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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

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DUTY TO INDEMNIFY

__Wausau Underwriters Ins. Co. v. Old Republic General Ins. Co.__, 2015 WL 4720285 (S.D.N.Y. Aug. 7, 2015). 170 Broadway NYC LP entered into an agreement with McGowan Builders Inc. pursuant to which McGowan agreed to serve as the construction manager for a hotel being built at 170 Broadway in Manhattan. The agreement required McGowan to obtain a general liability insurance policy naming 170 Broadway and its affiliates as additional insureds. McGowan obtained a general liability insurance policy from Old Republic General Insurance Company which provided additional insured coverage when required by written contract and when the liability at issue arose from an act or omission in furtherance of McGowan's "ongoing operations". In its capacity as construction manager, McGowan was responsible for overseeing several aspects of the project, including hiring subcontractors and creating and maintaining a "site-specific safety plan". In connection with that role, on October 23, 2012, Adam Burawski, an employee of Tyco Integrated Security LLC, came to the premises to meet with representatives of McGowan to discuss providing security services for the project. Before the meeting began, however, Burawski allegedly tripped and fell entering the bathroom and sustained serious injuries. Thereafter, Burawski filed suit against 170 Broadway and two of its affiliates, Carlyle Development Group LLC and Carlyle Partners II, LP (collectively the "Broadway Defendants"), and the Broadway Defendants tendered their defense and indemnification to McGowan. Old Republic, in turn, was notified, and rejected the tender on the basis that the claim did not trigger additional insured coverage under the policy. Wausau Underwriters Insurance Company, 170 Broadway's insurer, commenced an action against Old Republic seeking a declaration that it was obligated to provide the Broadway Defendants with a defense and indemnification and ultimately moved for summary judgment. The United States District Court for the Southern District of New York noted that in order to make a determination as to whether Old Republic's duty to indemnify had been triggered, it needed to be ascertained whether Burawski's claim actually fell within the additional insured provisions to the policy. The Court indicated that in applying *Regal Construction Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 15 N.Y.3d 34 (2010), lower courts in New York have held that where a person is acting on behalf of the named insured, "it is not necessary to

try the issue of causation" prior to concluding that the relevant injury arose out of the named insured's ongoing operations. In other words, it is possible to determine if an injury arose out of an insured's operations without reaching a determination on liability or causation. With that in mind and upon reviewing the record, the Court determined that Burawski's injuries arose out of McGowan's ongoing operations for purposes of the duty to indemnify. In this regard, Burawski's Complaint alleged that McGowan was hired to perform work at the premises, that it was performing work when Burawski was injured, and that his injury was caused by McGowan's failure to adequately maintain the site. As such, the Court held that the Broadway Defendants were entitled to indemnification from Old Republic, even without a determination regarding liability or causation. The Court found the fact that Tyco – Burawski's employer – was not a subcontractor of McGowan, but only a potential subcontractor at the time of the incident did not affect its conclusion. In this regard, given that McGowan was responsible for keeping the site safe and for selecting subcontractors and Burawski's injury occurred while he was on site in connection with Tyco's bid to become a subcontractor, it could be determined that the injuries arose out of McGowan's work for the purposes of the duty to indemnify. The Court reasoned that Burawski's alleged injury plainly had "some causal relationship" to, originated from, was incident to, and had a connection with the "risk for which coverage is provided", namely McGowan's operations. Thus, the fact that the injured party was an employee of a potential subcontractor, rather than an actual subcontractor was deemed immaterial, at least where the injury occurred in connection with the potential subcontractor's bid to work on the project and the insured had some role in evaluating the potential subcontractor's bid.

