QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

a quarterly report provided by

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

CASES OF INTEREST BY TOPIC

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APPLICABILITY OF EXCLUSIONS

Endurance American Specialty Ins. Co. v. Century Surety Co., 2015 WL 671786 (2d Cir. Nov. 4, 2015). Endurance American Specialty Insurance Company and Hayden Building Maintenance Corporation commenced an action against Century Surety Company seeking a declaration that Century was obligated to defend and indemnify Hayden in an underlying action wherein an employee of Hayden's subcontractor and Century's insured, Pinnacle Construction and Restoration Corporation, sustained injuries. The policy that Century issued to Pinnacle contained an Action Over Exclusion which precludes coverage for "'[b]odily injury' to: (1) [a]n 'employee' of the named insured arising out of and in the course of: (a) [e]mployment by the named insured; or (b) performing duties related to the conduct of the named insured's business…." Pursuant to the declarations and relevant terms in the policy, Pinnacle was the only Named Insured. The Century policy also contained a Separation of Insureds provision, which provided: "Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies: a. As if each Named Insured were the only Named Insured; and b. Separately to each insured against whom a claim is made or 'suit' is brought." On appeal, Endurance and Hayden contended that the Separation of Insureds provision requires the Action Over Exclusion provision to be read from the perspective of the particular insured seeking coverage. Thus, "the Named Insured" in the Action Over Exclusion provision should, according to Endurance and Hayden, be replaced with "Hayden", because "this insurance applies…[s]eparately to each insured." Endurance and Hayden further asserted that because the claimant was not an employee of Hayden, the policy would not exclude coverage to Hayden for the claimant's injuries. In rendering its decision, the Second Circuit found that Endurance's and Hayden's reasoning would apply if the Action Over Exclusion clause used the language "the insured" rather than "the named insured." In that scenario, the provision would be read to replace "the insured" with "Hayden", because Hayden is seeking coverage. However, in the Century policy at issue, the Action Over Exclusion states "the named insured." In analogous circumstances, where, for example, employee exclusions have altered the language "the insured" to language expressing a different intent, such as "any insured," courts have held that the insurance policy precludes coverage of injuries to any employee, whether employed by the insured seeking coverage or not, because to do otherwise

would render the unambiguous language referring to any insured "a nullity." Here, like the language "any insured," the language "the named insured" evinces that the Action Over Exclusion clause specifically excludes coverage for bodily injury to employees of the named insured, Pinnacle. Hayden, in contrast, is not a named insured; rather, it is an additional insured. Indeed, the Action Over Exclusion clause replaced and explicitly modified the previous employee liability clause to change the words "the insured" to "the named insured." Thus, the Second Circuit held that the District Court erred in reading "Hayden" into the words "the named insured" in the Action Over Exclusion provision and dismissed the declaratory judgment action.

