LB&C

QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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

CASES OF INTEREST BY TOPIC

ADDITIONAL INSURED COVERAGE

National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co., 103 A.D.3d 473 (1st Dept. Feb. 14, 2013). National Union Fire Insurance Company of Pittsburgh, PA sought a declaration that Greenwich Insurance Company was obligated to reimburse defense and settlement costs incurred in an underlying personal injury action as National Union's insured, NVR, Inc., was entitled to additional insured coverage under a Greenwich policy. The additional insured endorsement to the Greenwich policy provided coverage for bodily injury caused, in whole or in part, by Greenwich's named insured's acts or omissions or the acts or omissions of those acting on its behalf. In relying on its decision in *W&W Glass Sys. Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530 (1st Dept. 2012), the First Department stated that the phrase "caused by" "does not materially differ from the phrase 'arising out of'", which focuses "not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained." In that Greenwich's counsel admitted that the underlying personal injury action arose out of an accident that occurred while the injured party was acting on behalf of its named insured, the Court found that the additional insured endorsement was implicated.

AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc., 2013 WL 68992 (1st Dept. Jan. 8, 2013). AB Green Ganesvoort, LLC sought a declaration that Liberty Mutual Insurance Company owed a defense and indemnification relative to a personal injury action brought by Juan Vargas, who was allegedly injured while working at a construction site owned by AB Green. No further details about the cause of the injury were provided; however, we know that Pavarini McGovern, LLC was retained to act as general contractor at the site and subcontracted with Scalamandre & Sons, Inc. which purchased concrete for the project from Ferrara Brothers Building Materials Corp. pursuant to an unsigned purchase order. Ferrara was insured under a Liberty Mutual policy that contained an endorsement entitled: "Additional Insured—Owners, Lessees or Contractors—Automatic status when required in construction agreement with you". The endorsement stated, in pertinent part, that additional insured coverage is provided "when you and such…organization have agreed in writing in a contract or agreement that such…organization be added as an additional insured on your policy." Liberty Mutual moved for summary judgment seeking the dismissal of the declaratory judgment complaint arguing that under the plain language of the policy, since AB Green did not produce any written agreement between it and Ferrara, the additional insured endorsement was not implicated. In opposition, AB Green argued that the title of the endorsement— "Additional Insured Owners, Lessees or Contractors—Automatic status when required in construction agreement with you"—provided coverage based upon the purchase order Ferrara entered with Scalamandre in which it agreed to "assume all the obligations and risks which… [Scalamandre] assumed towards" AB Green. In finding that there was no additional insured coverage, the First Department stated that the title of a policy provision is insufficient to alter the unambiguous language in the body of the clause itself.

Davis & Partners, LLC v. QBE Ins. Corp., 38 Misc. 3d 1215(A) (Sup. Ct. N.Y. Co. Jan. 17, 2013). On February 17, 2004, Edward Callegari, an employee of Jansons Associates, Inc., was stabbed by Drew Rose, an employee of Davis & Partners, LLC, while performing construction at a worksite in Manhattan. RFD 425 Fifth Avenue L.P. was the owner of the construction site where the incident occurred, Davis was the general contractor, and Jansons was a subcontractor of additional party. RFD and Davis commenced a declaratory judgment action against QBE Insurance Corporation, which issued a Commercial General Liability policy to Jansons, seeking a declaration that they were entitled to coverage as additional insureds. RFD and Davis subsequently moved for summary judgment and QBE cross-moved arguing that it had no coverage obligation as the jury in the underlying action determined that the injuries did not arise out of Jansons' work and that the facts alleged did not constitute an accident within the meaning of the policy. The trial court stated that where an employee of the insured subcontractor is injured while performing the subcontractor's work, there is a sufficient connection to trigger additional insured

coverage under the "arising out of" language of the additional insured endorsement. As the facts demonstrated that the injury occurred while Callegari was performing operations for Jansons, the trial court held that QBE's coverage obligation to RFD and Davis had been triggered. The trial court further noted that QBE's argument that the stabbing incident was not an "accident" as defined by the policy and, thus, was not an occurrence was unavailing. In this regard, the trial court stated that "in deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen" and the incident, although intentional from the point of view of the assaulter, was unexpected, rather than intentional, from Jansons' point of view.

