LB&C QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC:

ADDITIONAL INSURED COVERAGE:

Jenel Mgmt. Corp. v. Pacific Ins. Co., 55 A.D.3d 313 (1st Dep't October 2, 2008) The Appellate Division, First Department, held a claim in connection with an underlying accident which occurred in a stairwell area were covered by the additional insured clause of a policy procured by the claimant's employer, where the clause extended coverage to the employer's landlord and the managing agent of the building. According to the First Department, coverage existed because the underlying claim arose out of the "maintenance or use" of the leased premises, within the meaning of the additional insured clause, where the accident occurred in the course of an activity incidental to the operation of the space leased by the employer, and in a part of the premises that was necessarily used for access in and out of the leased space.

Chunn v. New York City Hous. Auth., 55 A.D.3d 313 (1st Dep't October 23, 2008) The Commercial General Liability policy issued by National Casualty Company to American Security Systems, Inc. provided additional insured coverage to the New York City Housing Authority with respect to liability for, *inter alia*, bodily injury, caused, in whole or in part, by American Security's acts or omissions. The First Department held that since the underlying Complaint alleged that the plaintiff's injury was caused, at least in part, by American Security's acts or omissions, the Housing Authority was entitled to a defense under the policy. In addition, the First Department held that the Housing Authority was also entitled to a defense under the excess policy issued to American Security by Scottsdale Insurance Company because it was an excess follow form to National Casualty's policy.

Pav-Lak Industries, Inc. v. Arch Ins. Co., 56 A.D.3d 287 (1st Dep't November 13, 2008) The Appellate Division, First Department, held that a general contractor's Commercial General Liability policy, which provided that its coverage would be excess over any other primary insurance available to the general contractor covering liability for damages arising out of the premises or operations for which the general contractor has been added as an additional insured, was excess to the liability policy naming the general contractor as an additional insured.

Ibex Constr. v. Utica Nat'l Assurance Co., 2008 WL 5083824 (1st Dep't December 4, 2008) The Appellate Division, First Department, held that the plaintiff, a general contractor, was entitled to a defense as an additional insured under the defendant-insurer's policy, which defined additional insured as one "held liable for [the named insured's] acts or omission arising out of…ongoing operations performed by [the named insured] or [its] subcontractors", where the underlying personal injury Complaint included allegations that the injured employee fell from a ladder provided by his employer, the named insured and a subcontractor of the plaintiff.

ANTI-SUBROGATION:

Motors Ins. Corp. v. Africk, 55 A.D.3d 571 (2d Dep't October 7, 2008) Arroway Chevrolet, Inc. loaned a vehicle to the defendant-driver while his vehicle was being serviced. The defendant-driver subsequently damaged the loaned vehicle in a one-car collision. Arroway's insurer paid for the damage, and then commenced a subrogation action against the defendant-driver. The Second Department found that as a permissive user, the driver was insured

PENDING BILLS OF INTEREST IN THE NEW YORK LEGISLATURE:

LATE NOTICE BILL TO TAKE EFFECT JANUARY 19, 2009:

As previously reported in our Third Quarter 2008 Newsletter, on July 21, 2008, Governor David Patterson signed into law a bill reversing New York's longstanding "no-prejudice" rule concerning late notice denials and allowing for direct actions against insurers in certain circumstances. The new law takes effect on January 19, 2009, and applies to policies issued or delivered in New York on or after such date and to any action maintained under such a policy.

under Arroway's coverage and, therefore, the insurer had no right of subrogation against its own insured for a claim arising out of the very risk for which the insured was covered. The Second Department based its decision on the following: (i) the insurer did not dispute the lower court's finding that Arroway's loan of the vehicle to the defendant made him a permissive user, (ii) the terms of Arroway's policy provided that the insurer agreed to indemnify Arroway for loss to a covered auto occasioned by collision with another object, and (iii) the policy provided coverage for damage to a covered auto caused by the failure of a person in lawful possession of the auto under a lease, rental or loaner agreement.

Gallagher v. New York Post, 55 A.D.3d 488 (1st Dep't October 30, 2008) The Appellate Division, First Department, held that the anti-subrogation rule will only bar claims for indemnification to the extent of the limits of a common policy. In this regard, the First Department found that since the primary policy of a premises owner attached prior to the umbrella policy of a general contractor, the premises owner was entitled to maintain its claim of contractual indemnification against the general contractor for any damages awarded against the premises owner in excess of the general contractor's primary policy, which was a common policy via the premises owner's status as additional insured.

