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
Kaitlyn L. Lavaroni

ADDITIONAL INSURED COVERAGE

Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 2016 WL 4837454 (1st Dept. Sept. 15, 2016). The Dormitory Authority of the State of New York ("DASNY") retained Gilbane Building Co./TDX Construction Corp. ("Gilbane") to provide construction management services in connection with a project in Manhattan. Thereafter, Samson Construction Company entered into a separate contract with DASNY to perform services as the prime contractor for the foundation and excavation work at the project. Pursuant to the contract, Samson agreed to provide DASNY and Gilbane with additional insured status under its commercial general liability insurance policy. Samson obtained an insurance policy from Liberty Insurance Underwriters that contained an "Additional Insured – By Written Contract" clause, which provided additional insured coverage to "any person or organization with whom you have agreed to add as an additional insured by written contract…." During the project, Samson's excavation and foundation work allegedly caused adjacent buildings to sink, resulting in significant structural damage to those buildings. Thereafter, DASNY commenced litigation against Samson, among others, seeking damages for Samson's negligence in performing the work and a third-party action was commenced against Gilbane. Gilbane tendered its defense and indemnification in the third-party action to Liberty which was denied. Gilbane then commenced a lawsuit against Liberty seeking a declaration that Liberty was obligated to provide it with coverage and Liberty subsequently moved for summary judgment. In reversing the trial court's decision, the First Department stated that consistent with its prior decisions in *AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc.*, 102 A.D.3d 425 (1st Dept. 2013) and *Linarello v. City Univ. of N.Y.*, 6 A.D.3d 192 (1st Dept. 2004), the language in the Liberty policy clearly and unambiguously requires that the named insured execute a contract with the party seeking coverage as an additional insured. The Court reasoned that because Samson was not in privity of contract with Gilbane, the fact that the contract required Sampson to procure additional insured coverage for Gilbane was insufficient to trigger additional insured coverage under the Liberty policy for Gilbane. The Court was unpersuaded by Gilbane's argument that *AB Green* and *Linarello* were distinguishable because in those matters, the conferral of additional insured status was "expressly limited" to cases "when you and such…organization have agreed in writing" that a party be named as an additional insured, whereas the language at issue in the Liberty policy did

not contain "any such explicit requirement of direct contractual relationship, only that Samson, as the named insured, agreed in writing to name [Gilbane] as an additional insured." The First Department stated that Gilbane's argument distorted the plain language of the Liberty policy in that it placed undue emphasis on the phrase "by written contract" and ignored the inclusion of the words "with whom" as the object of the verb phrase "you agree." It was found that when restricted to its plain meaning, the substance of the Liberty language was indistinguishable from the substance of the language of the policies in *AB Green* and *Linarello* – in other words, for an organization to be added as an additional insured, there must be a written agreement between the named insured and the organization seeking coverage.

General Ins. Co. of America v. Starr Indem. & Liab. Co., 2016 WL 4120635 (S.D.N.Y. Jul. 22, 2016). Zbigniew Mroz, an employee of DNK Contracting Corp., sustained injuries while working at a construction project located in the Bronx. The construction project was owned by Omni New York, LLC, Omni New York LLC and/or OLR EWC L.P. (collectively, the "OLR Entities"), which were insured by New York Marine and General Insurance Company. KNS Building Restoration, the general contractor at the project, subcontracted a portion of the roofing work to DNK and, pursuant to a purchase order, DNK was required hold KNS harmless and to provide it with additional insured status. Northfield issued a commercial general liability insurance policy to DNK which provided additional insured coverage for liability caused by acts or omissions of DNK or its subcontractors. The Northfield policy also contained an Injury to Employee Exclusion which precluded coverage for bodily injuries to employees arising out of their employment with DNK. Mroz subsequently commenced a personal injury action against the OLR Entities and the OLR entities commenced a third-party action against KNS, among others. KNS then sought defense and indemnification from Northfield as an additional insured and Northfield disclaimed coverage. Coverage litigation ensued and Northfield moved for summary judgment dismissing, *inter alia*, the claims against it and seeking a declaration that Northfield had no duty to defend or indemnify KNS relative to the Mroz action. New York Marine subsequently cross-moved for summary judgment. In its motion, Northfield argued that the Injury to Employee Exclusion bars coverage for any claim, whether for indemnity or defense, by any party for alleged injuries to DNK employees, such as Mroz. New York Marine conceded that the policy excludes coverage for "bodily injury" to an employee arising out of the scope of his employment for DNK, but argued that the Court should look outside the four corners of the Mroz complaint to determine if there is coverage for the occurrence. New York Marine contended that there was significant documentary and testimonial evidence that Mroz was not injured in the course of his employment for DNK. If Mroz was injured outside the course of his employment, New York Marine argued, then the Injury to Employee Exclusion would not apply and Northfield would have a legal duty to defend KNS until Northfield could establish through judicial admission or determination that Mroz was injured in the course of his employment. Northfield responded that if Mroz was not injured while working for DNK at the project, then KNS did not qualify as an insured or additional insured under the Northfield policy and have no entitlement to coverage. Finding in favor of Northfield, the United States District Court for the Southern District of New York determined that under either scenario posited by New York Marine, there was no legal or factual allegation that would give rise to Northfield's duty to defend or indemnify KNS in the underlying action. In this regard, if Mroz was injured while not working on the project, KNS would not qualify as an additional insured and, thus, would not be entitled to any coverage. On the other hand, if Mroz was injured while working for DNK at the project – as his Complaint alleged – then coverage would be barred by the Injury to Employee Exclusion. Accordingly, it was held that Northfield had no duty to defend or indemnify KNS in connection with the Mroz action.

