

**CASES OF INTEREST BY TOPIC:****APPLICABILITY OF EXCLUSIONS**

**Utica First Ins. Co. v. Santagata, 66 A.D.3d 876 (2d Dep't October 20, 2009)** The Appellate Division, Second Department, held that the employee exclusion in an insurance policy issued by the plaintiff, which excluded coverage for bodily injury claims by employees of the insured or an employee of a contractor hired by the insured, if such injury occurred in the course of his or her employment, did not violate public policy. The Second Department noted that there was no statutory requirement for commercial liability coverage which would prohibit insurers from limiting their contractual liability in such a manner.

**WSTC Corp. d/b/a Vibe v. National Specialty Ins. Co., 67 A.D.3d 781 (2d Dep't November 10, 2009)** The plaintiff-insured, which owned a premises, brought action against its insurer, seeking a declaration that the insurer was obligated to provide coverage for an underlying action involving an assault at the premises. The Appellate Division, Second Department, held, *inter alia*, that the assault and battery exclusion of the policy applied to preclude coverage, despite the allegations of negligence, because no cause of action would exist but for the assault and battery. In sum, since the claims of negligence arose out of an assault, they fell within the ambit of the exclusion.

**BAD FAITH**

**Global Aerospace, Inc. v. Hartford Fire Ins. Co., 2009 WL 4072090 (2d Cir. November 25, 2009)** Under New York law, in order for an excess insurer to establish a *prima facie* case of bad faith against an underlying primary insurer, an excess insurer must show that the primary insurer's conduct constituted gross disregard of the excess insurer's interests. The primary insurer's conduct must involve a deliberate or reckless failure to place on equal footing the interests of the excess insurer with its own.

**CHOICE OF LAW**

**Liberty Surplus Ins. Co. v. Nat'l Union Free Ins. Co. of Pittsburgh, PA, 67 A.D.3d 420 (1st Dep't November 5, 2009)** A contract of insurance is governed by the local law of the state which the parties understood to be the principle location of the insured risk. Where the covered risks are spread over multiple states, courts will generally locate the risk in one state, namely the state of the insured's domicile at the time the policy was issued, with a corporate insured's domicile the state of its principle place of business.

**DECISION OF INTEREST:**

**Osowski v. AMEC Construction Management, Inc., 2009 WL 3200042 (1st Dep't October 8, 2009)**

This action arose from an accident that occurred during the construction of the New York Times Building in Manhattan. On May 13, 2005, the plaintiff, Frank Osowski, was seriously injured when a four-ton steel beam fell on him while he was unloading a truck at the construction project.

Prior to commencing the project, the owner of the building, the New York Times Building, LLC ("NYTB"), entered into an agreement with AMEC Construction Management, Inc. ("AMEC") for construction management services. Thereafter, AMEC entered into a subcontract with DCM Erectors, Inc. ("DCM"), Osowski's employer, for structural steel work at the project. Both AMEC and DCM were enrolled in the Owner Controlled Insurance Program ("OCIP"), through Travelers Insurance Company ("Travelers"), that NYTB had procured and implemented for the project. The OCIP provided, *inter alia*, commercial general liability insurance, workers' compensation and employers liability insurance, and excess insurance to NYTB, AMEC and all enrolled contractors, including DCM. The OCIP contained a waiver-of-subrogation provision which provided that "[t]he Owner and Contractor hereby waive all rights against each other and any of their Subcontractors...as to claims and damages covered by insurance obtained by the Owner under its OCIP program..."

Subsequently, Osowski and his wife commenced an underlying action against AMEC/ NYTB ("the Underlying Action"). On October 22, 2007, American International Specialty Lines Insurance Corp. ("AIG"), the first-layer excess insurer, issued a written denial of coverage to AMEC/NYTB in the Underlying Action. The ground for the declination was that, *inter alia*, its excess policy excluded coverage for bodily injury arising out of the loading or unloading of a vehicle.

On November 21, 2007, following AIG's disclaimer of coverage, AMEC/NYTB commenced a third-party action against DCM, for common-law and contractual indemnification and contribution ("the Third-Party Action"). (The Court noted that absent AIG's disclaimer of coverage, the third-party action would have been prohibited by the "waiver of subrogation" provision in the OCIP, as well as by the anti-subrogation rule.)

## DISCLAIMERS

**American Guarantee & Liability Ins. Co. v. State Nat'l Ins. Co., Inc., 67 A.D.3d 488 (1st Dep't November 12, 2009)** The Appellate Division, First Department, recognized that the protections of Insurance Law 3420(d), requiring timely disclaimers of coverage under certain circumstances, did not apply to one insurer's claim for reimbursement from another insurer.