United Specialty Insurance Co. v. Barry Inn Realty Inc., 2015 WL 5244662 (S.D.N.Y. Sept. 8, 2015). On or about December 31, 2012, Barry Inn Realty Inc. and Luis Zepeda Castelliano entered into a five-year lease wherein Castelliano was to rent a property owned by Barry Inn in order to open a sports bar and restaurant. On August 8, 2013, a New York City Police Department Drug and Alcohol Unit detective contacted the owner of Barry Inn to inform him that the police were planning to execute a search warrant at the premises because they believed that it was being used for drug trafficking. Upon entry, the police discovered that the premises was being used to grow marijuana. In constructing a marijuana-growing operation, Castelliano removed or modified a number of building components and installed a sprinkler system and illegal wiring. The extreme humidity necessary to grow marijuana caused significant damage throughout the building and required the demolition and replacement of most of the interior building components. On August 5, 2013 – three days before the NYPD raid – United Specialty Insurance Company issued a Commercial Lines insurance policy to Barry Inn, which excluded coverage for loss or damage caused directly or indirectly by dishonest or criminal acts by anyone to whom Barry Inn entrusts the property for any purpose (the "Entrustment Exclusion"). On August 9, 2013, Barry Inn submitted a notice of claim to United Specialty for the damage Castelliano had caused to the premises. United Specialty then commenced an action seeking a declaration that it had no obligation to indemnify Barry Inn for damage to the premises caused by Castelliano on the basis that the Entrustment Exclusion precluded coverage. In discussing the policy exclusion, the United States District Court for the Southern District of New York noted that an entrustment exclusion in an insurance policy applies "to persons whose status is created or accepted by the assured [as] the result of consensual relationship between the parties….", and that such a relationship has been found to exist despite a recipient's fraudulent intent, where the parties had a course of dealing or the insured had reason to trust the recipient independent of the recipient's own representations. An entrustment exclusion does not apply, however, where a property recipient's "status is solely self-generated" and accordingly an insured has not "entrusted" property to a recipient where there is "deceit from the outset, not only as to intent, but as to identification of the recipient." In finding that the Entrustment Exclusion applied to bar coverage, the Court stated that entrustment was manifest in the course of dealings between Barry Inn and Castelliano. In that regard, negotiation of the lease took place over a three-month period, during which time Barry Inn questioned Castelliano about his experience in operating a bar and restaurant, was shown another bar and restaurant that Castelliano was allegedly operating in Yonkers, and met with an individual who claimed to be working on obtaining a liquor license for the planned sports bar. Moreover, there was no evidence suggesting that Castelliano lied about his identity, and Castelliano's identity was not "solely self-generated." To the contrary, Barry Inn investigated and confirmed Castelliano's identity, demonstrating that his status was "accepted by Barry Inn" and that their contract was "the result of a consensual relationship between the parties." Barry Inn's entrustment of the premises to Castelliano was further demonstrated by the undisputed fact that – for more than eight months – Barry Inn never visited the premises and chose not to exercise its right to inspect the premises. This course of dealing established that Barry Inn and Castelliano had a "consensual relationship" and that Castelliano's status was "accepted by [Barry Inn]." Accordingly, the Court held that it was clear that Barry entrusted the premises to Castelliano, and no reasonable jury could conclude otherwise, and therefore, the Entrustment Exclusion applied to bar coverage relative to Barry Inn's loss.

TIMELY DISCLAIMER

Montpelier U.S. Ins. Co. v. 240 Mt. Hope Realty Co., 2015 WL 6395949 (S.D.N.Y. Oct. 22, 2015). Montpelier U.S. Insurance Co. ("MUSIC") issued a Commercial General Liability insurance policy to 240 Mt. Hope Realty Company. Subsequent to the procurement of the policy, 240 Mt. Hope was sued in connection with allegations that a pit bull belonging to a tenant in its building had bitten a child. A default judgment was granted against 240 Mt. Hope in the underlying action on July 8, 2013. MUSIC received notice of the underlying claim, and the attendant default judgment, on August 19, 2013, when 240 Mt. Hope's insurance agent provided copies of the relevant papers to MUSIC's general agent. Thereafter, MUSIC retained counsel for 240 Mt. Hope, who then successfully moved to vacate the default judgment on November 18, 2013, and subsequently served an Answer to the underlying Complaint. However, the Appellate Division, First Department, reversed the trial court's order and reinstated the default judgment. Approximately one month later, on June 12, 2004, MUSIC sent a letter to 240 Mt. Hope reserving – for the first time – its right to disclaim coverage for 240 Mt. Hope's default judgment "based on untimely notice of the lawsuit." On August 12, 2014, MUSIC initiated a declaratory judgment action against 240 Mt. Hope, contending it had no duty to defend or indemnify it for the default judgment. The United States District Court for the Southern District of New York held that 240 Mt. Hope was entitled to summary judgment because MUSIC failed, as a matter of law, to provide timely disclaimer of coverage. The Court reasoned that MUSIC had knowledge of sufficient facts to disclaim coverage when it received notice of the default judgment on August 19, 2013, at which time MUSIC would indisputably have been entitled to disclaim on the ground that 240 Mt. Hope's notice was untimely that it was prejudiced by the delay. In this regard, there is an "irrebuttable presumption of prejudice" that applies when, as here, an insurer receives notice of a claim only after the insured's liability has been determined. Nonetheless, MUSIC elected not to disclaim coverage and did not make any reservation of its right to disclaim coverage, instead taking up 240 Mt. Hope's defense in the underlying lawsuit; indeed, MUSIC did not disclaim coverage until nearly ten months later on June 12, 2014. That ten-month delay, with no explanation, is comparable to and longer than unexcused delays that the Second Circuit and other courts have held to be unreasonable as a matter of New York law. Thus, the Court held that MUSIC was obligated to defend and indemnify 240 Mt. Hope in connection with the underlying action.