APPLICABILITY OF EXCLUSIONS:

Atl. Cas. Ins. Co. v. West Park Assocs. Inc., 2008 WL 4820243 (E.D.N.Y. November 4, 2008) The Eastern District held that under New York law, an exclusion in a general contractor's liability insurance policy precluding coverage for injuries "arising out of the actions of independent contractors/subcontractors for or on behalf of any insured" barred coverage for an on-site injury to a subcontractor's vendor's employee, who sustained injury after falling from a ladder allegedly owner by the insured while delivering materials. According to the Eastern District, "but for" the actions of the subcontractor in hiring the vendor to deliver the materials, which had no contractual relationship with the insured, the vendors employee would not have been at the site and the accident would not have occurred.

ASSIGNMENTS:

Home Depot U.S.A., Inc. v. Nat'l Fire & Marine Ins. Co., 55 A.D.3d 671 (2d Dep't October 14, 2008) The Appellate Division, Second Department, held that the plaintiff, Home Depot U.S.A., Inc., which had entered into an assignment agreement with National Fire & Marine Insurance Company's insured, under which the insured agreed to assign its claims against National Fire to Home Depot in consideration for Home Depot's agreement to "limit any levy or execution or any process of any kind, relating to the default judgment against [National Fire's insured] solely to any and all claims...which [National Fire's insured] might have or possess against National Fire", was permitted to commence action against National Fire under Insurance Law § 3420. Contrary to National Fire's contention, the Second Department held that the assignment did not constitute a release of National Fire's insured's liability in the underlying personal injury action. In sum, the Second Department held that under New York law claims are typically transferable and that National Fire failed to support its contention that such an assignment was prohibited by Insurance Law §3420.

BANKRUPTCY & SELF-INSURED RETENTIONS:

Gillies v. Nat'l Fire Ins. Co. of Hartford, 56 A.D.3d 1236 (4th Dep't November 14, 2008) Plaintiff, injured in a motor vehicle accident, obtained a judgment of $1.3 million against Consolidated Freightways Corporation ("CFC") of Delaware, which held a Commercial Automobile policy issued by Reliance National Indemnity Company, that included a $3 million deductible

per accident. Pursuant to the policy, CFC was required to reimburse Reliance for any payments Reliance made within the deductible amount. As a result, CFC obtained a Deductible Reimbursement Security Bond from the defendant. In light of CFC's and Reliance's insolvency at the time judgment was secured, plaintiff filed claims in CFC's bankruptcy proceeding and Reliance's liquidation proceedings, and thereafter commenced an action against the defendant seeking, *inter alia*, a determination that the defendant had an obligation under the Bond to satisfy the plaintiff's judgment. The Appellate Division, Fourth Department, held that the lower court properly granted the defendant's motion to dismiss the complaint for failure to state a cause of action, noting that the bond expressly stated that "no right of action shall accrue to other than the named Obligee [in this case Reliance] and its successors and assigns, and nothing in the Bond of Agreement indicates an intent to benefit third parties such as plaintiff."

CHOICE OF LAW:

Travelers Cas. and Surety Co. v. Dormitory Authority-State of New York, 2008 WL 4861910 (S.D.N.Y. November 5, 2008) The Southern District held that New Jersey law applied, as opposed to New York law, with respect to coverage issues arising out of the defective construction of a building in New York. Specifically, the Southern District held that New Jersey law should be applied when evaluating the applicability of a policy issued by Harleysville Mutual Insurance Company to a subcontractor on the construction project. Upon applying the grouping of contacts theory, the Southern District noted the following: (i) under the Harleysville policy's "Schedule of Locations" the only address listed was the insured-subcontractor's principle place of business in New Jersey; (ii) both contracting parties were New Jersey corporations with principle places of business in New Jersey; (iii) the policy provided a New Jersey telephone number for the insured's agent; (iv) the policy contained numerous New Jersey specific additions/endorsements; and, (v) with respect to the portion of the policy providing property coverage, the entire risk was confined to New Jersey. The only factor, according to the Southern District, weighing in favor of applying New York law was the fact that most of the events in the underlying dispute, relating to improper construction work, took place in New York.

HOMEOWNERS' COVERAGE:

Smith v. State Farm Fire and Cas. Co., 55 A.D.3d 652 (2d Dep't November 18, 2008) Plaintiff brought suit pursuant to Insurance Law §3420(a)(2) against defendant-insurer seeking to recover an unsatisfied judgment the plaintiff had obtained against the defendant's named insureds. The Appellate Division, First Department, held that the defendant-insurer demonstrated that the plaintiff, the named insureds' daughter-in-law, who resided in their home at the time of the incident giving rise to her underlying personal injury action against the named insureds, was a resident "relative" and, therefore, fell within an exclusion from coverage contained in the homeowners' policy.