## DUTY TO COOPERATE

**Erie Ins. Co. v. JMM Properties, LLC, 66 A.D.3d 1282 (3d Dep't October 29, 2009)** In November 2006, property owned by the defendant, a limited liability company, was damaged by fire. The sole members of the limited liability company were Michael Orr, Michael Froncek and Jeffrey Truman. The defendant-company thereafter submitted a claim to the plaintiff, Erie Insurance Company, which issued a commercial insurance policy to the defendant. Erie investigated the fire and requested that Orr and Truman appear for an examination under oath ("EUO"). Although the EUOs were scheduled to take place in March 2007, Truman's criminal attorney advised Erie that he would not be available for examination until the conclusion of a criminal action related to the fire. As a result, Erie cancelled the EUOs, advised the company that Truman's refusal to submit to an EUO could result in a denial of its claim and sent a letter to Truman's attorney requesting his availability. The following month, Erie informed both the company and Truman's criminal attorney that it was prepared to hold the EUOs of Truman and Orr at a specified location on May 16, 2007. In response, Truman's criminal attorney confirmed Truman's attendance. Two days prior to May 16, 2007, Erie advised the company's counsel, with no notice to Truman or his criminal attorney, that the EUOs would be conducted in a different location. When Truman did not appear, plaintiff refused to conduct the EUO of Orr in Truman's absence. After continued efforts by both counsel for Erie and the company to produce Truman failed, Erie denied the company's claim on the ground that, *inter alia*, Truman failed to appear for an EUO or answer any questions relating to the fire.

The Appellate Division, Third Department, affirmed the lower court's decision that Truman's refusal to submit to an EUO was a breach of the insurance policy and the criminal charges did not provide him with a valid excuse for non-compliance. In assessing whether the company's noncompliance was sufficiently willful in order to justify excusing Erie from liability, however, the Third Department focused on the totality of the conduct of the company's principles, since business entities "necessarily co-operate or fail to do so because of actions of their agents...and it is only through them that the entities may assist in the investigation." The Third Department, agreeing with the lower court, found that the company's noncompliance was not sufficiently willful as to warrant the "extreme penalty" of excusing Erie from liability without giving the company one last chance to perform in accordance with the policy's provisions.

On December 3, 2007, AMEC/NYTB commenced a declaratory judgment action against AIG ("The DJ Action"). DCM was permitted to intervene in the DJ Action to challenge AIG's denial of coverage. Thereafter, on January 9, 2008, the trial court granted the Osowskis' Motion for Summary Judgment on the issue of AMEC/NYTB's liability under the Labor Law.

On May 20, 2008, during the damages trial in the Underlying Action, a "Confidential Settlement and Release Agreement" was made between the Osowskis, NYTB and AMEC. Pursuant to the agreement, NYTB and AMEC agreed to secure funding in the amount of \$12 million payable to the Osowskis, as follows: (1) a \$2 million payment from Travelers; and (2) a \$10 million irrevocable, unconditional letter of credit. In exchange for the \$12 million settlement, the Osowskis released AMEC/NYTB from all claims relating to the events giving rise to the Underlying Action.

The following day, on May 21, 2008, counsel for the Osowskis announced, in open court, that the Underlying Action had been settled pursuant to a confidential settlement agreement with AMEC/NYTB. Immediately thereafter, DCM informed the Court that DCM had not been made privy to the details of the settlement.

At that point, DCM was still a party to the DJ Action and the Third-Party Action. The Court, acknowledging the fact that DCM was preparing for a trial in the Third-Party Action, inquired of AMEC/NYTB's counsel as to whose interests the confidentiality clause was designed to protect. Counsel responded, "I can fairly say that the confidentiality provision[s] are for the benefit of all parties involved..." The proceeding concluded with counsel for DCM stating on the record that she intended to make an application for full disclosure of the settlement terms and conditions. The matter adjourned for trial in the Third-Party Action on June 3, 2008.

In the meantime, on May 30, 2008, DCM moved to compel disclosure of the settlement agreement and all related documents. DCM asserted that without disclosure, neither DCM nor the Court could determine whether the waiver of subrogation provisions were applicable, and thus, whether dismissal of the Third-Party Action was required. DCM noted that it was unaware whether settlement had been made on behalf of one or both defendants (*i.e.*, AMEC/NYTB and DCM), and whether the plaintiff had filed releases in favor of one, or both of them. DCM further noted that in the Third-Party Action AMEC/NYTB would be required to demonstrate that the amount paid in settlement was reasonable. Finally, DCM asserted that statements or representations in the settlement agreement could impact on credibility issues at the time of trial.

