QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

a quarterly report provided by

L'Abbate, Balkan, Colavita & Contini, L.L.P.

CASES OF INTEREST BY TOPIC

By Richard P. Byrne
John D. McKenna

ADDITIONAL INSURED COVERAGE

Strauss Painting, Inc. v. Mt. Hawley Ins. Co., 2014 WL 6607338 (Ct. of App. Nov. 24, 2014). Strauss Painting, Inc./Creative Finishes, Ltd. (a joint venture) contracted with the Metropolitan Opera Association, Inc. (the "Met") to perform work at the Met's premises. By way of the agreement, Strauss/Creative was required to procure and maintain insurance for its work at the premises and to hold the Met harmless. Specifically, an exhibit to the agreement entitled "Insurance Requirements" required Strauss/Creative to procure three types of insurance: (i) Workers' Compensation insurance (paragraph (a)); (ii) Owners and Contractors Protective Liability insurance ("OCP") (paragraph (b)); and (iii) Comprehensive Commercial General Liability insurance (paragraph (c)). After identifying OCP coverage as an insurance requirement, paragraph b specified that "[l]iability should add [the Met] as an additional insured and should include contractual liability and completed operations coverage". At the time Strauss/Creative contracted with the Met, Strauss had in place a Commercial General Liability policy issued by Mt. Hawley Insurance Company which contained an additional insured endorsement that provided coverage when the insured and the purported additional insured were in contractual privity and the contract required the procurement of additional insured coverage. Creative was separately insured under a Commercial General Liability policy issued by Nova Casualty Company. During the work, Manuel Mayo, a Creative employee, was injured when he fell from a ladder at the premises and he commenced suit against the Met, among others, asserting causes of action for negligence, violations of the Labor Law, and loss of consortium. The Met tendered its defense and indemnification to Strauss/Creative. Nova disclaimed coverage to the Met as an additional insured. The Met then brought a third-party action against Strauss, Creative, and Nova asserting causes of action for common law and contractual indemnification and breach of contract for failure to purchase insurance against Strauss and Creative and a claim for breach of contract against Nova for its denial of coverage. Strauss subsequently commenced a declaratory judgment action against Mt. Hawley and the Met seeking a declaration that Mt. Hawley was obligated to defend and indemnify it relative to the Met's third-party action. The Met cross-claimed against Mt. Hawley for a declaration that it was an additional insured under Strauss's Commercial General Liability policy and moved for summary judgment. The Court of Appeals noted that under the additional insured endorsement to the Mt. Hawley policy, the Met's entitlement to additional insured coverage hinged upon whether Strauss and the Met

agreed in writing that the Met be added as an additional insured on Strauss' policy. The Met argued that the second sentence of paragraph (b) of the "Insurance Requirements" exhibit to the contract contained the requisite agreement in writing. Paragraph (b) required Strauss/Creative to procure the following insurance: "[OCP] insurance with a combined single limit of $5,000,000.00. Liability should add [the Met] as an additional insured and should include contractual liability and completed operations coverage". Mt. Hawley, in turn, asserted that paragraph (b) simply reflected the Met's choice to require Strauss to purchase OCP coverage to protect the Met from risks arising out of Strauss' work, rather than mandating that Strauss include the Met as an additional insured on its Commercial General Liability policy. In finding for Mt. Hawley, the Court of Appeals stated that the second sentence in paragraph (b) can only refer to the OCP coverage that Strauss promised to purchase for the Met in the preceding sentence. The Court reasoned that this conclusion was supported by the language of paragraph (c) which set out Strauss' insurance commitments to the Met with respect to Commercial General Liability coverage, stating as follows: "Comprehensive General Liability. Combined coverage for property and bodily injury with a minimum single limit of $5,000,000.00 (Limits may be met with an 'Umbrella Policy'[)]." The Court stated that this provision, which was the only paragraph addressing Strauss' insurance obligations with respect to Commercial General Liability coverage says nothing about the Met being included as an additional insured. As such, the Court found that the contract did not require that the Met be afforded additional insured coverage and, therefore, the Met was not entitled to coverage under the Mt. Hawley policy.