NOTICE:

Sorbara Constr. Corp. v. AIU Ins. Co., 11 N.Y.3d 805 (Court of Appeals October 21, 2008) The Court of Appeals held, contrary to the insured's contention, that notice of an occurrence provided by the insured to its insurer under its workers' compensation policy did not constitute notice under the insured's liability policy, even though both the workers' compensation policy and liability policy were issued by the same insurer.

Briggs Avenue LLC v. Ins. Corp. of Hannover, 11 N.Y.3d 377 (Court of Appeals November 20, 2008) The Court of Appeals held that the defendant-insurer was entitled to disclaim coverage when the insured, because of its error

in failing to update the address it had listed with the Secretary of State, did not comply with a policy condition requiring timely notice of a lawsuit. According to the Court of Appeals, it was "unquestionably practical" for the plaintiff-insured to keep its address current with the Secretary of State, and thus to assure that it would receive, and be able to give, timely notice of a suit.

Romeo v. Malta, 55 A.D.3d 330 (1st Dep't October 7, 2008) The Appellate Division, First Department, held that the record before it established that although the insured knew about the plaintiff's accident on the day it occurred, it did not notify its insurer until nine months later, which constituted an unreasonable delay that was not excused by the insured's professed belief that the accident was the plaintiff's fault and would not result in liability of the insured.

2130 Williamsbridge Corp. v. Interstate Indem. Co., 55 A.D.3d 371 (1st Dep't October 16, 2008) The Appellate Division, First Department, held that the insured's excuse that it was unaware the notice provided to its broker was insufficient as notice to its insurer was unreasonable. In this regard, the First Department referred to the portion of the policy entitled, "Important Notice", which listed a telephone number for reporting claims, and indicated that all other correspondence should be sent to the broker. As such, the First Department held that the insured only had to read the policy to determine how to fulfill the condition precedent to coverage.

Liberty Moving & Storage Co., Inc. v. Westport Ins. Co., 55 A.D.3d 1014 (3rd Dep't October 16, 2008) A workers' compensation insurance carrier received notice of bodily injuries sustained to an employee of its insured four days after the alleged accident. However, the insured failed to provide the workers' compensation carrier with timely notice of the third-party action that was eventually commenced against the insured seeking contribution and indemnification in connection with the injuries sustained by its employee. The Appellate Division, Third Department, held that although the workers' compensation carrier received timely notice of the accident, this notice did not satisfy the insured's separate obligation to provide prompt notice of the third-party lawsuit that had been commenced against it. Moreover, the Third Department held that the workers' compensation carrier was not required to demonstrate prejudice in order to successfully disclaim coverage, declining to extend the holding of Matter of Brandon, 97 N.Y.2d 491 (2001) (which required a SUM insurer to establish prejudice in order to deny coverage for late notice of a lawsuit when the insurer had received timely notice of the occurrence).

Travelers Cas. and Surety Co. v. Dormitory Authority-State of New York, 2008 WL 4833103 (S.D.N.Y. November 3, 2008) The Southern District held that a six month delay in providing notice to an excess carrier was unreasonable as a matter of law where it was evident that the circumstances known to the insured suggested a reasonable possibility that the claim would trigger the excess insurer's coverage. "[W]here notice to an excess liability carrier is in issue, the focus is on when the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances."

Bd. of Hudson River-Black River Regulating Dist. v. Praetorian Ins. Co., 56 A.D.3d 929 (3d Dep't November 13, 2008) The Appellate Division, Third Department, held that the plaintiff-insured's excuse that its general counsel should have forwarded notice of claim to the defend-insurer when it was received and assumed that notice had been so provided, did not constitute a valid excuse. Although The Third Department recognized that there may be circumstances, such as lack of knowledge that an accident has occurred or a reasonable belief in non-liability that will excuse or explain delay in giving notice, it held that the mere neglect or inadvertence on the part of the plaintiff's employee was not a valid excuse.

Gardner v. Phoenix Ins. Co., 21 Misc.3d 1135(A) (N.Y. Sup. Ct. Kings County November 25, 2008) The New York Supreme Court, Kings County, held that timely notice furnished by one insured may be deemed timely notice by another only where the two parties are united in interest or where there is no adversity between them. However, according to the Court, since the plaintiff, which was seeking additional insured coverage from the defendant-insurer, had asserted cross-claims against the defendant's named insured, a co-defendant, an adversarial relationship had been created between the named insured and the plaintiff, the purported additional insured, and such adversarial relationship precluded the plaintiff's use of the named insured's timely notice to the defendant-insurer in order to avoid the consequences of the plaintiff's own late notice.

