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CASES OF INTEREST BY TOPIC

DUTY TO DEFEND

K2 Investment Grp., LLC. v. American Guar. & Liab. Ins. Co., 2014 WL 590662 (Ct. of App., Feb 18, 2014). As previously reported in our Second Quarter 2013 Coverage Newsletter, on June 11, 2013, the Court of Appeals (New York's highest court) in *K2 Investment Grp., LLC v. American Guar. & Liab. Ins. Co.*, 21 N.Y.3d 384 (2013) ("*K2-I*") held that "when a liability insurer has breached its duty to defend its insured, the insurer may not later rely on policy exclusions to escape its duty to indemnify the insured for a judgment against him." Thereafter, in September 2013, the Court of Appeals granted re-argument and on February 18, 2014, it vacated its prior decision and reversed the Appellate Division's order ("*K2-II*").

By way of background, K2 Group, LLC, provided loans secured by mortgages to Goldan, LLC; however, Goldan failed to record the mortgages or repay the loans. Consequently, K2 Group commenced a lawsuit against Goldan and its two principals, Mark Goldman and Jeffrey Daniels (an attorney). Although the lawsuit primarily sought payment on the loans, a claim for legal malpractice was also asserted against Daniels and, as such, notification was provided to his malpractice carrier, American Guarantee and Liability Insurance Company. American Guarantee refused to provide "either defense or indemnity coverage" based upon its belief that the allegations against Daniels were "not based on the rendering or failing to render legal services for others." After issuance of the disclaimer, K2 Group made a settlement demand on Daniels for $450,000—significantly less than the $2 million limit of the American Guarantee policy. Daniels forwarded the settlement demand to American Guarantee; however, it was rejected on the same grounds as cited in the disclaimer. Daniels ultimately failed to appear in the lawsuit and K2 Group obtained a default judgment in excess of the policy limits. The judgment was entered only as to the legal malpractice claim; the other claims against Daniels were discontinued. Daniels subsequently assigned his rights against American Guarantee to K2 Group and K2 Group commenced an action for, *inter alia*, breach of contract under the policy. American Guarantee thereafter moved for summary judgment seeking the dismissal of the Complaint, relying on policy exclusions pertaining to "insured status" and "business enterprise." K2 Group cross-moved for summary judgment asserting that as American Guarantee breached its duty to defend Daniels, it was bound up to the $2 million limit of its policy and required to pay the resulting judgment against him.

In *K2-II*, the Court stated that although American Guarantee had breached its duty to defend, the Court's earlier decision of *Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 64 NY2d 419 (1985) protected the insurer's right to rely on coverage defenses, including policy exclusions, in a later action. In *Servidone*, a case in which the insurer was relying on policy exclusions in defending litigation seeking coverage, the Court held that the answer to the question presented – namely, "[w]here an insurer breaches a contractual duty do defend its insured in a personal injury action, and the insured thereafter concludes a reasonable settlement with the injured party, is the insurer liable to indemnify the insured even if coverage is disputed?" – was no.

The plaintiff argued that *Servidone* and *K2-I* were distinguishable as *Servidone* involved a situation where the insured had settled with the plaintiff in the underlying litigation, whereas *K2-I* contemplated a judgment, not a settlement. The Court, however, did not find the proffered distinction persuasive. In that regard, it was noted that a liability insurer's duty to indemnify its insured does not depend on whether the insured settles or loses the case. Thus, although a default judgment may result in an insurer being precluded from re-litigating the issues in the underlying litigation, the Court of Appeals has now affirmed that it should have no impact on the insurer's ability to rely on policy exclusions that do not depend on facts established in the underlying litigation.

In reaching this decision, the Court also rejected the plaintiff's argument that the Court's decision in *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004) provided a basis for overruling *Servidone*. In support of their argument, the plaintiffs relied on the following language from *Lang*:

> [A]n insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured.

Id. at 356. While the Court noted that the *Lang* holding was "sound advice", it did not affect an insurer's ability to assert coverage defenses, including policy exclusions, in the context of a settlement by or judgment against an insured.