LATE NOTICE

Indian Harbor Ins. Co. v. City of San Diego, 2014 WL 4922143 (2d Cir. Oct. 2, 2014). Indian Harbor Insurance Company issued a pollution and remediation legal liability insurance policy to The City of San Diego in 2009. The policy contained a New York choice of law provision and required the City to notify Indian Harbor "as soon as practicable" of any liability claims relating to "pollution conditions." Prior to the issuance of the policy, the New York legislature amended the New York Insurance Law effectively to bar liability insurers, on policies "issued or delivered" in New York after January 17, 2009, from denying claims by reason of late notice unless the insurer suffered prejudice thereby. Indian Harbor filed an action seeking a declaration, among other things, that it had no duty to defend or indemnify the City relative to a claim wherein the City waited fifty-eight days to provide notice to Indian Harbor. Indian Harbor moved for summary judgment, but did not assert that it was prejudiced by the City's late notice. In opposition, the City argued, among other things, that Indian Harbor was required to show prejudice in order to disclaim coverage. In this regard, the City contended that a reasonable fact finder could conclude that the policy was "issued" in New York and governed by New York's Insurance Law. In affirming the District Court's grant of summary judgment to Indian Harbor, the Second Circuit held that no reasonable fact finder could conclude that the policy was "issued" in New York, under either of two accepted definitions of the term "issued"—"prepared and signed". To that end, the Court noted that although the President of Indian Harbor maintained an office in New York, his signature on the policy was a pre-existing electronic signature and was affixed to the policy in Pennsylvania. Moreover, the policy was created and mailed from Indian Harbor's Pennsylvania office and all transmittal paperwork bore that office's letterhead. As such, it was found that the policy was not "issued or delivered" in New York and, as such, by its terms, the amendment to the Insurance Law was inapplicable and prejudice need not be shown.

TIMELY DISCLAIMER

Sierra v. 4401 Sunset Park, LLC, 2014 WL 6607303 (Ct. of App. Nov. 24, 2014). 4401 Sunset Park, LLC and Sierra Realty Corp., the owner and managing agent of an apartment building in Brooklyn, respectively, contracted with LM Interiors Contracting, LLC to perform renovation work on the building. The contract required LM to maintain liability insurance that named the owner and managing agent as additional insureds, which LM obtained from Scottsdale Insurance Company. Sunset Park and Sierra Realty also had their

own insurance through Greater New York Mutual Insurance Company ("GNY"). On August 18, 2008, Juan Sierra, an LM employee, lost a finger in an accident while working on the renovation project and consequently commenced an action against Sunset Park and Sierra Realty. Sunset Park and Sierra Realty notified GNY of the claim and GNY, in turn, provided notice to Scottsdale and requested that it defend and indemnify Sunset Park and Sierra Realty. Scottsdale replied to GNY, disclaiming coverage on various grounds. Sunset Park and Sierra Realty then commenced a third-party action against LM and Scottsdale asserting, among other things, that Scottsdale was required to defend and indemnify them. In affirming the decision of the Appellate Division, the Court of Appeals held that Scottsdale's disclaimer was ineffective as it had not been issued to Sunset Park and Sierra Realty. The Court stated that it was undisputed that Scottsdale did not give notice of its disclaimer directly to Sunset Park, Sierra Realty or to their counsel and issuing the disclaimer only to GNY was insufficient to satisfy the Insurance Law. In this regard, the Court noted that GNY was not an insured under Scottsdale's policy and that although GNY had acted on behalf of Sunset Park and Sierra Realty, it did not make GNY their agent for purposes of receiving a declination. It was further noted that GNY's interests were not necessarily the same as Sunset Park and Sierra Realty and, as such, they were entitled to direct notice.

Vermont Mut. Ins. Co., Inc. v. Mowery Constr., Inc., 2014 WL 5714468 (3d Dept. Nov. 6, 2014). In 2005, James Ciuffo was injured while working on a construction project owned by Mowery Construction, Inc. Although Mowery's President and owner was aware of the incident on the date it occurred, he did not report it to his liability carrier, Vermont Mutual Insurance Company, Inc., until Ciuffo commenced a lawsuit alleging negligence against Mowery more than two years later. After Vermont Mutual received notice the action, it conducted an investigation into the circumstances underlying Mowery's failure to provide timely notice of the claim and, thereafter, accepted Mowery's defense subject to a reservation of rights. Specifically, Vermont Mutual indicated that it would disclaim coverage if it was later determined that Mowery did not have a good faith belief that it was not obligated to notify Vermont Mutual of the accident. Less than one month later, Vermont Mutual commenced a declaratory judgment action against Mowery and Ciuffo seeking, among other things, a declaration that it had no duty to defend or indemnify Mowery due to late notice. Ciuffo subsequently moved for summary judgment seeking dismissal of the Complaint. In affirming the trial court's grant of summary judgment to Ciuffo, the Third Department noted that after Vermont Mutual received notice of Mowery's claim on January 4, 2008, it retained an adjuster to conduct an investigation to determine when Mowery's President and owner first learned of Ciuffo's injury. The adjuster interviewed Mowery and provided Vermont Mutual with a written report dated January 15, 2008, which confirmed that although Mowery knew that Ciuffo had been injured on the date that the accident occurred, he did not believe that Vermont Mutual needed to be notified of the incident because Ciuffo was a subcontractor and not an employee of Mowery. The Court stated that although the adjuster's report provided Vermont Mutual with sufficient information upon which a disclaimer would have been soundly based, Vermont Mutual made no disclaimer, but instead retained an attorney to further investigate the circumstances of Mowery's untimely notice. The Court found that this was wholly unnecessary as the claim was not factually complicated and Vermont Mutual did not encounter any obstacles in conducting its investigation requiring further inquiry. As such, the Court held that Vermont Mutual failed to notify Mowery of its disclaimer as soon as reasonably possible, and accordingly, Vermont Mutual was required to defend and indemnify Mowery in connection with Ciuffo's action.