PRIORITY OF COVERAGE:

Briarwoods Farm, Inc. v. Cent. Mut. Ins. Co., 866 N.Y.S.2d 847 (N.Y. Sup. Ct. Orange County October 29, 2008) The Supreme Court, Orange County, held that a determination that a general contractor is entitled to additional insured coverage under a subcontractor's primary policy does not preclude a determination that the general contractor's own insurance policy also provides primary coverage. Thus, both the general contractor's and subcontractor's policies may be equally obligated to cover the costs associated with an underlying action depending upon the interplay of the policies relative Other Insurance clauses.

SUBROGATION:

State Farm Ins. Co. v. J.P. Spano Construction, Inc., 865 N.Y.S.2d 678 (1st Dep't October 21, 2008) The Appellate Division, First Department, held that a waiver-of-subrogation clause in a contract entered into by insureds barred recovery in the insurance company's subsequent subrogation action, where such clause waived subrogation for all claims for damages caused by fire or other causes of loss to the extent covered by the property insurance obtained, and the policy of insurance issued to insureds acknowledged the insureds' right to waive the insurer's subrogation rights.

TIMELINESS OF DISCLAIMERS:

Cont'l Cas. Co. v. Stradford, 2008 WL 4975081 (Court of Appeals November 25, 2008) Plaintiff-insurer brought suit seeking a declaration that it was entitled to disclaim coverage in connection with two underlying malpractice actions based upon the insured's lack of cooperation. On appeal, although the defendants did not dispute the lower court's conclusion that the plaintiff-insurer was entitled to disclaim coverage for lack of cooperation, the defendants contended that the disclaimer was untimely as a matter of law.

The Court of Appeals began its analysis by recognizing that even if an insurer possesses a valid basis to disclaim coverage for non-cooperation, it must still issue its disclaimer within a reasonable time, and that timeliness usually presents a factual question, requiring assessment of all relevant circumstances surrounding a particular disclaimer. Although the Court of Appeals declined to provide a "fixed yardstick" against which to measure the reasonableness of a delay in disclaiming coverage, it noted that cases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances. According to the Court of Appeals, the present matter did not present such a circumstance. In this regard, the Court of Appeals stated that unlike cases involving late notice of claims or other clearly applicable coverage exclusions, an insured's non-cooperative attitude is often not readily apparent. "Indeed, as here, such a position can be obscured by repeated pledges to cooperate and actual cooperation."

The Court of Appeals then provided that whereas "in some cases, such as where an insured openly disavows its duty to cooperate, little time is needed to evaluate the relevant non-cooperative conduct before disclaiming. But here, where an insured has punctuated periods of non-compliance with sporadic cooperation or promises to cooperate, some reasonably longer period of analysis may be warranted." In sum, the Court of Appeals held that a question of fact remained regarding the amount of time required for the plaintiff-insurer to complete its evaluation of the insured's conduct in the two underlying actions.

Saitta v. New York City Transit Auth., 55 A.D.3d 422 (1st Dep't October 23, 2008) According to the Appellate Division, First Department, it should have been apparent to the insurer that all of the information it needed to issue a denial of additional insured coverage was contained in the enclosures forwarded by the additional insured along with its notice of the accident, including the fact that the claim arose out of the work of the named insured, that the injured claimant was an employee of the named insured, and that the additional insured's notice of the accident was untimely. As such, the insurer's four-month delay in disclaiming coverage, measured from its receipt of the additional insured's notice of the accident, was unreasonable as a matter of law. In addition, the First Department rejected the insurer's argument that it was not required to limit its investigation to the additional insured's delay, where the insurer's claims examiner could not identify what other grounds for denying coverage were investigated.

WAIVER OF COVERAGE DEFENSES:

Adames v. Nationwide Mut. Fire Ins. Co., 55 A.D.3d 513 (2d Dep't October 7, 2008) The plaintiff was allegedly injured when she fell after slipping on ice on a sidewalk in front of a commercial building owned by Charles Bobrowsky. Bobrowsky was covered under a homeowners' policy and umbrella policy issued by Nationwide Mutual Insurance Company. Upon notice of the plaintiff's claim, Nationwide issued a disclaimer letter to Bobrowsky and the plaintiff's attorney denying coverage under both policies. The disclaimer letter relied upon the definition of "insured location" appearing in the homeowners' policy, the definition of "business property," as well as an exclusion applicable to "occurrence[s] arising out of the business pursuits or business property of an insured," appearing in the umbrella policy.