ADDITIONAL INSURED COVERAGE

Genting New York LLC v. Navigators Ins. Co., 48 Misc.3d 1211(A) (N.Y. Sup. Ct. July 15, 2015). Genting New York LLC, Tutor Perini Corporation, Resorts World Corp., and the State of New York filed a declaratory judgment action and moved for summary judgment seeking a declaration that Navigators Insurance Company was obligated to defend and indemnify them as additional insureds in connection with several underlying personal injury actions. The plaintiff in the underlying actions, Greg Goodley, a carpenter working on the construction of a casino at Aqueduct Racetrack alleged that he was injured when a hanging electrical cable became entangled in his tool belt and caused him to fall as he was descending the ladder. Goodley sued Genting, Tutor, Resorts World, the State, as well as North Star Electric Corp., one of the subcontractors on the job, alleging that North Star owned and had left dangling, the cable at issue. Goodley alleged that Genting and Resorts World owned the casino and hired Tutor Perini as the general contractor. The State owned the Racetrack. Prior to the underlying incident, Navigators had issued a liability insurance policy to North Star. The Navigators policy contained an additional insured endorsement that provided coverage for "[a]ny person or organization for whom you [North Star] are performing operations during the policy period when you [North Star] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." In moving for summary judgment, Genting, Tutor, Resorts World, and the State contend that they were entitled to additional insured coverage under the Navigators policy because the contract between Tutor and North Star required North Star to provide them with such coverage. In rendering its decision, the New York County Supreme Court stated that while it was undisputed that North Star entered into a contract with Tutor that required North Star to obtain general liability coverage naming, among others, Genting, Tutor, and the State

as additional insureds, none of the parties – except Tutor – alleged that it entered into a contract with North Star. Accordingly, the Court found that none of the entities, except Tutor, were entitled to additional insured coverage.

APPLICABILITY OF EXCLUSIONS

Balaban-Krauss v. Executive Risk Indem., Inc., 2015 WL 3868334 (N.D.N.Y. June 23, 2015). Executive Risk Indemnity, Inc. ("ERII") issued a Directors and Officers Liability policy to the New York State Association of Health Care Providers, Inc. (the "Association"), which covered "any past, present or future director, officer, [or] trustee…of the Insured Entity." The policy was subsequently amended to add the Health Care Providers Self-Insurance Trust (the "Trust"), for which Judy Balaban-Krauss, Robert Callaghan, Ronald Field, and Laura Donaldson (collectively referred to as the "Trustees") served as Trustees, as an insured under the policy. Pursuant to the terms of the policy, ERII was obligated to pay "Defense Expenses", which included "reasonable legal fees and expenses incurred by an Insured in defense of" an underlying claim in which one seeks to "hold any Insured responsible for a Wrongful Act, or…a legal…proceeding against an Insured Person." Wrongful acts were defined to include "any actual or alleged error, omission, misstatement, misleading statement or breach of duty…by an Insured Person solely in his or her capacity as such." The policy excluded coverage for claims "based upon, arising out of, directly or indirectly resulting from, or consequence of, or in any way involving…any comingling or mishandling of funds with respect to any…Insurance Contract." On July 8, 2011, the New York State Workers' Compensation Board commenced an action against the Trustees, among others, generally alleging that they acted improperly and failed to satisfy their duties as Trustees, causing the Trust to be underfunded by several million dollars. The Trustees subsequently notified ERII of and sought defense and indemnity relative to the underlying action. ERII, however, issued a declination on the basis that coverage was excluded because the underlying action involved the mishandling of funds. The Trustees then commenced an action seeking a declaration that ERII was obligated to defend and indemnify them. The parties cross-moved for summary judgment with ERII contending that the allegations in the underlying Complaint fall within the cited exclusion and the Trustees asserting to the contrary that the claims are not clearly encompassed by exclusion. In rendering its decision, the United States District Court for the Northern District of New York held that ERII's assertion that the gravamen of the underlying action stems from the Trustees' "mishandling of funds", such that defense for the underlying actions would fall within the policy's exclusionary language, was unavailing. In this regard, the Court indicated that ERII failed to acknowledge the well-settled principles that, in order to rely on an exclusionary clause as a basis to disclaim coverage, an insurer must demonstrate that the "allegations of the [underlying] complaint[s] cast the pleadings *wholly within* that exclusion" and that "[i]f any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action." The Court determined that many of the allegations in the underlying Complaint appeared to be plainly encompassed by the policy. By way of example, the underlying action alleged, among other things, that the Trustees; "failed to take sufficient or timely corrective actions to establish the financial viability of the Trust"; "failed to properly and timely inform the members of the Trust of the true financial status of the Trust"; caused the Trust to enter into contracts and agreements that were detrimental to the Trust"; "fail[ed] to properly administer the affairs of the Trust": "violated their fiduciary duty by failing to perform, or negligently and improperly performing, the Trust Services"; and "fail[ed] to exercise reasonable care and skill in administering the affairs of the Trust, [and thus] were negligent and breached their duties to the Trust". As such, the Northern District held that although some of the allegations and causes of action in the underlying action may potentially constitute a "mishandling of