In addressing the dissent, which would have limited *Servidone* to cases where the defense was "based on noncoverage" rather than "predicated on an exclusion", the Court opined that the suggested distinction was clearly not made in *Servidone* and, therefore, should not be adopted by the *K2-II* Court. As such, the Court stated: "In short, to decide this case we must either overrule *Servidone* or follow it. We choose to follow it."

The Court found that the plaintiffs did not present any indication that the *Servidone* rule has proved unworkable or caused significant injustice or hardship since its adoption in 1985. It was further noted that a majority of other states and federal courts have adopted the rule set forth in *Servidone*. Accordingly, the Court stated:

> When our Court decides a question of insurance law, our insurers and insureds alike should ordinarily be entitled to assume that the decision will remain unchanged unless or until the Legislature decides otherwise. In other words, the rule of stare decisis, while it is not inexorable, is strong enough to govern this case.

Having decided that American Guarantee was not precluded from relying on its policy exclusions, the Court then addressed the applicability of the exclusions in question; specifically, the "insured status" and the "business enterprise" exclusions. It was ultimately decided that an issue of fact precluded a determination as to the applicability of the cited exclusions and, as such, the matter was remanded to the trial court.

Martinez v. OEL Realty Corp., 978 N.Y.S.2d 159 (1st Dept. Jan. 9, 2014). Miguel Angel Cabrera Martinez commenced an action alleging negligence against OEL Realty Corp. after he sustained injuries during the course of a robbery in the interior staircase of a building owned by OEL. OEL subsequently tendered its defense and indemnification to Tower Insurance Company of New York, which issued a Commercial General Liability policy to OEL that was in effect on the date of the purported robbery. After its investigation of OEL's claim, Tower disclaimed coverage pursuant to the policy's Assault and Battery exclusion. The exclusion, which was contained in a separate endorsement, provided that it modified the Commercial General Liability Coverage Part and the Liquor Liability Coverage Part to the policy. OEL then commenced a third-party action against Tower and Tower moved for summary judgment seeking an order that it had no duty to defend or indemnify OEL in connection with Martinez's action. In opposition, OEL contended, among other things, that the Assault and Battery Exclusion was inapplicable to OEL as it does not engage in any business relating to liquor and that the policy Tower issued did not contain a Liquor Liability Coverage Part. In reversing the decision of the trial court, the First Department held that as the negligence claims set forth in Martinez's Complaint "could not survive except for the assault, those claims are deemed to have arisen from the assault and are thus subject to the Assault and Battery Exclusion. The Court noted that contrary to OEL's assertions, the Declarations pages of the policy clearly stated that the policy was issued with a Commercial General Liability Coverage Part and an endorsement called the "Assault and Battery Exclusion". The fact that the policy was issued without a Liquor Liability Coverage Part created no ambiguity or confusion in the form itself, which expressly stated that it applied to the Commercial General Liability Coverage Part. Accordingly, the First Department found that Tower had no duty to defend or indemnify the negligence claims Martinez asserted against OEL.

ABM Mgmt. Corp. v. Harleysville Worcester Ins. Co., 2013 WL 6640143 (2d Dept. Dec. 18, 2013). On June 11, 2007, Vincent Castro Hernandez was fatally injured when a major artery in his arm was severed by a shattered glass entrance door of a building owned by 65-41 Booth Street Owners, Inc. From September 2002 through