Mecca Contracting, Inc. v. Scottsdale Ins. Co., 140 A.D.3d 714 (2d Dept. June 1, 2016). Mecca Contracting, Inc. was the general contractor on a construction project known as the 49 Wilson Avenue project. Mecca hired Salcora Construction Corp. to perform certain work on the project and by way of agreement, Salcora agreed to provide Mecca with additional insured status on the various policies it was required to procure and maintain. Salcora obtained liability insurance from Scottsdale Insurance Company. Although Mecca was not explicitly named as an

additional insured on the policy, the policy contained a "Blanket Additional Insured Endorsement" which provided, in relevant part, that any person or organization whom Salcora was required to add as an additional insured on the policy pursuant to a written contract, would be considered an additional insured under the policy. Although the policy provided Salcora with primary coverage, the Blanket Additional Insured Endorsement only provided additional insureds with "excess" coverage, unless a written contract specifically required that the Scottsdale policy be primary. It was undisputed that the contract between Mecca and Salcora expressly stated that the Scottsdale policy would be primary. A worker for a sub-subcontractor hired by Salcora was allegedly injured and commenced a lawsuit against Mecca and others to recover damages for his injuries. Mecca sought a defense from Scottsdale, and Scottsdale disclaimed coverage. Thereafter, Mecca commenced a breach of contract and declaratory judgment action against both Scottsdale and Salcora, seeking, among other things, a declaration that Mecca was an additional insured under the Scottsdale policy and moved for summary judgment. The Second Department, affirming the decision of the trial court, found that Mecca had established its *prima facie* entitlement to the declaration sought and that Scottsdale, in opposition, failed to raise a triable issue of fact. In this regard, in support of its motion, Mecca submitted, *inter alia*, its contract with Salcora and the Scottsdale policy. In Mecca's contract with Salcora, Salcora agreed to provide Mecca with additional insured status under its policy. Moreover, under the Blanket Additional Insured Endorsement of the policy, Scottsdale agreed to provide primary coverage to any party with whom Salcora entered a contract if such contract specifically required the Scottsdale policy to be primary. Because the policy provided Salcora with primary coverage and Salcora agreed to make Mecca an additional insured, the contract between Mecca and Salcora constituted a contract requiring Scottsdale to provide Mecca with primary coverage, thereby satisfying the requirements of the Blanket Additional Insured Endorsement and obligating Scottsdale to provide additional insured coverage to Mecca on a primary basis.