funds", it was clear that other allegations and causes of action plainly fell within the purview of the policy's coverage of liability for "wrongful acts". Accordingly, it was determined that ERII had an obligation to provide a defense to the Trustees relative to the underlying action.

Parler v. North Sea Ins. Co., 2015 WL 3756485 (2d Dept. June 17, 2015). On March 12, 2009, Miaja Parler sustained injuries while a patron at a bar in Suffolk County when an unknown individual struck her in the face with a bar stool during an altercation involving several other patrons. Parler commenced an action against, among others, Effie's Pub Corp., which operated the bar, and 609 Montauk Corp., which owned the premises, alleging that her injuries were caused by their negligence in, *inter alia*, failing to provide suitable security and continuing to serve alcoholic beverages to visibly intoxicated patrons. On April 7, 2009, after receipt of a notice of occurrence from Effie's Pub and 609 Montauk, North Sea Insurance Company disclaimed coverage based upon the assault and battery exclusion and the liquor liability exclusion in the insurance policy it had issued to Effie's Pub and 609 Montauk. Parler then commenced an action against North Sea seeking a declaration that North Sea was obligated to defend and indemnify Effie's Pub and 609 Montauk in connection with her claims in the underlying action. Parler and North Sea cross-moved for summary judgment. The Second Department found that the claims asserted by Parler in the underlying action arose out of an assault and, therefore, were precluded from coverage under the assault and battery exclusion contained within the North Sea policy. The Court stated that Parler failed to raise a triable issue of fact as to the applicability of the exclusion. In this regard, contrary to Parler's contention, the fact that the bar stool made physical contact with her and not the intended target did not negate the conclusion that the act was done with the intention to commit an assault or battery. Accordingly, it was determined that the lower court properly awarded judgment in favor of North Sea declaring that it had no duty to defend or indemnify Effie's Pub and 609 Montauk relative to the underlying action.

Hermitage Ins. Co. v. Beer-Bros, Inc. of NYC, 7 N.Y.S.3d 885 (N.Y. Sup. Ct. May 12, 2015). Hermitage Insurance Company commenced an action seeking a declaration that it was not obligated to defend or indemnify Beer-Bros, Inc. of NYC and its employee Shawn Morgan under a liability policy it issued to Beer-Bros in connection with a personal injury action commenced by Catiana Mourino. Mourino claims that she was injured when Morgan, Beer-Bros security person/bouncer, tackled Mark Petrisch into Mourino. After reportedly being denied admission to the Beer Bros' establishment by Morgan, Petrisch allegedly spit on Morgan, and Morgan then chased Petrisch across the street. Mourino was injured when Morgan tackled Petrisch into her. Hermitage moved for summary judgment asserting that it has no duty to defend or indemnify Beer-Bros by way of an assault and battery exclusion contained within the subject policy. The assault and battery exclusion barred coverage for bodily injury arising or alleged to arise out of "[a]n assault and/or battery caused by or at the instigation or direction of:…the insured, his agent or employee;…any patron of the insured;…or any other person; or…[a]ny act or omission of the insured, his agent or employee in connection with the prevention or suppression of an assault and/or battery or criminal acts by third parties." However, the exclusion did not apply to bodily injury resulting from the use of reasonable force to protect persons or property. Mourino opposed the motion, asserting that the Complaint did not allege an assault or battery, but rather that Morgan acted negligently in tackling Petrisch into Mourino, and that Beer-Bros was negligent in hiring, training, educating and supervising its security personnel, and in providing proper security. In rendering its decision, the New York County Supreme Court held that although Mourino plead her claim in the underlying action as negligence, her injuries arose out of a battery, which was barred from coverage