LATE NOTICE

Atlantic Casualty Ins. Co. v. Value Waterproofing, Inc., 2012 WL 152854 (S.D.N.Y. Jan. 15, 2013). Kansas Fried Chicken ("KFC") hired Value Waterproofing, Inc. to perform work on support beams of a two story structure it owned in Manhattan. Value had previously obtained a Commercial General Liability policy from Atlantic Casualty Insurance Company for the policy period May 12, 2009 to May 12, 2010. In February 2010, the roof of the building collapsed after a twenty-inch snow storm. Following the collapse, the New York City Department of Buildings ordered the demolition of the second floor of the building and the same was completed on March 17, 2010. On September 2, 2012, KFC's insurer sent a letter to Atlantic Casualty notifying it of the collapse at the property and Atlantic Casualty subsequently disclaimed coverage on late notice grounds. Atlantic Casualty then instituted a declaratory judgment seeking a declaration that it had no duty to defend or indemnify Value asserting, *inter alia*, that it did not receive notice of the loss until approximately six months after the roof collapsed and that it was prejudiced as a result of the late notice. Based on the undisputed evidence that Value knew of the roof's collapse within a few hours after its occurrence and that KFC requested a Certificate of Insurance from Value within days after the incident, the United States District Court for the Southern District of New York held that the six month delay in notifying Atlantic Casualty of the loss was unreasonable as a matter of law. The Court stated that the expeditious demolition of the second floor of the building prior to notifying Atlantic Casualty prevented it from being able to independently ascertain potential causes of the collapse and, therefore, Atlantic Casualty was prejudiced as the late notice materially impaired its ability to investigate the claim and defend against it. Accordingly, the Court found that Atlantic Casualty had no coverage obligation to Value.

DISCLAIMER

Sierra v. 4401 Sunset Park, LLC, 101 A.D.3d 983 (2d Dept. Dec. 19, 2012). A Certificate of Insurance was issued to 4401 Sunset Park, LLC and Sierra Realty Company indicating that they were additional insureds under a Scottsdale Insurance Company policy covering a construction project in which several apartments in the subject building were being renovated. On August 18, 2008, Juan Sierra was allegedly injured while working at the project. On January 6, 2009, Greater New York Insurance Company ("GNY"), the primary insurer of 4401 and Sierra Realty, tendered the claim to Scottsdale seeking defense and indemnification. Scottsdale responded to GNY by disclaiming coverage and rejecting the tender on late notice grounds; however, Scottsdale did not provide a copy of its disclaimer to 4401 or Sierra Realty. After instituting a third-party action seeking declaratory relief against Scottsdale, 4401 and Sierra Realty moved, *inter alia*, for summary judgment declaring that Scottsdale was obligated to defend and indemnify them as additional insureds. The Second Department stated that where a claim is tendered to an insurer which provides additional insured coverage, the disclaimer must comply with the requirements of Insurance Law § 3420 by providing written notice to the additional insureds. Moreover, the fact that GNY provided untimely notice of the accident "does not excuse [Scottsdale's] unreasonable delay in disclaiming coverage." In affirming the trial court's decision, the Second Department found that Scottsdale's failure to provide written notice of disclaimer to 4401 and Sierra Realty rendered the same ineffective as against them and, accordingly, 4401 and Sierra Realty were entitled to additional insured coverage under the Scottsdale policy.

Penn Millers Ins. Co. v. C.W. Cold Storage, Inc., 2013 WL 387992 (4th Dept. Feb. 1, 2013). Pursuant to an agreement with Thruway Produce, Inc., C.W. Cold Storage, Inc. stored apples that Thruway had sold to a subsidiary of Milnot Holding Corporation for the later processing into baby food. A recall was ordered following the discovery of rodenticide in the apples between January and March 2006 and Milnot commenced an action against Thruway seeking damages for the economic losses sustained. Thruway subsequently impleaded C.W., which was

insured under an Agribusiness Property and Commercial General Liability policy it had procured from Penn Millers Insurance Company. Upon receiving notice of the claim against C.W., Penn Millers reserved its right to disclaim coverage on late notice grounds but, nevertheless, undertook C.W.'s defense in the third-party action. However, in February 2011, Penn Millers instituted a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify C.W. and subsequently moved for summary judgment arguing that C.W. failed to provide it with timely notice of the alleged claim. The Fourth Department stated that Penn Millers met its initial burden on the motion by establishing that C.W. did not provide it with notice of a potential claim until more than four months after the latest rodenticide incident and, thus, C.W. failed to comply with the policy condition requiring timely notice. Nevertheless, it was held that the trial court properly denied Penn Millers' motion because triable issues of fact remained with respect to the effectiveness of its disclaimer. In this regard, the Fourth Department stated that "where, as here, the underlying claim involves only economic injury, the timeliness, and thus effectiveness, of an insurer's disclaimer is not governed by Insurance Law §3420 but rather is governed by the common law under which prejudice must generally be established as the result of an unreasonable delay in disclaiming before an insurer will be estopped from asserting noncoverage." The Court reasoned that C.W. plausibly contended that it was prejudiced by Penn Millers' delay in disclaiming coverage which was made on the eve of trial and after C.W.'s defense had been assumed by Penn Millers.