## DUTY TO DEFEND

**Burlington Ins. Co. v. Guma Const. Corp., 66 A.D.3d 622 (2d Dep’t October 6, 2009)** Burlington Insurance Company issued a Commercial General Liability insurance policy to Guma Construction Corporation, including a “classification limitation” endorsement, which provided that the policy would apply only to losses arising out of those operations listed in the “classification” section of the policy’s Declarations form, wherein Guma listed “Garbage, Ash, or Refuse Collecting”. Guma was subsequently sued after a firefighter was injured at a building where Guma was performing demolition work. The Complaint in the underlying action alleged that Guma improperly removed pipe and used one or more torches in connection with the work it performed. Guma forwarded a copy of the Complaint to Burlington, which subsequently issued a disclaimer based upon Guma’s breach of the “classification limitation” endorsement. According to Burlington, Guma made misrepresentations in its application for insurance by describing its business as “Garbage, Ash or Refuse collecting”, when it was actually supervising the removal of pipes. As such, Burlington sought a declaration that it was not obligated to defend Guma in the underlying action or indemnify Guma for any liability attributed to it.

The Appellate Division, Second Department, held that since the allegations in the underlying Complaint suggested a reasonable possibility of coverage, Guma was entitled to summary judgment declaring that Burlington had an obligation to provide a defense. Although Burlington contended that a determination on the duty to defend was premature because discovery had not yet been completed, the Second Department noted that any evidence that would be obtained via discovery would be irrelevant, since extrinsic evidence that a claim may ultimately prove meritless or outside the policy’s coverage, cannot be utilized to avoid providing a defense.

## EXCESS COVERAGE

**Metropolitan Trans. Auth. v. Zurich Am. Ins. Co., 2009 WL 4910052 (1st Dep’t December 22, 2009)** The defendant-excess insurer issued a follow-form excess policy incorporating the terms and conditions of an underlying general liability policy to the extent not contradicted by the excess policy’s express terms. The underlying policy provided that additional insureds, such as the plaintiffs, would be covered up to the lesser of the policy limits or the amount required by their trade contracts with the insured. Since there was no conflict between the excess policy terms and the blanket additional insured rider in the underlying policy, the Appellate Division, First Department, held that the trade contract limitation was incorporated into the excess policy, limiting the excess carrier’s exposure to that provided by the trade contract limitation rider.

On June 2, 2008, AMEC/NYTB filed a cross-motion for a protective order barring the disclosure sought by DCM. AMEC/NYTB asserted that DCM was not entitled to disclosure of the contents of the settlement agreement, except for the amount paid in settlement, which it represented was \$12 million. AMEC/NYTB argued, *inter alia*, that since AIG had disclaimed coverage for claims in the main action, the waiver of subrogation provision did not bar AMEC/NYTB’s Third-Party action against DCM seeking to recoup the settlement amounts in excess of the \$2 million primary coverage.

Later that day, with both parties before it, the court reviewed the “Confidential Settlement and Release Agreement” and subsequently directed AMEC/NYTB to turn over the agreement to counsel for DCM.

After reviewing the “Confidential Settlement and Release Agreement”, DCM noted that the agreement stated only that AMEC/NYTB would “provide” the Osowskis with a \$10 million letter of credit, but did not state that AMEC/NYTB would fund the letter of credit. DCM indicated to the Court that the balance of the agreements must be disclosed because if it were determined that AIG was funding the settlement then the contractual waiver of subrogation provision would be triggered. The Court found this argument persuasive.

On June 3, 2008, AMEC/NYTB was ordered to disclose the related settlement agreements. Thereupon, DCM learned the details of the related confidential “Settlement Agreement and Release” among AMEC, NYTB and AIG. DCM discovered that: (1) AIG agreed to provide AMEC/NYTB with an irrevocable letter of credit in the amount of \$10 million designating the Osowskis as intended beneficiaries; (2) AMEC/NYTB agreed to dismiss the DJ Action, with prejudice, and to release all claims and actions against AIG for any matters connected to the Underlying Action; (3) AMEC/NYTB agreed to assign to AIG any and all claims it had against any person or entity arising out of or in connection with the Underlying Action, including but not limited to the claims in the Third-Party Action [it was expressly agreed that the rights conveyed to AIG by this latter provision represented an assignment, and not subrogation]; and (4) AMEC/NYTB agreed that settlement was without prejudice to AIG’s disclaimer of coverage with respect to the Third-Party Action, and that such disclaimer “remain[ed] in full force and effect.”