under the assault and battery exclusion. The Court reasoned that regardless of the theory pleaded, if there is no cause of action "but-for" an assault or battery, the exclusion applies. It was noted that although Morgan's intentional act may have been directed at Petrisch and Mourino was merely an innocent bystander, the same was insufficient to change the fact that Mourino's injuries arose out of a battery, and thus was excluded from coverage. Accordingly, the Supreme Court held that Hermitage had no duty to defend or indemnify Beer-Bros and Morgan relative to the Mourino action.

RESCISSION

Caldara v. Utica Mut. Ins. Co., 130 A.D.3d 665 (2d Dept. July 8, 2015). Anthony Caldara, who was insured under a homeowners insurance policy issued by Utica Mutual Insurance Company, commenced an action against Utica alleging that it breached the insurance policy by failing to pay a claim made after a fire damaged the insured premises. After the action was commenced, Utica's attorney sent Caldara a check with a letter stating that an investigation revealed that Caldara had misrepresented the premises was a two-family home when, in actuality, the basement was being occupied as a third unit. The correspondence stated that the policy had been voided ab inito and the check represented a return of Caldara's premium. Caldara negotiated the check which was deposited in the escrow account of Caldara's attorney. Utica moved for summary judgment dismissing the Complaint, arguing that the policy was rescinded as a matter of law and that the plaintiff's acceptance of the check constituted an accord and satisfaction. The Second Department held that although Utica made a prima facie showing of its entitlement to judgment as a matter of law by submitting an affidavit from its underwriter and its underwriting guidelines, demonstrating that it would not have issued the subject policy had it known that the premises was a three-family dwelling, the plaintiff raised a triable issue of fact by submitting affidavits from tenants to the effect that no one had rented or occupied the basement as a separate unit. The Court further held that Utica failed to establish that Caldara's negotiation of the check returning his premium constituted an accord and satisfaction. In this regard, the Court stated that acceptance of a check in full settlement of a disputed unliquidated claim generally operates as an accord and satisfaction discharging a claim; however, such agreements are enforceable only when the person has been clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim. The Court found that neither the check nor the accompanying letter clearly informed Caldara that his acceptance of the check would be in settlement of the pending litigation, thus discharging his claim for coverage under the policy.

LATE NOTICE

Kleinberg v. Nevele Hotel, LLC, 128 A.D.3d 1126 (3d Dept. May 7, 2015). Robert Kleinberg, among others, commenced an action seeking a declaration that Lexington Insurance Company was obligated to defend and indemnify Nevele Hotel, LLC in an underlying personal injury action instituted by Kleinberg wherein it was alleged that he sustained an injury on the slopes of Nevele's ski resort. Lexington moved for summary judgment, seeking dismissal of the Complaint and a declaration that it was not obligated to defend and indemnify Nevele in connection with Kleinberg's underlying action. In its motion, Lexington argued, *inter alia*, that Nevele had cancelled its insurance prior to the date of the alleged injury, and that, even if the policy were in effect, Lexington was not required to provide coverage as it did not receive timely notice of the potential claim. The Third Department found that Lexington met its prima facie burden by establishing that it did not receive timely notice of the potential claim. In this regard, the Lexington policy contained an "as soon as practicable" notice clause and Lexington established that although Nevele had generated an accident report on the day of the incident in February 2006, Lexington did not receive