Scottsdale Ins. Co. v. Utica First Ins. Co., 2013 WL 518674 (2d Dept. Feb 13, 2013). Vasca Siding Inc. subcontracted Sunburst Home Improvement, Inc. to perform certain construction work. On August 17, 2007, an employee of Sunburst sustained injuries while working at the construction site and subsequently instituted a personal injury action against Vasca, among others. Utica First Insurance Company, which had issued a liability policy to Sunburst, first received notice of the accident on August 31, 2007 from the owners of the premises, and on September 11, 2007, Utica disclaimed coverage and copied Vasca on the same. Subsequently, via letter dated December 28, 2007, Scottsdale Insurance Company, which insured Vasca, tendered the defense and indemnity of Vasca to Utica as an additional insured. On February 20, 2008, Utica denied the existence of additional insured coverage. Scottsdale and Vasca then commenced a declaratory judgment action seeking a declaration that Vasca was entitled to additional insured coverage under the Utica policy relative to the employee's lawsuit. The Second Department found that Utica's February 20, 2008 rejection of Scottsdale's tender did not constitute a timely disclaimer as Utica failed to provide any adequate explanation for its delay in providing its coverage position and since the grounds for disclaimer had been apparent to Utica since at least September 2007. Although Utica argued on appeal that its September 11, 2007 disclaimer was equally applicable to Vasca as it was copied on the same, the Court rejected that argument as it was not raised in the trial court proceedings. As such, the Second Department held that Utica failed to comply with the requirements of Insurance Law 3420 to provide a prompt disclaimer of coverage.

4185 Development Corp. v. Harleysville Ins. Co. of New York, 2013 WL 692685 (2d Dept. Feb 27, 2013). 4815 Development Corp. leased out space in a building it owned to Today's Laundromat, Inc. ("TLI"). In accordance with the terms of the lease, TLI obtained Comprehensive General Liability insurance from United National Specialty Insurance Company which named 4815 Development as an additional insured. In July 2007, TLI assigned the lease to New Today's Laundromat, Inc. ("NTLI"), which procured a Commercial General Liability policy from Harleysville Insurance Company of New York that also named 4815 Development as an additional insured. On October 6, 2007, Phurbu Tsering sustained fatal injuries when he fell down a flight of stairs at the subject premises. In March 2008, the decedent's administrator instituted an action to recover damages against 4815 Development and NTLI. Approximately two months later, 4815 Development notified United of the accident and requested that United defend and indemnify it as an additional insured in connection with the wrongful death lawsuit. In July 2008, approximately forty-nine days after receiving 4815 Development's notice of claim, United disclaimed coverage asserting, *inter alia*, failure to provide timely notice. 4815 Development then commenced a declaratory judgment action seeking a declaration that United was obligated to provide it with additional insured coverage relative to the wrongful death lawsuit. The Second Department found that United's delay in disclaiming coverage to 4815 Development was unreasonable as a matter of law, and that, consequently, United was precluded from asserting a late notice coverage defense.

RESCISSION/REFORMATION

Essex Ins. Co. v. Vickers, 2013 WL 517597 (2d Dept. Feb. 13, 2013). In 2004, 99 Lynn Avenue, LLC and 105 Lynn Avenue, LLC, the owners of property located at 99 Lynn Avenue and 105 Lynn Avenue, respectively, entered into separate contracts with George E. Vickers, Jr. Enterprises, Inc., by which Vickers was hired to act as the general contractor for the construction of homes on each of the properties. Vickers subcontracted with Paul Michael Contracting Corp. to perform masonry work at the 99 Lynn job site. Vickers procured a Commercial General Liability insurance policy from Essex Insurance Company which excluded coverage for "bodily injury…sustained by any contractor…or subcontractor, or any employee…of same." On January 27, 2004, Essex added the Lynn entities as additional insureds for the 2003 to 2004 coverage period. However, the renewal quotations for the 2004 to 2005 and 2005 to 2006 policy periods stated that the policies would not include additional insured coverage. On June 25, 2005, Miguel Pinon, an employee of Paul Michael, sustained serious injuries during his lunch break when he dove into shallow water at a nearby beach and broke his neck. Pinon commenced a personal injury action against Vickers and the Lynn entities and they subsequently sought a defense and indemnification from Essex as additional insureds. Essex disclaimed coverage and instituted a declaratory judgment action. Essex then moved for summary judgment arguing, *inter alia*, that the Lynn entities were not additional insureds under the policy. The Second Department found that the Essex policy for the 2005 to 2006 coverage period should be reformed to include the Lynn entities as additional insureds as a mutual mistake was demonstrated by clear and convincing evidence. This evidence included the request in Vickers' renewal application to provide additional insured coverage to the Lynn entities, the absence of evidence that Essex refused this request, and the fact that Essex previously granted a written request by Vickers to add the Lynn entities as additional insureds for the 2003 and 2004 policy periods. Moreover, the Court found the employee exclusion to be ambiguous and not applicable.