Endurance American Specialty Ins. Co. v. Utica First Ins. Co., 2015 WL 5840162 (1st Dept. Oct. 8, 2015). Adelphi Restoration Corp. retained CFC Contractor Group, Inc. to perform work at a jobsite in Queens, New York. Pursuant to the construction agreement, CFC was required to name Adelphi as an additional insured under its liability insurance policy. Thereafter, an employee of CFC was involved in an accident and allegedly suffered injuries in the course of his work. The employee commenced the underlying action against, among others, Adelphi, seeking to recover damages for his injuries. Adelphi sought additional insured coverage from Utica First Insurance Company under an insurance policy that Utica had issued to CFC. The Utica policy contained an additional insured endorsement conferring additional insured coverage on entities for which CFC was required to procure additional insured coverage under a written agreement executed before the date of the alleged loss. However, the Utica policy also contained an exclusion for bodily injuries sustained by employees of any insured, or by contractors or employees of contractors "hired or retained by or for any insured." Utica first received notice of the accident on November 16, 2011 from Rockville Risk Management, the third party Administrator for Endurance American Specialty Insurance Company, Adelphi's insurer. By letter dated November 21, 2011, Utica informed CFC that it was denying coverage for the accident, citing the employee exclusion. In its correspondence, Utica stated that it would not provide coverage "to you or any other party seeking coverage under this policy of insurance for damages arising out of this incident." Utica further advised that it would "not defend any legal action against you or any other party; [would] not indemnify our insured or any other party for any judgment awarded; and [would] not make any payment on our insured or any other party's behalf in connection with damages arising out of the event."

Utica did not inform Adelphi directly of the denial, but sent Rockville a copy of this letter. By letter dated May 10, 2012, Rockville, on behalf of Endurance and Adelphi, tendered its defense and indemnity to Utica, noting that CFC had entered into a contract with Adelphi. However, Rockville did not include a copy of the contract. On November 20, 2012, Rockville sent another tender letter to Utica on behalf of Endurance and Adelphi, requesting a response to its earlier tenders and noting that Utica had not responded to the same on Adelphi's behalf. On January 25, 2013, Rockville, on behalf of Adelphi, sent Utica a copy of the contract that triggered the blanket endorsement for Adelphi's benefit; Utica received that letter on January 28, 2013. One day later, on January 29, 2013, Utica informed Adelphi and Rockville that although Adelphi had provided a contract requiring that it be named as an additional insured on the Utica policy, the employee exclusion precluded coverage for the accident. Endurance then commenced an action against Utica seeking a determination that Utica was obligated to defend and indemnify Adelphi as Utica's disclaimer to Adelphi was untimely. In reversing the decision of the trial court and finding in favor of Endurance, the First Department held that Utica's disclaimer of liability for coverage via its letter dated November 21, 2011 to CFC did not constitute notice to additional insured Adelphi under Insurance Law § 3420(d)(2). Further, although Utica knew by November 21, 2011, at the latest, that the employee exclusion applied to the employee's alleged accident, Utica did not immediately disclaim coverage until January 29, 2013 – one day after it received the contract that triggered the blanket endorsement. The Court reasoned that if Adelphi was not entitled to coverage because of the employee exclusion, it did not matter one way or the other whether it was an additional insured under the CFC/Utica policy, and Utica therefore did not need to investigate Adelphi's status in order to disclaim coverage under the exclusion. Indeed, given its statement that it would not indemnify "our insured *or any other party* for any judgment awarded", Utica must have known that the employee exclusion was effective not only as to CFC but also as to Adelphi, and therefore, Utica should have immediately disclaimed to Adelphi on that basis. Thus, Utica's investigation as to whether Adelphi was an additional insured was insufficient as a matter of law as the basis for a disclaimer.