DUTY TO DEFEND

National Fire Ins. Co. of Hartford v. E. Mishan & Sons, Inc., 2016 WL 3079958 (2d Cir. June 1, 2016). National Fire Insurance Company of Hartford, Valley Forge Insurance Company, and Transportation Insurance Company (collectively, the "Insurers") provided coverage to Emson, Inc. ("Emson") under several commercial general liability insurance policies. The policies provided coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies." The policies defined "personal and advertising injury" to include the "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." In addition, the policies contained an exclusion of coverage for personal and advertising injuries for knowing violations of another's rights, defined as "'[p]ersonal and advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" In 2013, Emson was sued in two class action lawsuits alleging that Emson worked with other companies to deceptively trap customers into recurring credit card charges. In essence, the underlying lawsuits asserted that Emson acted as a purveyor of data, facilitating "data passes" and transferring private customer information for profit. After the underlying lawsuits were initiated, the Insurers filed an action in the District Court seeking a declaratory judgment that they were not required to defend Emson in the underlying lawsuits under the terms of the policies. The parties cross-moved for summary judgment and the District Court granted judgment to the Insurers. In finding that the District Court improperly held that the Insurers did not have a duty to defend Emson in the underlying class action lawsuits, the Second Circuit considered both the causes of action and the accompanying factual allegations against Emson and concluded that the knowing violation exclusion alone did not absolve the Insurers of their duty to defend. In this regard, it was noted that the duty to defend exists "until it is determined with certainty that the policy does not provide coverage." The Court stated that it could not conclude with certainty that the policy did not provide coverage, because the conduct triggering the knowing violation policy exclusion was not an element

of each cause of action. Therefore, as Emson could be liable to the plaintiffs even absent evidence that it knowingly violated its customers' right to privacy, the Court determined that the Insurers had a duty to defend Emerson.

PROPERTY DAMAGE

St. George Tower v. Ins. Co. of Greater New York, 139 A.D.3d 200 (1st Dept. Apr. 21, 2016). St. George Tower and Grill Owners Corp., a cooperative apartment corporation and owner of a building located in Brooklyn, procured a commercial package policy from the Insurance Company of Greater New York ("GNY") insuring its building. During the policy period, pressure testing of a pump related to the building's fire suppression system resulted in a flood that damaged the ceilings and floors in certain apartments. GNY did not dispute that the damage to the floors and ceilings caused by the flood was a covered loss under the policy and reimbursed St. George Tower for water damage and lost maintenance incurred as a result of that covered loss. The flooding of the building also caused mold to develop within some units, which made it necessary to remove internal finishes in those areas. During the course of remediation, an architect retained by St. George Tower inspected various apartments at the building and it was discovered that the concrete slabs under the flooring were in a distressed and deteriorated condition, including some open cracks through the slabs. This condition of the concrete slabs constituted a violation of the New York City Building Code, and required repair before the water damage remediation could be completed. It was stipulated that the condition of the concrete slabs was not caused by the flooding. GNY rejected the claim for the remediation of the slabs based upon the Blanket Ordinance or Law Coverage Endorsement and St. George Tower brought a declaratory judgment action, asserting a cause of action for breach of contract based on GNY's failure to provide coverage. The parties subsequently moved and cross-moved for summary judgment. The Blanket Ordinance or Law Coverage Endorsement at issue provided coverage in the event the building "sustains direct physical damage that is covered under this policy and such damage results in the enforcement of the ordinance or law". Another provision of the Endorsement, covering "Increased Cost of Construction," applied when an insured building sustains covered direct physical damage, and "when the increased cost [of construction] is a consequence of enforcement of the minimum requirements of the ordinance or law." St. George Tower reasoned that the covered water damage remediation resulted in the enforcement of the Building Code regarding the condition of the concrete slabs and that the cost of repairs to the concrete slabs should accordingly be covered. In other words, the need to comply with the Building Code resulted from the performance of covered remediation. The First Department stated that the Ordinance or Law Endorsement could not be triggered simply by the discovery, in the course of an inspection necessitated by a covered event, of structural problems that amounted to code violations. The Court opined that this held true regardless of whether the discovered condition could have been discerned earlier, or where, as here, it could not have been discovered absent the covered damage. It was reasoned that if the rule were otherwise, even an inspector's discovery of code violations resulting from shoddy original construction, such as beams or pipes made of sub-par materials, would leave the insurance company liable for the necessary replacement of those materials any time the problem happened to be uncovered in the course of damage remediation. As such, it was held that there must be some direct connection between the covered damage and the enforcement of the ordinance, and that the necessity of a relationship between the damage and the code enforcement work is not satisfied by the fact that the covered work cannot be completed until the code-complaint repairs are performed. Accordingly, the First Department found that as there was no evidence that the code-compliant repairs were caused by the flood, that GNY was not obligated to indemnify St. George Tower for its claim.

