizure, arrest, taking, restraint, detainment, confiscation…or the consequences thereof" was excluded under the Excess Policy. During the policy term, a pipeline control valve failed at a Petroterminal facility in Chiriqui Grande, Panama, causing a minor oil spill. Thereafter, Castor Petroleum sued Petroterminal in New York State court, alleging that the oil spill amounted to a breach of their Transport and Storage Agreement, which caused Castor to suffer damages for shipping expenses, trading losses, and lost profits, and that it triggered Petroterminal's indemnification obligations under the agreement. Petroterminal and its insurers subsequently entered into a written agreement whereby the insurers were to advance Petroterminal 50% of its costs to defend the Castor suit, and that the losing party in any later coverage action would reimburse the prevailing party for the costs advanced or owed. Approximately seven years later, the New York court found that the true cause of Castor's damages was an attachment order concerning 5.4 million barrels of oil at the facility which was issued by a Panamanian Court and not the oil spill itself which relieved Petroterminal of any liability under its agreement with Castor. Petroterminal then commenced coverage litigation against its insurers seeking a declaration that the claims asserted in the Castor action were covered under the policies and the District Court concluded that they were not because, *inter alia*, they fell within the exclusions to the policies. On appeal, the Second Circuit noted that the threshold issue is whether the Primary and Excess Policies impose upon the insurers a duty to defend, a duty to pay defense costs for claims which are arguably covered subject to a right of recoupment, or simply a duty to indemnify. It was further stated that "[a]n insurer with a duty to defend must pay defense costs '[i]f the claims asserted, though frivolous, are within policy coverage,' whereas the duty to indemnify 'is determined by the actual basis for the insured's liability to a third person." Petroterminal conceded that the policies do not impose a duty to defend, but it argued that the policies "require [the insurers] to pay defense costs as they are incurred" and that this duty to pay defense costs "turns solely on whether…the complaint alleges facts or grounds that bring the action within the liability coverage purchased." With regard to the Excess Policy, the Second Circuit found that it imposes only a duty to indemnify and that under the language of the policy, the insurer has a duty to pay defense costs for claims

that are established to be covered through judgment and settlement *i.e.*, claims for which the insurer has a duty to indemnify, and not for claims only potentially falling within the policy's coverage. Thus, the Excess insurer were liable only if the judgment established that Castor's claims were covered under the Excess Policy. It was found by the District Court that Castor's damages arose out of the attachment order, rather than any of Petroterminal's action and that this fell squarely within the Excess Policy's exclusion for loss or damages "resulting from…capture, seizure, arrest, taking, restraint, detainment, confiscation…or the consequences thereof." Accordingly, the Court held that the Excess insurer had no obligation to pay for Petroterminal's defense of the Castor suit. The Court further opined that the Primary Policy only imposed a duty to defend on the insurer and thus, the Primary insurer was likewise only required to pay defense costs incurred in connection with any claim or money demanded for which Petroterminal was liable to pay – in other words, costs expended in the defense of covered liability. As the District Court had determined that the claims asserted in the Castro suit were not entitled to coverage under the Primary Policy, the Primary insurer had no duty to pay for Petroterminal's defense of the Castor suit.

Intelligent Digital Systems, LLC v. Beazley Ins. Co., Inc., 2016 WL 5390390 (E.D.N.Y. Sept. 16, 2016). Under the terms of a Directors and Officers and Company Liability Insurance policy, Beazley Insurance Company, Inc. agreed to provide insurance coverage to the Directors and Officers of Visual Management Systems, Inc. for "all Loss which is not indemnified by [Visual Management] resulting from any Claim first made against the Directors and Officers during the Policy Period for a Wrongful Act." "Loss" was defined as "[T]he amounts which the Insureds become legally obligated to pay on account of a Claim, including damages, judgments, any award of prejudgment or post-judgment interest, costs and fees awarded pursuant to judgments, settlement amounts and Costs, Charges, and Expenses, incurred by any of the Insureds". Subsequent to the issuance of the policy, Intelligent Systems, LLC, among others, filed suit against Beazley seeking coverage under the policy as assignees of former Directors of Visual Management. Specifically, the former Visual Management Directors were sued in an underlying action for negligence, common law fraud, securities fraud, and non-payment of promissory notes. The Court in the underlying action so-ordered stipulations settling the underlying claims wherein the former Directors consented to judgments against them individually, but Intelligent Systems agreed to "unconditionally forbear" the collection of the judgments against the former Directors in exchange for, among other things, the assignment under the policy for costs and expenses incurred in connection with the underlying action. Beazley moved for summary judgment asserting that because it was undisputed that Intelligent Systems agreed not to collect the judgments against the former Visual Management Directors, the former Directors never suffered a "Loss" within the meaning of the policy and therefore, were not entitled to coverage under the policy relative to the underlying action. Intelligent Systems, in turn, contended that the former Directors never agreed to release Beazley from liability under the policy and thus, the judgments against them do constitute a "Loss" under the policy, irrespective of whether Intelligent Systems agreed to forbear collection of those judgments. In finding in favor of Intelligent Systems, the United States District Court for the Eastern District of New York held that an insurance company remains "legally obligated" to pay a claim under a policy even where the claim was assigned to a third party, and the third party agreed not to execute a judgment against the insured's personal assets. Thus, the Court found that the former Visual Management Directors did suffer a "Loss" under the policy, and Intelligent Systems, standing in the shoes of the former Directors, was entitled to seek coverage under the policy for those judgments, barring proof of another policy exclusion. As such, Beazley's motion was denied.

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