NUMBER OF OCCURRENCES

Verlus v. Liberty Mut Ins. Co., 2015 WL 7170484 (S.D.N.Y. Nov. 12, 2015). On May 28, 2011, Jean and Joanne Verlus were walking on the street near a home owned by Beverly and Grace Taylor in White Plains, New York. At some point during Jean's and Joanne's walk, the Taylors' two American Pit Bull Terriers started running towards Jean and Joanne. Both dogs approached Jean and Joanne from the same direction and one of the dogs jumped towards Jean's face, while the other attacked Joanne. The second dog then stopped attacking Joanne and joined the first attack on Jean. The Verluses sued the Taylors for their injuries and secured a judgment in the amount of $1,076,494.72. Liberty Mutual Insurance Company, the Taylors' insurance carrier, paid the Verluses $314,619.67 inclusive of interest, purportedly in accordance with the liability provisions of the Taylors' insurance policy. Liberty Mutual asserted that the attack constituted only one "occurrence" under the Taylors' policy and that liability for each occurrence is capped at $300,000. The Verluses subsequently commenced an action against Liberty Mutual seeking a declaratory judgment that the attack by the Taylors' dogs constitutes three separate "occurrences" within the meaning of the policy, requiring payment of $900,000 to them, and Liberty Mutual moved for summary judgment. The Liberty Mutual policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. 'Bodily injury'; or b. 'Property damage.'" The policy also describes the limit of liability per occurrence as follows: "Our total liability under Coverage E for all damages resulting from any one 'occurrence' will not be more than the limit of liability for Coverage E as shown in the Declarations. This limit is the same regardless of the number of 'insureds,' claims made or persons injured. All 'bodily injury' and 'property damage' resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful conditions shall be

considered to be the result of one occurrence." The United States District Court for the Southern District of New York noted that contrary to the Verluses' assertion, the unfortunate event test was inappropriate as the language of the Liberty Mutual policy intends to aggregate separate into a single occurrence. When not applying the unfortunate event test, the Second Circuit, in analyzing similar contractual terms, has noted that "New York courts appear to interpret such a grouping provision as at most combining exposures emanating from the same location at a substantially similar time." As such, the Court found that the attack by the Taylors' dogs constituted "continuous or repeated exposure to substantially the same general harmful conditions" and thus qualified as one occurrence under the policy. The attack occurred while the Verluses were walking within arms-length of each other and lasted for a very short period of time. Although Jean and Joanne were not exposed to the exact same conditions, they were exposed to the same general conditions – a simultaneous attack by two dogs – which the policy treats as one occurrence for liability purposes. Moreover, the attacks on Jean and Joanne emanated from the same location as both Jean and Joanne testified that the dogs were running towards them from the same direction at the same time. Accordingly, Jean and Joanne were found to have been attacked simultaneously, over a short three to four minute period. To the extent the Verluses argued that because Jean and Joanne were both injured the Court should find their injuries constitute multiple occurrences, the Court noted that the plain language of the Policy forecloses such a result, as it limits liability per occurrence "regardless of the number of 'insureds,' claims made or persons injured."