APPLICABILITY OF EXCLUSIONS

Rego Park Holdings, LLC v. Aspen Specialty Ins. Co., 140 A.D.3d 1147 (2d Dept. June 29, 2016). Aspen Specialty Insurance Company issued a commercial general liability insurance policy to Anton Developers of Forest Hills in connection with a construction project at a property owned by Rego Park Holdings, LLC. Rego Park,

among others, was included as an additional insured under the policy. Construction work on Rego Park's property allegedly caused certain damage to two neighboring properties and Rego Park was named as a defendant in an underlying action. Rego Park tendered its defense and indemnification to Aspen. In response, Aspen disclaimed coverage on the ground that a "Subsidence Exclusion Endorsement" in the policy excluded coverage for the damage allegedly sustained by the two adjoining properties. The exclusion provided, in relevant part: "This policy does not apply to any liability for…'Property Damage' arising out of…the subsidence, settling, sinking, slipping, falling away, caving in, shifting, eroding, mud flow, rising, tilting, bulging, cracking, shrinking, or expansion of foundations, walls, roofs, floors, ceilings or any other movements of land or earth, regardless of whether the foregoing emanates from, or is attributable to, any operations performed by or on behalf of any insured." Rego Park commenced a declaratory judgment action against Aspen seeking judgment that Aspen is obligated to defend and indemnify it in the underlying action. Rego Park moved, and Aspen cross-moved, for summary judgment. The Second Department held that Aspen established, *prima facie*, that its policy did not insure Rego Park for any damage to the two adjoining properties and that the language of the Subsidence Exclusion Endorsement was clear and was not susceptible to any other reasonable interpretation. Accordingly, it was determined that the trial court properly awarded summary judgment to Aspen declaring that it was not required to defend or indemnify Rego Park in the underlying action.

LATE NOTICE

Osorio v. Bowne Realty Assocs., LLC, 140 A.D.3d 1136 (2d Dept. June 29, 2016). On September 16, 2007, Nathalie Osorio allegedly fell to the ground from a fourth floor window of a building owned by Bowne Realty Associates, LLC. In September 2010, Osorio commenced an action to recover damages for personal injuries she allegedly sustained as a result of the accident. After being served with the Summons and Complaint, Bowne provided notice of the action to its insurer, Mt. Hawley Insurance Company. In October 2010, Mt. Hawley disclaimed coverage based on late notice of claim. Thereafter, Bowne commenced a third-party action seeking, *inter alia*, a declaration that Mt. Hawley had a duty to defend and indemnify it in the main action. After the conclusion of discovery, Mt. Hawley moved for summary judgment declaring, *inter alia*, that it had no duty to defend or indemnify Bowne in the main action. The Second Department noted that where an insurance policy requires that notice of an occurrence be given "as soon as practicable," notice must be given within a reasonable time in view of all of the circumstances. Absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage. However, circumstances may exist that will excuse or explain the insured's delay in giving notice, such as lack of knowledge that an accident has occurred. It was determined that Mt. Hawley established its *prima facie* entitlement to judgment as a matter of law by demonstrating that Bowne did not provide notice of the accident until approximately three years after it occurred. However, in opposition, Bowne raised a triable issue of fact as to whether the delay in giving notice was reasonable. In this regard, Bowne submitted affidavits of its manager and director of operations, both of whom stated that they did not know about the accident until they received the Summons and Complaint. The Court found that contrary to the lower court's determination, the transcript of a taped conversation between Bowne's building superintendent and an investigator for Mt. Hawley, which was not verified or certified, was inadmissible and, in any event, did not conclusively resolve the issue of when Bowne first acquired knowledge of the accident. Accordingly, it was determined that the trial court should have denied Mt. Hawley's motion for summary judgment.