REINSURANCE

United States Fidelity & Guaranty Co. v. American Re-Insurance Co., 2013 WL 451666 (N.Y. Ct. of App. Feb. 7, 2013). From 1948 or earlier until mid-1960, United States Fidelity & Guaranty Company was one of the liability insurers of Western Asbestos Company, a distributor of asbestos products. The policies USF&G issued to Western Asbestos contained "per person" and "per accident" limits in varying amounts, with the highest per person limit being $200,000; however, they contained no aggregate limit. Western Asbestos was taken over in the 1960s by Western MacArthur Company which was subsequently found liable for personal injury claims arising out of exposure to the products that Western Asbestos had sold. By 1991, such claims had exhausted MacArthur's own insurance coverage and, as such, MacArthur demanded a defense from Western Asbestos' insurers, including USF&G. USF&G refused the demand and, in 1993, MacArthur brought suit in a California state court against USF&G, among others, to establish the existence of coverage. USF&G relied principally on two grounds in its defense of the coverage litigation: (i) that in the decades that passed between the issuance of the policies and the claims made thereunder, the policies themselves had been lost and, thus, MacArthur could not prove that they had ever been issued; and (ii) that USF&G had, at most, insured only Western Asbestos, not MacArthur, and had no obligation to defend the latter company. In response, MacArthur claimed that USF&G had, by refusing to defend the asbestos lawsuits, breached its implied covenant of good faith and fair dealing. In 2002, USF&G and MacArthur settled, requiring USF&G to pay a total of $975 million to resolve the asbestos lawsuits (inclusive of bad faith claims), plus $12.3 million in fees to counsel for the asbestos claimants. USF&G then turned to its reinsurers with whom it had entered into a treaty of reinsurance for the years 1956 through 1962. Pursuant to USF&G's allocation of the settlement payments, it calculated the reinsurers' obligation to be approximately $391 million. After the reinsurers refused to reimburse those sums, USF&G commenced an action against them. The reinsurers challenged USF&G's allocation of the settlement payments arguing, *inter alia*, that the decision to allocate all the settlement claims within the policy limits, and nothing to the claims for bad faith, worked to USF&G's advantage because the bad faith claims were not covered by reinsurance. The Court of Appeals (New York's highest court) stated that a cedent's allocation of a settlement for reinsurance purposes will be binding on a reinsurer if it is reasonable and consistent. In this regard, the Court of Appeals concluded that it was impossible to determine, as a matter of law, that parties bargaining at arm's length, in a situation where reinsurance was absent, could reasonably have given no value to the bad faith claims. As such, the Court determined that the amount of reimbursement must be determined at trial.

MISCELLANEOUS

QBE Ins. Corp. v. Public Service Mut. Ins. Co., 2013 WL 68898 (1st Dept. Jan. 8, 2013). 33rd Street Bakery, a tenant in a building owned by Dierks Heating Company, Inc., procured a Commercial General Liability policy from Public Service Mutual Insurance Company which, in accordance with the lease, named Dierks as an additional insured. Dierks also had its own Commercial General Liability policy issued by QBE Insurance Corporation. One of Bakery's employees sustained unspecified injuries and subsequently commenced a personal injury action against Dierks. Rockville Risk Management Associates, Inc., the Third-Party Administrator acting on behalf of QBE and Dierks, tendered the defense and indemnification of Dierks to PSM. PSM, in turn, disclaimed coverage based on the "Intra-Insured" exclusion to its policy which excluded coverage for any insured against a claim or suit brought by any other insured. QBE then commenced a declaratory judgment action against PSM and both parties moved for summary judgment. The First Department found that based on the plain meaning of the provision, the Intra-Insured exclusion was inapplicable as the underlying plaintiff, an employee of the Bakery, was not an insured under the PSM policy unless and until he was named as a defendant in a claim which arose out of the scope of his or her employment.