After the plaintiff obtained a default judgment against Bobrowsky, she commenced action against Nationwide pursuant to Insurance Law § 3420(a)(2) to recover the amount of the judgment. In defense of the suit, Nationwide attempted to assert additional defenses to coverage that were not contained in its denial letter. The Appellate Division, Second Department, began its analysis by noting that a notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated. In conclusion, the Second Department held that since Nationwide was attempting to rely upon exclusions relating to business pursuits and rental property in the homeowners' policy which were not included in Nationwide's disclaimer letter, they were waived.

MISCELLANEOUS:

Ferguson v. E.M.D. Enterprises, Inc., 2008 WL 4446711 (4th Dep't October 3, 2008) The Appellate Division, Fourth Department, held that the lower court did not err in denying Lexington Insurance Company's motion to intervene in an action commenced against Lexington's insured. Lexington sought to intervene after its insured failed to respond to a Complaint filed against it. The Fourth Department held that although Lexington did not have a duty to defend its insured until the policy's Self-Insured Retention had been exhausted, it had both the right and opportunity to defend before exhaustion of the retained limit and, therefore, there was no need for the intervention, inasmuch as Lexington could, as of right, protect its own interests by defending its insured in the action.

Dimmick v. New York Prop. Ins. Underwriting Ass'n., 2008 WL 5175074 (2d Dep't December 9, 2008) The defendant-insurer issued a policy of insurance which insured the plaintiff-insured's property against loss from fire. The policy contained a provision that an action against the defendant-insurer had to be commenced within two years of the date of loss. Although the plaintiff-insured's property sustained fire damage on July 11, 1999, the plaintiff failed to commence suit until July 31, 2001. The Appellate Division, Second Department, held that the Complaint should have been dismissed as time-barred since the plaintiff-insured failed to comply with the contractual limitations period under the policy and since the defendant-insurer did not engage in any conduct during the limitations period that induced the plaintiff-insured to postpone commencing suit.

GuideOne Specialty Ins. Co. v. Admiral Ins. Co., 2008 WL 5174774 (2d Dep't December 9, 2008) GuideOne Specialty Insurance Company issued liability coverage to the owner of a premises that had entered into an agreement with a general contractor, which was insured by Admiral Insurance Company. According to the agreement, the general contractor was required to provide the owner with additional insured coverage in the sum of no less than $2 million per occurrence and $5 million in the aggregate. However, contrary to the provision, the general contractor's policy with Admiral contained coverage limits of only $1 million per occurrence. During the construction project, a construction worker was injured, resulting in suit against the premises owner. GuideOne thereafter wrote to Admiral seeking assurance from Admiral's claims superintendent that Admiral would provide a "full defense and indemnification" to the property owner in connection with the personal injury action. Specifically, GuideOne requested that the claims superintendent sign a copy of the letter and return it to counsel. The letter contained, *inter alia*, the following sentence: "[Admiral] is providing [the owner of the premises] with a full defense and indemnification in this matter." Before signing and returning the letter, Admiral's claims superintendent handwrote an addition to the sentence, so that it read as follows: "[Admiral] is providing [the owner of the premises] with a full defense and indemnification in this matter, as it conforms with the contract between [the general contractor and the premises owner]." Following this exchange, the underlying personal injury action was settled for $1,225,000, to which Admiral contributed $1 million and GuideOne contributed $225,000. GuideOne thereafter commenced an action against Admiral seeking to recover the $225,000 it paid toward the settlement and arguing that the letter signed by Admiral's claim superintendent, in effect, modified Admiral's policy to provide coverage in the amounts required by the agreement between the general contractor and the premises owner.

The Appellate Division, Second Department, began its analysis by noting that the Admiral policy expressly provided that its terms could not be "amended or waived [except] by endorsement issued by [Admiral] and made a part of this policy." As such, the Second Department held that the letter signed by Admiral's claims superintendent did not purport to be, and did not constitute, such an endorsement. Moreover, according to the Second Department, inasmuch as the Admiral policy was unambiguous with respect to the limits of coverage afforded, resort to extrinsic evidence was not proper.

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Should you have any comments, questions or suggestions in connection with the information provided in this newsletter please contact Richard P. Byrne, Esq., John D. McKenna, Esq. or Jillian Menna, Esq. at (516) 294-8844. You may also wish to visit the Firm's website at lbcclaw.com