August 2006, ABM Mgmt. Corp acted as property manager for the building. 65-41 Booth Street procured a liability insurance policy from Harleysville Worcester Insurance Company, which was effective from June 1, 2007 to June 1, 2008. Hernandez' estate commenced a personal injury action against ABM, among others, and ABM tendered its defense to Harleysville based upon language in the policy which extended coverage to 65-41 Booth Street's real estate manager. Harleysville denied the tender on the grounds that ABM was not the real estate manager on the date that Hernandez sustained injuries or at any time during the effective dates of the policy. Thereafter, ABM commenced a declaratory judgment action seeking a declaration that Harleysville was obligated to defend and indemnify it in the personal injury action. The trial court granted Harleysville's Motion for Summary Judgment declaring that it had no obligation to ABM. On appeal, the Second Department noted that the Harleysville policy provided coverage for, *inter alia*, "'bodily injury' or 'property damage': (a) [t]hat occurs during the policy period; and (b) [t]hat is caused by an 'occurrence.'" In addition, to the named insured, the policy provided coverage to "[a]ny person (other than your employee), or any organization while acting as [65-41 Booth Street's] real estate manager." In construing the terms of the policy, the Court stated that it is plain that these provisions of the subject policy are intended to cover the person or entity acting as 65-41's real estate manager during the policy's effective dates and for "occurrences" which take place within those dates. The Court reasoned that to extend this coverage to 65-41 Booth Street's prior real estate managers and to acts or omissions outside the scope of the policy's effective dates would improperly re-write the parties' agreement to include coverage which was never intended. As such, the Second Department affirmed the lower court's decision in finding that Harleysville had no duty to defend or indemnify ABM in connection with the underlying action.

APPLICABILITY OF EXCLUSIONS

Martin, Shudt, Wallace, Dilorenzo & Johnson v. The Travelers Indemnity Company of Connecticut, 2014 WL 460045 (N.D.N.Y. Feb. 5, 2014). Martin, Shudt, Wallace, Dilorenzo & Johnson ("MSWD&J") procured an insurance policy from The Travelers Indemnity Company of Connecticut which contained a Businessowner's Property Coverage Special Form which provided that Travelers "will pay for direct physical loss or damage to Covered Property," including money or securities, "caused by or resulting from a Covered Cause of Loss." Covered Causes of Loss included "risks of direct physical loss," but excluded "loss or damage caused by or resulting from…[v]oluntary parting with any property by you or anyone else to whom you have entrusted the property" (the "Voluntary Parting Exclusion"). In June 2012, someone presented to MSWD&J what appeared to be a cashier's check for $95,000. MSWD&J believed that the check represented a payment of funds owed to one of its clients. As such, MSWD&J deposited the check into its client escrow account, and after the funds were made available by the depository bank, wired the money to a third-party's bank account as instructed by the client. MSWD&J soon learned that the check it had deposited was forged and that the bank had charged MSWD&J's account for the amount. Further investigation revealed that the presentation of the check and the client's instructions to wire the funds to a third party was an act of larceny. Thereafter, MSWD&J submitted a claim for the loss to Travelers, but Travelers denied coverage stating that the Voluntary Parting Exclusion precluded coverage for the loss as MSWD&J voluntarily parted with the money. MSWD&J subsequently commenced an action for, *inter alia*, breach of contract against Travelers. Travelers removed the case to the United States District Court for the Northern District of New York and moved to dismiss, asserting that the Voluntary Parting Exclusion precluded coverage for loss. Although Travelers cited a number of cases holding that a "voluntary parting" with property exclusion encompasses larcenies by false pretenses or fraud, MSWD&J argued that the cited cases were unpersuasive because the exclusions in those cases contained explicit references to losses induced by scheme, fraud, or trick, whereas the Voluntary Parting Exclusion contained no such language. The Court noted that, on its face, the Voluntary Parting Exclusion unambiguously encompassed the claimed loss as MSWD&J wired the funds at issue to another bank account, thereby voluntarily parting with the same. It was further stated that the fact that the money was wired in reliance on misrepresentations or false pretenses did not alter the voluntariness of that parting. In finding in favor of Travelers, the Court reasoned, *inter alia*, that by its terms the Voluntary Parting Exclusion applied to any voluntary parting with property and, therefore, it was broader than exclusions with additional language limiting the exclusion only to voluntary partings induced by fraud, scheme, or trick. Accordingly, the Court held that the exclusion was applicable to bar MSWD&J's claim, and thus, its Complaint was dismissed.