B&R Consolidated, LLC v. Zurich American Ins. Co., 2014 WL 4723503 (2d Dept. Sept. 24, 2014). B&R Consolidated, LLC commenced an action against Frederic Powell, an attorney who represented B&R in connection with a real estate transaction for, *inter alia*, breach of fiduciary duty and breach of the duty of loyalty. Fifty-one days after receiving the Summons and Complaint, Powell notified its professional liability insurers, American Guarantee and Liability Insurance Company, among others, of B&R's claims against him. American Guarantee then assigned defense counsel to

represent Powell. Eighteen days after notice was provided, American Guarantee reserved its rights to disclaim coverage based upon certain policy exclusions and Powell's failure to give timely notice of the commencement of the underlying action. Approximately five months later, American Guarantee disclaimed coverage based upon Powell's alleged late notice. The trial court ultimately found in favor of B&R and awarded it a judgment in the amount of $585,056.18 against Powell. Thereafter, B&R commenced an action against American Guarantee, among others, pursuant to Insurance Law § 3420(b) to recover the amount of the unsatisfied judgment it was awarded. American Guarantee moved for summary judgment to dismiss the action and B&R cross-moved. In affirming the trial court's decision, the Second Department held that American Guarantee was estopped from relying on its late notice defense to disclaim coverage to Powell. In this regard, the Court noted that when the matter does not involve death or bodily injury, the untimely disclaimer by an insurer does not automatically estop the insurer from denying coverage on the basis of late notice unless there has been a showing of prejudice to the insured due to the delay. Nevertheless, although the trial court did not make a determination that Powell was prejudiced by the insurer's approximate five-month delay in disclaiming coverage, the Second Department held, based upon the record, that B&R made a sufficient showing of prejudice to Powell due to American Guarantee's late disclaimer. Moreover, the Second Department noted that the purported grounds for the disclaimer were evident on the face of the pleadings and did not require any additional investigation by American Guarantee. As such, American Guarantee was estopped from denying coverage to Powell.

DUTY TO DEFEND

Greenwich Ins. Co. v. City of New York, 2014 WL 6425569 (1st Dept. Nov. 18, 2014). Greenwich Insurance Company commenced a declaratory judgment action seeking a coverage determination relative to a series of vehicular accidents alleged to have been the result of negligence in connection with construction work on an exit ramp from the Queensboro Bridge. Greenwich's insured, Triumph Construction Corporation, was the contractor for the New York City Economic Development Corporation, which was retained to perform the work on the bridge. Triumph procured a Commercial General Liability insurance policy from Greenwich which provided additional insured coverage to the City, among others, for damages arising out of Triumph's acts or omissions or those acting on its behalf. Greenwich sought to be relieved of its duty to provide a defense relative to the underlying actions arguing that the alleged injuries were caused by the City's negligent placement of a guard rail and its failure to post proper warnings, matters over which Triumph reportedly had no control. The City brought a Motion to Dismiss the declaratory judgment action on the ground that the underlying Complaints contain allegations that potentially fell within the protection afforded to additional insureds under the policy. In rendering its decision, the First Department found that as the underlying Complaints alleged defects in conditions on or about the roadway for which Triumph would have been responsible as a contractor, additional insured coverage had thereby been triggered under the Greenwich policy and Greenwich was obligated to defend the City in connection with the underlying actions.