National Liability & Fire Ins. Co. v. Itzkowitz, 2015 WL 5332109 (2d Cir. Sept. 15, 2015). In April 2010, a dump truck owned and operated by Stony Ridge Top Soil was traveling on a highway in Ontario County, New York, when the dump box attached to the truck struck and damaged an overpass owned by the New York State Thruway Authority. After hitting the overpass, the dump box separated from the truck and landed in the right lane of the highway. Between thirty seconds and five minutes later, a vehicle carrying the Itzkowitz claimants struck the detached dump box. Then, at some point between a few seconds and twenty minutes later, a vehicle occupied by the Compton-Hershkowitz claimants struck the same detached dump box. Stony Ridge was insured under a Business Auto Policy issued by National Liability & Fire Insurance Company, which provided, in pertinent part, that "[a]ll 'bodily injury' [and] 'property damage'…resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one accident", and accident was defined as "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'" National Liability commenced an interpleader action seeking to deposit the policy limits with the United States District Court for the Eastern District of New York. However, the parties disagreed about the number of occurrences, with National Liability contending that the series of events constituted one accident or, at most, two separate accidents, whereas the defendants claimed that three separate accidents occurred. In rendering its decision, the Second Circuit noted that under New York law, "absent policy language indicating an intent to aggregate separate incidents into a single occurrence, the unfortunate event test will be applied to determine how occurrences are categorized for coverage purposes." The unfortunate event test, in turn, involves a two-part inquiry. First, the "operative incident…giving rise to liability" must be determined. Second, after identifying the operative incident or incidents, it must be considered "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum without intervening agents or factors." In applying the unfortunate event test, the Court concluded that the District Court did not err in granting summary judgment to the defendants and determining that three separate accidents occurred for purposes of the policy at issue. In this regard, the Court stated that each collision was a separate operative incident. With regard to the temporal proximity, the Court noted that no evidence in the record suggested that the short timespan between the dump box's collision with the overpass and the Itzkowitz vehicle's collision with the dump box played any role in the Itzkowitz vehicle's collision with the dump box. As for the temporal gap of at least "a few seconds" between the Itzkowitz and Compton-

Hershkowitz vehicles' collisions with the dump box, there was also no indication that the timing played a role in the two incidents. For example, there was no indication that the Itzkowitz vehicle's collision in any way distracted or limited the reaction time of the driver of the Compton-Hershkowitz vehicle. With regard to the spatial proximity, the Court stated that the first and second incidents were distinct because they occurred in different locations: the first involved the elevated dump box striking the overpass, whereas the second involved the Itzkowitz vehicle colliding with the stationary dump box farther down the road. The second and third incidents, however, were spatially proximate as they occurred in virtually identical spots on the highway and involved the same dump box. The Court noted, however, that the spatial proximity of the second and third incidents was not necessarily outcome determinative. In discussing whether the incidents were part of the same causal continuum, the Court indicated that it must look to whether there was an unbroken continuum between the events. Once an incident occurs and that incident does not then cause further injury, the causal chain is broken. Here, the first incident involved the elevated dump box striking the overpass, separating from the dump truck, and landing in the road. That incident was not responsible for the second and third incidents. When the Itzkowitz vehicle collided with the dump box, a second causal chain, started, and this chain was distinct from the one that caused the damage to the overpass. Then, the Compton-Hershkowitz vehicle struck the dump box, and this collision was unrelated to the preceding collision involving the Itzkowitz vehicle. As such, the Court held that three separate accidents occurred for purposes of the National Liability policy.