DISCLAIMERS

Country-Wide Ins. Co. v. Preferred Trucking Services Corp., 2014 WL 59502 (Ct. of App. Feb. 18, 2014). Preferred Trucking Services Corp. procured a Business Auto Insurance policy from Country-Wide Insurance Company which required the insureds to cooperate with Country-Wide in its investigation or settlement of a claim or defense against a lawsuit. While the policy was in effect, Filippo Gallina was injured while unloading a vehicle owned by Preferred Trucking and operated by Carlos Arias. Thereafter, Gallina commenced a personal injury action against Preferred Trucking and Arias. Throughout the Spring of 2007, Country-Wide made numerous attempts to contact Preferred Trucking and Arias with no success. Additionally, neither Preferred Trucking nor Arias appeared in the personal injury action and, as such, Gallina moved for a default judgment. Country-Wide received its first formal notice of the suit on October 4, 2007 when Gallina's attorney faxed it a copy of the Motion for Default Judgment. By way of a letter dated October 10, 2007, Country-Wide reserved its right to disclaim coverage to Preferred Trucking and Arias due to, among other things, their failure to cooperate. Thereafter, Preferred Trucking expressed a willingness to cooperate, but Country-Wide was subsequently unable to get in contact with it despite multiple efforts throughout the Summer of 2008, which included telephone calls, letters, and sending an investigator to the home of Preferred Trucking's President six times. Moreover, in August 2008, Arias also indicated that he would cooperate; however, after depositions had been scheduled, on October 10, 2008, Arias stated that he did not care about the deposition. On November 6, 2008, Country-Wide disclaimed coverage to Preferred Trucking and Arias due to their failure to cooperate. Country-Wide then commenced a lawsuit, seeking a declaration that it was not obligated to defend or indemnify Preferred Trucking or Arias relative to the underlying action. The Court of Appeals was asked to consider whether Country-Wide's and November 6, 2008 declination was untimely as a matter of law noted that although disclaimers are to be issued as soon as reasonably possible, insurers are generally permitted a longer period for a disclaimer for noncooperation. In this regard, it was noted that an insurer cannot properly disclaim coverage for lack of cooperation unless it has satisfied its burden of showing "that it acted diligently in seeking to bring about the insured's cooperation; that the efforts employed by the insurer were reasonably calculated to obtain the insurer's cooperation; and that the attitude of the insured, after his [cooperation] was sought, was one of willful and avowed obstruction…." While Country-Wide did not dispute that it knew or should have known that Preferred Trucking would not cooperate in July 2008, it asserted that it was not in a position to know that Arias would not cooperate until October 13, 2008. In finding in favor of Country-Wide, the Court of Appeals stated that under the circumstances in which the insured "punctuated periods of noncompliance with sporadic cooperation or promises to cooperate", that Country-Wide had established as a matter of law that its delay in issuing the disclaimer was reasonable. Accordingly, the Court held that Country-Wide had no duty to defend and indemnify Preferred Trucking or Arias in connection with Gallina's action.

QBE Ins. Corp. v. Jinx-Proof Inc., 2014 WL 590494 (Ct. of App. Feb. 18, 2014). QBE Insurance Corp. issued a liability insurance policy to Jinx-Proof, Inc. which contained an assault and battery exclusion. In December 2007, a patron of a bar owned by Jinx-Proof commenced a personal injury action against it to recover for injuries she allegedly sustained when one of Jinx-Proof's employees threw a glass at the patron's face. On January 28, 2008, Jinx-Proof notified QBE of the underlying action, which advanced claims sounding in both negligence and intentional conduct. QBE subsequently issued two letters to Jinx-Proof stating, among other things, that Jinx-Proof was not entitled to coverage under the policy for assault and battery claims as the same were precluded by the assault and battery exclusion to the policy. Upon dismissal of the negligence and Dram Shop Act claims, QBE commenced a declaratory judgment action and moved for summary judgment seeking a declaration that it was not further obligated to defend or indemnify Jinx-Proof in connection with the remaining claims. In addressing whether QBE preserved its coverage defenses, the Court of Appeals stated that QBE effectively disclaimed coverage for the assault and battery claims asserted against Jinx-Proof in the underlying action. In this regard, it was noted that the first letter QBE issued stated that QBE would not defend or indemnify Jinx-Proof "under the General Liability portion of the policy for the assault and battery allegations" and that Jinx-Proof did not have liquor liability coverage. The second letter stated, however, that Jinx-Proof did have liquor liability coverage, but that the policy still excluded coverage for the assault and battery claims. The Court held that although the letters contained some contradictory and confusing language (presumably with respect to the liquor liability coverage), the coverage correspondence specifically and consistently stated that Jinx-Proof's insurance policy excluded coverage for the assault and battery claims. These statements were sufficient to apprise Jinx-Proof that QBE was disclaiming coverage pursuant to the assault and

battery exclusion and were effective even though the letters also contained reservation of rights language. Accordingly, the Court held that QBE had no duty to defend or indemnify Jinx-Proof in connection with the remaining assault and battery claims in the underlying action.