Consequently, DCM made an oral motion to dismiss the Third-Party Action. AMEC/NYTB’s counsel objected to the oral motion, asserting that DCM’s motion was one for summary judgment and thus, should be made on papers. The Court then granted a continuance to June 5, 2008 for “an offer of proof in the trial.”

## NOTICE

### **American Transit Ins. Co. v. Brown, 66 A.D.3d 447 (1st Dep’t**

**October 8, 2009)** Arthur Brown was involved in a motor vehicle accident with Albertano Batista, American Transit Insurance Company’s insured. American Transit acknowledged receipt of Brown’s third-party claim and paid for his property damage. Brown subsequently commenced an action against Batista and forwarded a copy of the Summons and Complaint to American Transit at the address included in American Transit’s initial acknowledgment letter. Unbeknownst to Brown, however, American Transit had moved its offices. Upon Batista’s failure to appear in the action, Brown moved for a default judgment against Batista and proceeded to inquire, resulting in a judgment in the amount of \$81,830. Pursuant to Insurance Law 3420(a)(2), Brown served copies of the unsatisfied judgment with notices of entry upon American Transit and Batista, in response to which American Transit issued a disclaimer, and commenced a declaratory judgment action on the ground that neither Batista nor Brown gave it timely notice of the underlying lawsuit. According to the Appellate Division, First Department, Brown demonstrated a valid excuse for forwarding the Summons and Complaint to American Transit’s former address in that he was never notified of its change of address. American Transit’s allegation that it had “sent out a post card to claimants and attorneys who had filed any claims against us during that time” was found to be hollow and did not evidence that any specific notification was sent to Brown or his counsel. The dissent, however, opined that the majority placed the burden on the wrong party, rejecting American Transit’s statements that it sent a mass mailing announcing the change of address at the time of the move, and that it notified the State Insurance Department and the post office of the change of address, and changed its address on its website and all phone listings.

### **QBE Ins. Corp. v. D. Gangi Contracting Corp., 66 A.D.3d 593 (1st Dep’t October 29, 2009)**

The Appellate Division, First Department, held that QBE Insurance Corporation properly disclaimed coverage for late notice. QBE’s policy required that its insured, Gangi Contracting Corporation, provide QBE with notice of an occurrence as soon as reasonably practicable, and provided that “knowledge...by [Gangi’s] agent, servant or employee shall not itself constitute knowledge...unless the Corporate Risk Manager of your corporation shall have received notice of such Occurrence.” The claimed lack of knowledge of the underlying accident on the part of Gangi’s Risk Manager did not relieve Gangi of the obligation to provide QBE with notice within a reasonable period of time, since Mr. Gangichiodo, Gangi’s President, Vice-President, Secretary, sole-shareholder and officer, admitted contemporaneous knowledge of the underlying accident. In this regard, because Gangichiodo was an “executive officer” and not merely an “agent, servant or employee” of Gangi, the Appellate Division, First Department, held that his knowledge was imputed to Gangi and triggered its duty to notify QBE of the accident. Nor was Gangi’s failure to notify QBE of the accident until three years after its occurrence excusable based on a reasonable, good-faith belief of non-liability, since Gangichiodo was aware that the injured worker had sustained serious injuries, had been removed from the scene by ambulance and that Gangi was subject to

After the parties reconvened on June 5, 2008, DCM made an offer to support its previously articulated Motion to Dismiss. DCM concluded that by virtue of the confidential settlement agreement and associated documents: “there was, in fact, insurance that covered the loss; that there has been a promise and payment of those damages and, therefore, based upon the provisions in the contract that are now in evidence, the waiver of subrogation provision bars completely the pursuit of the third-party claim against DCM.”

AMEC/NYTB countered that AIG had not rescinded its disclaimer, and that nothing in the confidential settlement agreement and associated documents stated or implied otherwise. AMEC/NYTB contended that it DCM’s position that the set of agreements constituted insurance was without basis.