OCCURRENCE

James River Ins. Co. v. Power Management, Inc., 2014 WL 5460548 (E.D.N.Y. Oct. 28, 2014). On February 18, 2008, Wehran Energy Corp. purchased a power generation facility and landfill gas control system located in Brookhaven, New York, from U.S. Energy Biogas ("USEB"). The facility included two inoperable engines. Rather than purchase new engines, Wehran retained Power Management, Inc. ("PMI") to rebuild one of the engines. PMI contended that its job was to be performed alongside USEB. PMI subsequently sent a mechanic to the facility to rebuild the engine and the mechanic was assisted by, among others, two USEB employees. On March 5, 2008, PMI finished the major mechanical work on the engine and it was placed online at 34% for approximately fifteen minutes before it suffered a "catastrophic failure". As a result of the engine failure, Wehran's insurer, Pacific Indemnity

Company, provided coverage to Wehran for the loss. Pacific Indemnity, as subrogee of Wehran, then filed an action against PMI. On April 6, 2009, PMI notified its Commercial General Liability insurer, James River Insurance Company, of the engine failure and Pacific Indemnity's action. James River subsequently provided PMI with a defense, subject to a reservation of rights, based upon the policy's Work Product exclusions. James River then commenced an action against PMI seeking a declaration that it had no duty to defend or indemnify PMI in connection with the underlying action. James River moved for summary judgment and PMI crossed moved. In its motion, James River argued that the engine failure did not constitute an "occurrence", which was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" under the policy. In rendering its decision, the District Court noted that, under New York law, Commercial General Liability insurance policies do not insure against faulty workmanship in the work product itself, but rather faulty workmanship which creates a legal liability by causing bodily injury or property damage to something other than the work product. The Court stated that in the underlying action, Pacific Indemnity alleged that PMI's faulty workmanship relative to the rebuild of the engine caused damage to the engine only. As such, the Court held that the engine failure did not constitute an "occurrence" and coverage under the James River policy was not triggered. Nevertheless, the Court found material issues of fact existed as to whether James River unreasonably delayed in bringing the declaratory judgment action and, therefore, effectively disclaimed coverage under the policy for the engine failure. In this regard, it was noted that, according to PMI, James River had sufficient information to disclaim coverage based upon the product exclusions and late notice (an additional coverage defense) for fifteen months and thirty-six months, respectively, prior to commencing the action.

PROPERTY COVERAGE

Jane Street Holding, LLC v. Aspen American Ins. Co., 2014 WL 5287051 (2d Cir. Oct. 16, 2014). On October 29, 2012, Hurricane Sandy destroyed Jane Street Holding's generator in the basement of One New York Plaza. Aspen American Insurance Company issued an insurance policy to Jane Street which provided coverage for flood damage and defined the "covered location" as Jane Street's corporate headquarters; specifically, "One New York Plaza, 33rd Floor, New York, N.Y. 10004." Jane Street submitted a claim, but Aspen refused to pay any more than $50,000—the policy's sublimit for property not in a covered location. Jane Street sued Aspen for breach of contract, breach of fiduciary duty, and bad faith. The District Court granted Aspen's Motion for Summary Judgment as to all three causes of action on the ground that the policy covered property only on the 33rd floor and did not extend to the basement where the generator had been located. Jane Street appealed the judgment. In rendering its decision, the Second Circuit stated that the plain meaning of the policy is that the property inside a building or structure located on the 33rd floor of One New York Plaza is covered, while for all other property a $50,000 limit applies. As stated above, Jane Street's flood-damaged generator was located in One New York Plaza's basement and not the 33rd floor. As such, the Court affirmed the District Court's decision and held that the policy required no more of Aspen than the $50,000 payment that it tendered to Jane Street.

MISCELLANEOUS

Nesmith v. Allstate Ins. Co., 2014 WL 6633553 (Ct. of App. Nov. 25, 2014). In September 1991, Allstate Insurance Company issued an insurance policy with a $500,000 limit of liability per occurrence to the landlord of an apartment building. The policy was renewed annually for the years beginning September 1992 and September 1993. The policies each contained a noncumulation clause which 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 an apartment in the building, and one suffered injuries as a result of that exposure. The mother of those children commenced an action against the landlord of the building, 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. In support of her contention, the subsequent tenant asserted that the incidents were separate because they did not result "from continuous or repeated exposure to the same general conditions." The Court of Appeals, however, rejected her argument stating that the loss was caused by the same hazard, namely, lead paint in the same apartment. The Court noted that while the children of the subsequent tenant may not have been exposed to exactly the same conditions as the children of the prior tenant, to say that the "general conditions" were not the same would deprive the word "general" of all meaning. The subsequent tenant further argued that because the landlord made an effort to correct the problem subsequent to the first incident and before the current tenant and her children moved into the apartment, that the conditions which injured the current tenant's children must have been new. The Court also disagreed with this contention finding that the record provided no basis for inferring that a new lead pain hazard had been introduced into the apartment. The Court stated that the only possible conclusion from the record is that the landlord's remedial efforts were not wholly successful, and that the same general conditions—the presence of lead paint that endangered children's health—continued to exist. Accordingly, the Court held that as the children were injured by exposure to the same general conditions their injuries were part of a single "accidental loss", and only one policy limit was available to both families.