STANDING

Alfonso v. Zurich American Ins. Co., 42 Misc.3d 1202(A) (Sup. Ct. Kings Co. Dec. 4, 2013). On December 15, 2004, Ciro H. Alfonso sustained various injuries when he was allegedly struck by a heating unit that fell from the ceiling of a building which was leased by Delmar Sales, Inc. and located in Brooklyn New York. By way of a Summons and Complaint dated April 27, 2006, Alfonso commenced an action against Delmar alleging violations of the Labor Law. At the time of the alleged accident, Delmar was insured under a liability policy issued by Zurich American Insurance Company. Via correspondence dated May 22, 2007, Zurich disclaimed coverage as to Delmar due to its failure to provide timely notice of the claim. Thereafter, Alfonso commenced a declaratory judgment action against Zurich seeking a declaration that Zurich was obligated to compensate him for any judgment obtained against Delmar in the underlying action. In opposition to Alfonso's Motion for Summary Judgment, Zurich argued, *inter alia*, that Alfonso lacked standing to bring the claim against Zurich as he had not obtained a judgment against Delmar. In relying on the Court of Appeal's decision in *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004), the trial court stated that although Insurance Law § 3420 grants an injured party a right to sue the tortfeasor's insurer, compliance with the statutory requirements – namely that the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment, and await payment for thirty days – is a condition precedent to a direct action against the insurance company. The Court noted that as it was undisputed that Alfonso commenced the declaratory judgment action against Zurich without first obtaining a judgment against Delmar, Alfonso did not have standing to maintain his action against Delmar. Moreover, the Court noted that although the Second Department had at one time held that an injured plaintiff may maintain a pre-judgment declaratory judgment against the tortfeasor's insurer, those decisions pre-dated *Lang* and, subsequent to *Lang*, the Second Department has followed its holding.

POLLUTION COVERAGE

URS Corp. v. Zurich American Ins. Co., 979 N.Y.S.2d 506 (Sup. Ct. New York Co. Jan. 16, 2014). On August 18, 2007, a fire broke out at 130 Liberty Street in Manhattan in which two firefighters lost their lives and a number of other firefighters and individuals were injured. The building, which had been severely damaged by the September 11, 2011 terrorist attack, had been conveyed to the Lower Manhattan Development Corporation ("LMDC") for purposes of redevelopment. LMDC hired URS Corporation and URS Corporation – New York (collectively, "URS") to provide "owner representative services" in connection with the deconstruction of the building. Subsequently, The John Galt Company was retained to perform services as the lead contactor relative to the project. Galt procured contractors pollution liability coverage from Hudson Specialty Insurance Company under which Hudson was obligated to pay for damages resulting from a pollution condition at any site where the insured was performing any contracting or remediation operations. A "pollution condition" was defined as "the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals[,] liquids or gasses, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water which results in bodily injury or property damage." After the fire, various actions were commenced against URS, among others, seeking to hold them liable for the death or injuries caused by the fire. In the present action, URS sought a declaratory judgment that Hudson was obligated to defend it in the underlying actions. Hudson moved to dismiss URS' action contending that it had owed no such duty as its policy was intended to insure against claims for environmental harm and the claims did not arise out of a "pollution condition". In opposition, URS opined that two of the underlying actions mentioned "toxic smoke" and argued that the subject fire constituted a "release" of smoke or other contaminants, thereby qualifying as a pollution condition. In rendering its decision, the trial court indicated that the interpretation of the language used in the Hudson policy appeared to be a question of first impression, but noted that there were a number of New York cases discussing and interpreting various pollution *exclusions* contained in Commercial General Liability policies, which generally contain similar language to the Hudson policy. The Court surmised that given the close identity between the traditional pollution exclusion provision and Hudson's pollution coverage provision, it would be logical to conclude that the two clauses share the same purpose and are complimentary-with one meant to fill the gap in coverage created by the other. In this regard, the