The trial court dismissed the Third-Party Complaint on the ground that NYTB had not sustained any damages that would trigger a common-law right of indemnification against DCM. The court interpreted the settlement documents as the legal equivalent of insurance because “[AMEC/NYTB] will [never] be out-of-pocket a penny.” Thereafter, the trial court severed the Third-Party Action from the Underlying Action, ordered the entry of a judgment dismissing AMEC/NYTB’s Third-Party Complaint, and dismissed DCM’s breach of contract counterclaim as moot.

On appeal, AMEC/NYTB argued that the trial court abused its discretion in ordering disclosure of the confidential settlement agreements. Furthermore, AMEC/NYTB contended that AIG’s disclaimer was not mooted by the confidential settlement agreements. AMEC/NYTB asserted that since AIG disclaimed coverage for “claims and damages” in the Underlying Action as not “covered” under the AIG policy, the waiver of subrogation did not bar AMEC/NYTB’s Third-Party Action against DCM seeking to recoup settlement amounts in excess of Travelers’ \$2 million primary policy. Additionally, AMEC/NYTB argued that the trial court erred in entertaining DCM’s oral application.

The Appellate Division, First Department, found that AMEC/NYTB’s assertions were without merit. First, the First Department held that pursuant to CPLR 3101, it was proper for the trial court to compel disclosure of the “Confidential Settlement and Release Agreement” between the Osowskis and AMEC/NYTB/AIG, the “Letter of Credit,” and the “Settlement and Release Agreement” between AMEC/NYTB and AIG because these agreements were “material and necessary” to the issues raised in the Third-Party Action.

According to the First Department, there was no question that the confidential settlement materials were properly ordered to be disclosed. The Third-Party Action was based on a premise that AMEC/NYTB were “passively negligent”

potential liability under the Labor Law. In addition, QBE's disclaimer of coverage, issued two days after it learned of Gangichiodo's contemporaneous knowledge of the accident, was, according to the First Department, given as soon as reasonably possible under Insurance Law 3420(d) and, since QBE's disclaimer of coverage addressed to Gangi was copied to the injured worker's counsel, it was effective as to the injured worker, even though no mention was made therein of the injured worker's own failure to give QBE timely notice.

**Board of Managers of the Park Condominium v. Clermont Specialty Managers, Ltd., 2009 WL 4672143 (1st Dep't December 10, 2009)**

An injured construction worker was taken to the hospital by ambulance after falling off a ladder while installing a water tank on the roof of the insured's building. The insured admitted to immediately learning of the accident and, therefore, its notice of claim was untimely; however, the insured argued that its untimeliness should be excused because it had a reasonable, good-faith belief that no claim would be asserted against it, based upon a phone call it made to the worker's employer on the day of the accident, in which it was informed that the worker was not admitted to the hospital, did not sustain any serious injuries, and was expected to return to work the next day. The Appellate Division, First Department, held, however, that given the nature of the work being performed, and the insured's knowledge that the worker had fallen off a ladder and been taken to the hospital by ambulance, this single phone call was not adequate inquiry into the circumstances of the accident and its outcome and, as a matter of law, could not have caused the insured to reasonably believe that there was no possibility of the policy's involvement.

**American Transit Ins. Co. v. Hashim, 2009 WL 4910572 (1st Dep't December 22, 2009)**

The Appellate Division, First Department, held that since the plaintiff-insurer received timely notice of the underlying automobile accident, it could not deny coverage in connection with the subsequently filed lawsuit based upon untimely notice of the lawsuit, unless it was prejudiced by the late notice.

**REIMBURSEMENT OF COSTS**

**Thomas Johnson, Inc. v. State Ins. Fund, 67 A.D.3d 1362 (4th Dep't November 13, 2009)**

The Appellate Division, Fourth Department, recognized that it is well settled that an insured may not be awarded attorneys' fees incurred in the prosecution of a declaratory judgment action against an insurer to determine coverage. Fees can only be sought where the insured was cast in a defensive posture by the legal steps the insurer took in an effort to free itself from its policy obligations. According to the Fourth Department, therefore, the fact that the defendant-insurer took an appeal in the declaratory judgment action commenced by the plaintiff did not bear any consequence.

tortfeasors whose payment to the Osowskis in the Underlying Action entitled them to seek indemnification from DCM, the subcontractor alleged to have control of the work giving rise to Osowski's injury. Thus, the question of who funded the settlement of the Underlying Action was critical to whether AMEC/NYTB could continue to maintain the Third-Party Action. In other words, if AMEC/NYTB's alleged losses were not "out-of-pocket", no suit could be maintained for common-law or contractual indemnification, either by AMEC/NYTB or by AIG as its assignee.