MISCELLANEOUS

Keyspan Gas East Corp. v. Munich Reinsurance America Inc., 2016 WL 4543479 (1st Dept. Sept. 1, 2016). Keyspan Gas East Corporation operated two manufactured gas plants located on Long Island since the early 20th century. These sites were contaminated with numerous hazardous wastes that leached into the surrounding groundwater and soil. Although exactly when contamination of these sites began was disputed and the amount of environmental damage that occurred in any given year could not be precisely ascertained, it was clear that the contamination was

continuous and gradual, occurring over a period of many decades. In 1995, the New York Department of Environmental Conservation sought to hold Keyspan strictly liable for the resulting pollution, requiring it to pay for the investigation and clean-up of the sites. Keyspan then sought to have its insurer, Century Indemnity Company, cover those costs based upon sixteen successive years of general liability insurance policies issued by Century from 1953 to 1969. In that regard, it was argued that the various claims implicate multiple successive insurance policies, as well as periods of no insurance. Keyspan subsequently commenced a declaratory judgment action seeking indemnification from Century for not only the sixteen-year period that the policies were in effect, but also for the periods of time, both before 1953 and after 1969, when insurance covering this risk could not be purchased in the marketplace. Century moved for summary judgment denying that it was obligated to indemnify Keyspan for any damages that did not occur "during the policy period," contending that any property damage that occurred outside that sixteen-year period and during periods of no insurance is the sole responsibility of Keyspan, whether or not insurance coverage was available in the marketplace. In rendering its decision, the First Department noted that the New York appellate courts have not expressly ruled on the question presented in Century's motion: When the insured could not have obtained insurance even if it had wanted to, is the risk attendant to the unavailability of insurance in the marketplace allocable to the existing, triggered insurance policies or to the insured? The Court held that the policy language supports a conclusion that the unavailability exception to the proration to the insured does not apply. In this regard, each Century policy (despite some minor variations) provided Keyspan with coverage for occurrences, accidents and continuous and repeated exposure to conditions that result in damage "during the policy period." While none of the policies expressly addressed how to allocate liability in a situation where the underlying damage was long-term, continuous and indivisible, the fact that the policies required Century to indemnify Keyspan for occurrences, accidents, etc., "during the policy period" was consistent with allocation for time on the risk. It was reasoned that unavailability is an exception to time on the risk, since it allocates responsibility for periods of time when no insurance was purchased and it is, therefore, inconsistent with policy language restricting coverage to the policy period. At the same time, there are no express contract provisions requiring the insurer to cover damages outside of the policy period when insurance is otherwise unavailable in the marketplace. Accordingly, the Court held that Century was entitled to a judgment declaring that Century is not responsible for any part of the costs of cleanup for periods of time when insurance was unavailable.

Boro Park Land Co., LLC v. Princeton Excess Surplus Lines Insurance Co., 140 A.D.3d 909 (2d Dept. June 15, 2016). Boro Park Land Co., LLC ("Boro Park") owns certain premises located in Brooklyn, which it leased to Boro Park Operating Co., LLC (the "Center"), for the operation of a nursing home. Princeton Excess Surplus Lines Insurance Company issued a Senior Living Professional Liability, General Liability, and Employee Benefits Liability policy to the Center. Boro Park was named as an additional insured under the policy, as required by the lease agreement. Vanessa Wickham, an employee of the Center, was allegedly injured when she slipped and fell in the parking garage of the Center when she arrived at work. Wickham thereafter commenced an action alleging that Boro Park was negligent in maintaining the premises and provided notice to Princeton. By way of correspondence dated December 14, 2012, Princeton denied coverage under the policy based upon, *inter alia*, the "Insured Versus Insured" exclusion which excluded coverage for "[a]ny 'claim' made by or for the benefit of, or in the name or right of, one current or former insured against another current or former insured." Boro Park then commenced this action for a judgment declaring that Princeton was obligated to defend and indemnify it in the underlying action. Princeton moved for summary judgment dismissing the complaint as asserted against it and Boro Park cross-moved for summary judgment declaring that Princeton was obligated to defend and indemnify it in the underlying action. In rendering its decision, the Second Department found that it was unclear from the language of the exclusion whether Wickham, as an employee, was an "insured" as that term was defined in the policy and, as such, the provisions were ambiguous and subject to more than one interpretation. Accordingly, it was held that the lower court properly denied Princeton's motion for summary judgment dismissing the complaint, and granted that branch of

Boro Park's cross motion which was for summary judgment declaring that Princeton was obligated to defend Boro Park in the underlying action.

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