Court noted that in interpreting a nearly identical pollution exclusion, the Court of Appeals had stated that the clause was meant to deal with broadly dispersed environmental pollution and not asbestos related personal injury claims (*Cont. Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640 (1993)); it was further noted that the Court of Appeals had held that the pollution exclusion has been held inapplicable to preclude coverage for claims arising from the inhalation of paint fumes (*Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003)). It was also noted that in interpreting a policy providing pollution coverage contained language similar to the Hudson policy, that the Second Circuit held that the policy was intended to provide coverage for "environmental harm" (*Colonial Oil Indus. Inc. v. Indian Harbor Ins. Co.*, 528 Fed.Appx. 71 (2d Cir. 2013). In finding for Hudson, the Court stated that URS did not advance an interpretation of the policy language which is sensible in light of common speech and the reasonable expectations of a businessperson. In this regard, it was noted that even allowing the stress URS placed on the reference to "toxic smoke" in two of the Complaints, "an allegation of injury from some sort of poisonous material is not enough to qualify for coverage; the injury must be caused by the 'discharge, dispersal, release or escape' of such contaminant 'into or upon land, the atmosphere or any watercourse or body of water.' The Court stated that to read the terms 'land', 'atmosphere' and 'watercourse or body of water' as 'everywhere' would render the modifying clause misleading and useless surplusage." As such, the Court found Hudson had no duty to defend URS in connection with the underlying actions.

MISCELLANEOUS

Zurich American Ins. Co. v. Sony Corp. of America, Index No. 651982/2011 (N.Y. Sup. Ct. Feb. 21, 2014). Sony Corporation of America, among other related entities, was sued in connection with a data breach wherein hackers stole confidential information relative to tens of millions of Sony PlayStation Network users. Sony sought coverage from its insurers, including Zurich American Insurance Company, which issued a Commercial General Liability insurance policy to Sony that was in effect when the data breach occurred. Thereafter, Zurich commenced an action against Sony, among others, seeking, *inter alia*, a declaration that it had no duty to defend or indemnify Sony in connection with the underlying class action suits. Sony subsequently moved for partial summary judgment seeking an order declaring that the underlying data breach suits were subject to coverage under the Zurich policy. Sony asserted that the definition of personal and advertising injury, which included coverage for "oral or written publication in any manner of…material that violates a person's right of privacy" encompassed the theft of the users' information. Sony further argued that because the policy provided coverage for publication "in any manner", it was immaterial whether the publication was perpetrated by the insured or by the third-party hackers and/or whether the publication was done negligently or intentionally. In rejecting Sony's interpretation, the trial court stated in a bench opinion that the "in any manner" language referred to the medium used to publish the information (*i.e.*, by fax, e-mail, etc.), and not to the person or entity who actually carried out the publication. As such, the Court held that Sony's coverage could not be triggered through the actions of third-parties – in this case, the hackers who stole the information. Accordingly, it was found that Sony was not entitled to coverage under the Zurich policy in connection with the underlying actions. In rendering the decision, however, the trial court declined Zurich's arguments that there had been no publication as it applied to the personal and advertising injury definition. Specifically, the Court stated: "[w]e are talking about the electronic age that we live in. So that in itself, by just merely opening up that safeguard or that safe box where all of the information was, in my mind my finding is that that is publication. It's done."