Furthermore, the First Department held that the trial court did not abuse its discretion in entertaining DCM's oral Motion to Dismiss. In this regard, the First Department noted that there was no *per se* rule against oral motions, so long as a movant makes a proper evidentiary showing. Indeed, according to the First Department, the motion was made on an evidentiary record sufficient for a determination, and defendants/third-party plaintiffs had ample notice and opportunity to respond to it. Since the motion was prompted by revelation of the terms of the settlement that had been reached in the Underlying Action, defendants/third-party plaintiffs could not claim to be surprised by it.

Moreover, the First Department held that the trial court's ruling on the motion was correct. In funding the \$10 million letter of credit, AIG effectively paid on the policy on which it had disclaimed. As a result, it foreclosed any claims AMEC/NYTB could have pursued against DCM in any Third-Party Action because AMEC/NYTB were not out of pocket in connection with the settlement. "Thus, AMEC/NYTB had no claims left to pursue or to assign to any other party, least of all to AIG since the effective payment on the policy triggered the waiver of subrogation clause."

The fact that the confidential agreement between AMEC/NYTB and AIG purported to keep AIG's disclaimer alive by stating that the disclaimer remained "in full force and effect" was, as per the First Department, irrelevant. The only possible way that AIG's disclaimer could have remained "in full force and effect" was if AIG and AMEC/NYTB had executed a reservation of rights agreement whereby AIG agreed to fund the \$10 million in order to cap the damages but that, if a subsequent action determined that its disclaimer was indeed valid, then AMEC/NYTB would owe that amount to AIG. In that situation, AMEC/NYTB would be in a position to bring the Third-Party Action against DCM, or even to assign its claim.

"Indeed, the fiction of the disclaimer was belied by AIG's funding of the \$10 million letter of credit on condition that AMEC/NYTB agreed not to pursue its declaratory judgment action against AIG. In other words, both AMEC/NYTB and AIG stipulated away the possibility of adjudicating the validity of the disclaimer. Thus, they created a

## RESCISSION

**Varshavskaya v. Metropolitan Life Ins. Co., 2009 WL 4673917 (2d Dep't December 8, 2009)** To establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented. To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, or rules pertaining to similar risks that show it would not have issued the same policy if the correct information had been disclosed in the application. According to the Appellate Division, Second Department, the defendant-insurer demonstrated its *prima facie* entitlement to judgment as a matter of law since it established that the decedent's misrepresentation was material by submitting an affidavit of its associate chief underwriter and relevant portions of its underwriting manual which showed that the defendant would not have been issued the same policy if the correct information had been disclosed in the application.

## MISCELLANEOUS

**State Farm Ins. Co. v. Jose Frias, 66 A.D.3d 997 (2d Dep't October 27, 2009)** Passengers who were allegedly injured in a collision with a car owned by State Farm's insured were not estopped from challenging the declarations secured by State Farm via its default judgment against certain defendants, including its insured, which declared that the collision resulted from an intentional act and that State Farm was not obligated to defend or indemnify its insured or to provide any coverage. The Appellate Division, Second Department, held that since State Farm had moved for leave to enter judgment against the defaulting defendants only, the resulting judgment bound only those defendants and could not be used to estop the other passengers from seeking coverage, even though the other injured passengers did not (i) oppose State Farm's proposed default judgment, (ii) propose a counter-judgment, (iii) move for leave to renew or reargue, (iv) move to vacate the judgment, or (v) appeal the judgment.

**Adamowicz v. North Country Ins. Co., 2009 WL 4348479 (3rd Dep't December 3, 2009)** According to the Appellate Division, Third Department, by sending a demand for a sworn proof of loss to the insured's attorney, and not to the insured, the insurer failed to comply with requirements of the statute precluding denial of an insured's property insurance claim for lack of proof.

situation where AMEC/NYTB could never find itself in a position of owing the \$10 million to AIG, and thus would never be in a position to pursue its action against DCM or to assign its claim to AIG. As DCM asserted, the fiction of the disclaimer was nothing more than an attempt to circumvent the waiver of subrogation clause and thus AMEC/NYTB's contractual obligation." In conclusion, the First Department held that AIG's arguments against disclosure of the agreement between it and AMEC/NYTB could not be viewed as anything "but a clear attempt to perpetrate a fraud on the court."

### 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., John D. McKenna, Esq. or Jillian Menna, Esq. at (516) 294-8844. You may also wish to visit the Firm's website at [lbclaw.com](http://lbclaw.com)