MISCELLANEOUS

Viznitz v. Church Mut. Ins. Co., 132 A.D.3d 853 (2d Dept. Oct. 21, 2015). On March 15, 2012, a fire significantly damaged two dormitories that were used to house students on Yeshiva Viznitz's property. Yeshiva Viznitz, a religious school, had to lease off-site living space for the students for three and one half months. The total rent for that time period was $326,500. At the time of the fire, Yeshiva Viznitz was covered by a multi-peril insurance policy issued by Church Mutual Insurance Company, which paid Yeshiva Viznitz for the property damage claim, but only paid $10,000 for the temporary relocation costs to house the students while the dormitories were being restored, based upon a limitation of liability applicable to Section 5 of the policy covering "Institutional Income and Extra Expense." Yeshiva Viznitz then commenced a breach of contract action against Church Mutual alleging that the loss it incurred due to the temporary relocation costs was not subject to a limitation of liability. Church Mutual moved for summary judgment. In reversing the decision of the trial court, the Second Department held that Church Mutual established its prima facie entitlement to judgment as a matter of law. In this regard, the $10,000 limitation was at the end of the pertinent "Additional Coverage" section titled "Institutional Income and Extra Expense", which stated that the most the Church Mutual "will pay under this Additional Coverage for Institutional Income and Extra Expense is $10,000, unless a higher limit is shown on the Declarations Page." There was no such higher limit shown and, contrary to Yeshiva Viznitz's contention, the Court found there was no ambiguity in this additional coverage. To that end, the Court reasoned that the limitation was consistent with the other language of Section 5 under which the claim was made and that an interpretation that claims for loss under the "Institutional Income and Extra Expense" provisions are unlimited would improperly rewrite the parties' agreement and eliminate the applicable limitation of liability.

American Casualty Co. of Reading, P.A. v. Gelb, 132 A.D.3d 476 (1st Dept. October 15, 2015). Former directors and officers of Lyondell Chemical Company sought insurance coverage from American Casualty Company of Reading, P.A., Lyondell's excess Directors & Officers insurer, for their defense of an adversary proceeding commenced by the Creditor's Committee in Lyondell's bankruptcy proceeding. The bankruptcy proceeding was commenced in 2009 by Lyondell, a company with which it had merged in 2007, and approximately 90 of their subsidiaries. Before the merger was consummated, a shareholder brought a putative class action challenging the merger price and alleging that Lyondell's directors and officers had failed

to get the best price possible for the company. American Casualty provided a defense for the directors and officers in that action, which eventually was dismissed. For the purpose of prosecuting the adversary proceeding, the Creditors Committee's claims were assigned to a litigation trust, which alleged in its Complaint that the merger price set by the directors and officers resulted in a windfall to them, that the price was derived from misleading financial data, and that the financing arranged to consummate the merger was over-leveraged, leading to the bankruptcy. The directors and officers sought coverage for the adversary proceeding under excess Directors and Officers Liability policies issued by American Casualty, among others, to Lyondell in various layers over the course of two separate policy periods running from 2006 to 2007 and from 2007 to 2013. This excess coverage was to follow form to Lyondell's primary coverage. The primary insurer provided a defense for the directors and officers in the adversary proceeding. However, after the primary policies were exhausted and the defense was tendered to American Casualty, American Casualty commenced an action for a declaration that it had no obligation to defend the directors and officers in that proceeding on the basis that both the class action litigation commenced in 2007 and the adversary proceeding commenced in July 2009 arose out of the merger transaction and therefore must be treated as a single, unified claim that came into existence when the initial litigation was commenced, and since that claim came into existence during the 2006-2007 policy period, it is subject to an exclusion in the 2006-2007 policies for claims brought by or on behalf of Lyondell against any of its own directors or officers (this exclusion was narrowed in subsequent policies). In rejecting American Casualty's argument that the class action litigation and the adversary proceeding constitute one continuous claim, the First Department stated that the two proceedings, while arising from the merger, are wholly different, with different parties, different allegations, and different causes of action. In essence, the initial litigation was premised on the allegation that the price per share set by Lyondell's directors and officers was too low, while the adversary proceeding is premised on the allegation that the price was in a sense too high, supported by unsustainable revenue projections and requiring excessive leverage by Lyondell to finance and consummate the transaction. Thus the Court held that as the adversary proceeding claim came into existence in July 2009, and coverage was not precluded by the subject exclusion.

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