River View at Patchogue, LLC v. Hudson Ins. Co., 2014 WL 6461667 (2d Dept. Nov. 19, 2014). VTEQE, Ltd., which was insured by Hudson Insurance Company, entered into an agreement with River View at Patchogue, LLC whereby VTEQE was to perform environmental remediation work on real property owned by River View. During the performance of the remediation work, VTEQE was under investigation in connection with improper remediation practices, which ultimately lead to the criminal prosecution and conviction of VTEQE. Consequently, River View incurred significant costs in hiring another entity to perform additional work on the property. River View then commenced an action to recover damages from VTEQE. In response, Hudson commenced a lawsuit against VTEQE seeking a declaration that it was not obligated to defend or indemnify it relative to River View's action due to a breach of the notice requirements under the policy and Hudson was ultimately awarded summary judgment. River View subsequently procured a judgment by settlement in its action against VTEQE, without Hudson's knowledge or participation. River View then commenced an action pursuant to the Insurance Law to compel Hudson to pay the unsatisfied judgment. Hudson moved, *inter alia*, for summary judgment dismissing the Complaint. In affirming the decision of the Trial Court, the Second Department found that Hudson was properly awarded summary judgment based upon collateral estoppel. In this regard, the Court reasoned that when a plaintiff maintains a direct action against an insurer pursuant to the Insurance Law, it stands in the shoes of the insured and can have no greater rights than the insured. The Court stated that River View, by proceeding directly against Hudson, does so as a subrogee of VTEQE's rights and is subject to whatever rules of collateral estoppel would apply to it. It was further noted that as the issue in the previous action–namely, whether Hudson was obligated to defend or indemnify VTEQE

relative to the River View action, was identical to the one in River View's action against Hudson and as that issue had been decided on the merits in the previous action, Hudson had established its entitlement to judgment as a matter of law.

Harris Beach PLLC v. Eber Bros. Wine & Liquor Corp., 121 A.D.3d 1524, 99 N.Y.S.2d 207 (4th Dept. Oct. 3, 2014). Harris Beach PLLC, the longtime general counsel for Eber Bros. Wine & Liquor Corp., commenced an action seeking to recover approximately $750,000 in costs, disbursements, legal fees, and the interest thereon for services it rendered to Eber Bros. relative to the defense of an underlying tort and breach of contract action. The underlying action was commenced on October 5, 2006, and, at that time, Eber Bros. was insured by Illinois National Insurance Company pursuant to a policy of Directors, Officers and Private Company Liability insurance for the period of March 31, 2006 to March 31, 2007. The coverage under the Illinois National policy was limited to claims made and reported during the policy period. National Union Fire Insurance Company of Pittsburgh, Pa. issued a similar policy to Ebar Bros. for the period of March 31, 2008 to March 31, 2009. On August 7, 2008, approximately two years after the underlying action was instituted, Harris Beach wrote to the insurance agency from which Eber Bros. had obtained the National Union policy and, *inter alia*, tendered the defense in connection with the underlying action. National Union rejected Harris Beach's tender on the ground that it was untimely. In its Answer to Harris Beach's fee claim, Eber Bros. asserted two counterclaims, including one for professional negligence alleging, in relevant part, that Harris Beach was negligent in failing to provide National Union with timely notice of the underlying action. After the Answer was interposed, Harris Beach moved for partial summary judgment dismissing, *inter alia*, the Counterclaims. In reversing the trial court's decision, the Fourth Department stated that despite the notice provisions to the policy, which required the insured to provide notice of an occurrence as soon as practicable, Harris Beach did not tender the defense of Eber Bros. to any insurer until approximately two years after the commencement of the underlying action. (It was noted that Harris Beach had apparently never tendered Eber Bros.' defense to Illinois National.) As such, the Court held that Harris Beach did not meet its burden on the Motion for Partial Summary Judgment and, therefore, reversed the trial court's order in its entirety and reinstated that part of Eber Bros.' Counterclaim for professional negligence based upon Harris Beach's alleged failure to provide Eber Bros.' insurers with timely notice of the underlying claim.

Richard P. Byrne is a Partner in the law firm of L'Abbate, Balkan, Colavita & Contini, L.L.P.
Contact:
rbyrne@lbcclaw.com
516-837-7317

John D. McKenna is a Partner in the law firm of L'Abbate, Balkan, Colavita & Contini, L.L.P.

Contact:
jmckenna@lbcclaw.com
516-837-7370

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