notice of the incident until ten months later. Moreover, the Court found that Kleinberg failed to raise a material issue of fact as to his reasonable efforts to identify Lexington as the relevant insurer in order to provide it with independent notice. To that end, Kleinberg wrote to Nevele requesting that it complete an attached questionnaire, and requesting that it forward the correspondence to its insurance carrier. While the questionnaire requested insurance carrier information, it only specifically requested insurance information regarding Nevele's automobile insurer. Nevele responded to the correspondence, but it did not provide information relative to its insurance coverage. The Court noted that there was no evidence that Kleinberg made any investigatory efforts outside of his correspondence to Nevele nor that he ever responded to Nevele's correspondence. The Court held that given Kleinberg's initial failure to specifically ask for the relevant insurance information, his failure to ask for such information after Nevele's response to his correspondence, and given his failure to promptly follow up in any other manner, Kleinberg failed to raise a triable issue of fact as to his reasonable efforts to ascertain Lexington's identity. As such, the Third Department held that Lexington had no duty to defend or indemnify Nevele relative to Kleinberg's action as timely notice of the claim was not received. (We note that the Lexington policy was issued prior to 2009 when the New York legislature required prejudice to be established to deny on late notice grounds.)

MISCELLANEOUS

Spencer v. Tower Ins. Group Corp., 130 A.D.3d 709 (2d Dept. July 8, 2015). Denise Spencer was injured when she slipped and fell at a premises owned by Sara Zacharia, who was insured under a homeowners policy issued by Tower Insurance Group Corporation. Spencer commenced an action to recover damages for personal injuries against Zacharia, among others. While that action was pending, Tower commenced an action against Spencer and Zacharia in the New York County Supreme Court for a judgment declaring that it had no duty to defend or indemnify Zacharia in the underlying personal injury action and moved for summary judgment. The Supreme Court granted Tower's Motion for Summary Judgment and declared that it had no duty to defend or indemnify Zacharia in the underlying personal injury action since Zacharia never resided at the premises as required under the policy. Spencer ultimately obtained a judgment against Zacharia in the underlying action and then commenced a declaratory judgment action to compel Tower to pay the amount of the judgment. In affirming the lower court's decision to dismiss Spencer's Complaint against Tower on the basis of collateral estoppel, the Second Department held that Spencer was in privity with Zacharia for the purpose of the application of collateral estoppel. The Court reasoned that when a plaintiff maintains a direct action against an insurer pursuant to Insurance Law § 3420, the plaintiff stands in the shoes of the insured and can have no greater rights than the insured. Moreover, Spencer, by proceeding directly against Tower, did so as subrogee of Zacharia's rights and is subject to whatever rules of estoppel would apply to Zacharia. Accordingly, it was held that Spencer was precluded from re-litigating the issue against Tower.

Carlson v. American Intern. Group, Inc., 130 A.D.3d 1477 (4th Dept. July 2, 2015). Michael J. Carlson, Sr., Individually and as Administrator of the Estate of Claudia D'Agostino Carlson commenced an action pursuant to Insurance Law § 3240(a)(2) to collect on certain insurance policies after a second amended judgment against MVP Delivery and Logistics, Inc. and William Porter was entered upon a jury verdict. DHL Worldwide Express, Inc., doing business as DHL Express (USA), Inc., had a cartage agreement with MVP, whereby MVP provided delivery services for DHL. In the underlying wrongful death action, the jury determined that Porter was negligent in causing the motor vehicle accident that lead to the death of the decedent. MVP was statutorily liable for Porter's negligence as owner of the vehicle involved in the accident. Carlson recovered from MVP's insurer and then instituted an action to recover under, *inter alia*, an umbrella policy issued to DHL by American

Alternative Insurance Co. ("AAIC"). AAIC moved to dismiss, *inter alia*, the first cause of action in Carlson's Complaint against it, which alleged that AAIC was responsible to Carlson for payment of the judgment pursuant to Insurance Law § 3240(a)(2). In finding in favor of AAIC, the Fourth Department noted that the right to sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor exists only pursuant to § 3420. In reviewing the record, it was determined that the AAIC policy was issued in New Jersey and delivered in Washington and then Florida. The Court held that as the policy was not issued or delivered in New York, it was not subject to Insurance Law § 3420 and, as such, the first cause of action in the Complaint against AAIC was dismissed.

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