Executive Plaza, LLC v. Peerless Ins. Co., 2014 WL 551251 (Ct. of App. Feb. 13, 2014). Executive Plaza, LLC owed an office building in Island Park, New York which was severely damaged in a fire on February 23, 2007. Prior to the loss, Executive Plaza had secured $1 million in insurance coverage from Peerless Insurance Company which provided the insured with a choice between the payment of "actual cash value" or "replacement cost". The policy stated, however, that Peerless would "not pay on a replacement cost basis for any loss or damage: (i) [u]ntil the lost or damaged property is actually repaired or replaced; and (ii) [u]nless the repairs or replacement are made as soon as reasonably possible after the loss or damage." The policy also contained a clause which provided that no one may bring a legal action against Peerless unless the action is brought within two years after the date on which the direct physical loss or damage occurred." After the fire, Peerless paid Executive Plaza the actual cash value of the destroyed building, $757,812.50. Thereafter, Executive Plaza provided notice to Peerless that it would be making a replacement cost claim up to the $1 million policy limit to which Peerless replied that in order to collect that amount, Executive Plaza would have to provide "documentation verifying the completion of repairs." The replacement building was completed in October 2010 and Executive Plaza then demanded payment of the unpaid portion of the

policy limits. Peerless denied liability on the ground that the two year limitations provision under the policy had expired. Executive Plaza then commenced an action against Peerless and Peerless moved for summary judgment. After the United States District Court for the Eastern District of New York granted Peerless' motion, Executive Plaza appealed to the United States Court of Appeals for the Second Circuit, which certified the following question to the Court of Appeals: "If a fire insurance policy contains (1) a provision allowing reimbursement of replacement costs only after the property was replaced and requiring the property to be replaced 'as soon as reasonably possible after the loss'; and (2) a provision requiring an insured to bring suit within two years after the loss; is an insured covered for replacement costs if the insured property cannot reasonably be replaced within two years?" In answering the question in the affirmative, the Court of Appeals noted that an agreement which modifies the statute of limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable. The Court of Appeals, however, concluded that the contractual period at issue – two years from the date of "direct physical loss or damage" – is not within that category if the property cannot reasonably be replaced in two years. In this regard, the Court concluded that it is neither fair nor reasonable to require a suit within two years from the date of loss, while imposing a condition precedent to the suit that cannot be met within the two year period.

Jane Street Holding, LLC v. Aspen American Ins. Co., 2014 WL 28600 (S.D.N.Y Jan. 2, 2014). Jane Street Holding LLC, procured an insurance policy, which included a Commercial Out Program ("COP") Part, from Aspen American Insurance Company for the period of September 2, 2011 to September 2, 2012. The COP Part provided, in relevant part: "Covered business personal property means 'your' business personal property in buildings or structures at a 'covered location' or in the open (or in vehicles) on or within 1,000 feet of a 'covered location'." By way of a Scheduled Locations Endorsement, "covered location" was defined as "a location that is described on the Location Schedule." The policy's Location Schedule for the COP Part indicated "One New York Plaza, 33rd Floor, New York, N.Y. 10004" as the "Covered Location". During the policy's term, Jane Street purchased a generator and installed it in the basement of One New York Plaza. Thereafter, Aspen issued a renewal policy to Jane Street which was effective from September 2, 2012 to September 2, 2013; the policy was renewed on identical terms as the 2011-2012 policy. As a result of Hurricane Sandy, which hit Manhattan on October 29, 2012, the basement level of One New York Plaza was flooded, and Jane Street's generator sustained damage. According to Jane Street, the generator was a total loss. On or about November 1, 2012, Jane Street provided notice of the loss of its generator to Aspen. Aspen subsequently advised Jane Street that the generator was not in an insured location. As such, Jane Street was advised that coverage was limited to $50,000 under the sublimit for "Locations You Elect Not to Describe" in the policy. Jane Street then commenced a declaratory judgment action against Aspen and moved for partial summary judgment. Aspen cross-moved for, *inter alia*, summary judgment. In rendering its decision, the United States District Court for the Southern District of New York noted that courts in New York have held that if the description of the premises is not restricted to a particular office suite or floor, the policy covers the entire premises at the described location. Conversely, insurance contracts which describe a particular floor or office space limits coverage to that particular area in a multi-story building. The Court stated that as the policy specified that the covered location was "One New York Plaza, 33rd Floor, New York, N.Y. 10004", the policy clearly limited its coverage to the 33rd floor of One New York Plaza and the loss of Jane Street's generator did not occur at a "covered location".

LBC&C's INSURANCE INDUSTRY PRACTICE GROUP

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