Ment Bros. Iron Works Co., Inc. v. Interstate Fire & Cas. Co., 702 F.3d 118 (2d Cir. Dec. 11, 2012). WXIV Broadway Grand Realty, LLC, a building owner and developer, began construction at 40 Mercer Street in 2005, using Pavarini McGovern, LLC as a general contractor. Pavarini subcontracted the welding work to Ment Brothers Iron Works Company, Inc., which completed its work between April and July 2006. During that time, WXIV/Broadway was the sole fee owner of the building at 40 Mercer. Thereafter, Pavarini discovered damage in the building that was allegedly caused by welding sparks and subsequently sued Ment. Ment tendered the defense and indemnification of the claim to its liability insurer, Interstate Fire & Casualty Company, which accepted the tender but reserved its rights on the ground that the damage had occurred during the construction of a condominium, which was precluded pursuant to a residential construction exclusion to the policy that barred property damage "arising out of the construction of 'residential properties,' except 'apartments.'" "Residential properties" was defined to include condominiums and "apartment" was defined as "a unit of residential real property in a multi-unit residential building or project where all units are owned by and titled to a single person or entity." Ment then filed a lawsuit against Interstate seeking a declaration concerning the existence of coverage for the underlying action. The Second Circuit noted that WXIV/Broadway did not file a condominium declaration until February 9, 2007 – after Ment had completed its work at 40 Mercer. As such, although WXIV/Broadway and everyone involved in the project may have intended that 40 Mercer would become a condominium, under New York law, it was not one until 2007 when the declaration was filed. The Court reasoned that because the condominium declaration had not been filed and because the property, a multi-unit residential project building, was solely owned by WXIV/Broadway at the time, 40 Mercer was an apartment building when Ment was performing operations in it. Accordingly, the Second Circuit found that Interstate had a duty to defend and indemnify Ment.

Nesmith v. Allstate Ins. Co., 2013 WL 387970 (4th Dept. Feb. 1, 2013). Allstate Insurance Company issued an insurance policy with a $500,000 limit of liability per occurrence to Tony Clyde Wilson, the owner of an apartment building. The policy's noncumulation clause provided, in relevant part: "Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed [$500,000 per occurrence]. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss." In 1993, two children were exposed to lead paint while residing in the apartment owned by Wilson and one suffered injuries as a result of that exposure. The mother of those children commenced an action against Wilson, seeking damages for the injuries that her child sustained. That suit settled for $350,000. Then, in 1994, two children of a subsequent tenant were also exposed to lead paint in the same apartment and instituted a separate action. In that action, Allstate took the position that the noncumulation clause in the policy limited its liability for all lead exposures in the apartment to a single policy limit of $500,000 and, therefore, offered the children of the subsequent tenant the remaining $150,000 of coverage to settle the suit. The claimants subsequently subrogated to the rights of the property owner via settlement and instituted a declaratory judgment action concerning the available limits. Upon its review of Wilson's deposition testimony, the Fourth Department found that the lead paint that injured the second set of children was the same that was present in the apartment when the first set of children lived there. As such, the Fourth Department held that inasmuch as the

claims arise from exposure to the same condition and are spatially identical and temporally close enough that there were no intervening changes in the injury-causing conditions, the claims must be viewed as a single occurrence within the meaning of the policy.

LBC&C's INSURANCE INDUSTRY PRACTICE GROUP

LBC&C has extensive knowledge and experience in the insurance industry, and the wide array of services which it provides to the insurance community is a foundation of the Firm's practice. LBC&C is dedicated to achieving the goals of its clients in a professional, cost-effective and timely manner. The Firm's reputation for meaningful analysis, tough advocacy and creative solutions serves clients well for the regulatory and legal challenges which they face in the ever-changing national landscape of the insurance industry. Insurance companies rely upon LBC&C to draft policies, render coverage opinions, act as monitoring counsel, advise excess carriers and reinsurers, litigate declaratory judgment and "bad faith" actions, and provide auditing services. These services are performed on a nationwide basis and LBC&C attorneys represent their clients' interests in litigation, arbitration and mediation throughout the country. Furthermore, because the law of insurance is evolutionary and dynamic, the Firm provides in-house seminars for underwriting, claims and marketing personnel on developing issues. Should you have any comments, questions or suggestions in connection with the information provided in this newsletter please contact Richard P. Byrne, Esq. or John D. McKenna, Esq. at (516) 294-8844. You may also wish to visit the Firm's website at lbcclaw.com