LB&C QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC:

ADDITIONAL INSURED COVERAGE

Regal Const. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 64 A.D.3d 461 (1st Dep't July 14, 2009) The Appellate Division, First Department, held that the focus of the additional insured clause included in a prime contractor's Commercial General Liability policy, which provided for additional insured coverage only with respect to liability "arising out of" the insured's ongoing operations for the additional insured, was not on the precise cause of the accident, but the general nature of the operations in the course of which the injury took place. As such, since a causal connection existed between the injury sustained by the prime contractor's employee at the construction site, and the prime contractor's work, the First Department determined that the construction manager was entitled to additional insured coverage, given that the prime contractor's responsibilities encompassed all construction work to be performed.

Bovis Lend Lease LMB, Inc. v. Garito Contracting, Inc., 885 N.Y.S.2d 59 (1st Dep't September 8, 2009) Bovis Lend Lease LMB, Inc. hired Garito Contracting, Inc. to perform demolition work on a construction project for which Bovis was acting as the general contractor. Pursuant to its subcontract with Bovis, Garito was required to obtain a primary general liability insurance policy naming Bovis as an additional insured. Garito secured a policy with Twin City Fire Insurance Company, which provided additional insured coverage to Bovis "only with respect to liability arising out of:…[Garito's] work for [Bovis]…" A worker thereafter commenced an action seeking recovery for injuries he allegedly sustained when he fell through an opening in the floor of the job site that Garito had created during its demolition work. The jury not only determined that Bovis was negligent, but determined that its negligence was a substantial factor in causing the worker to fall through the hole. Although the jury also found that Garito was negligent, its negligence was not deemed to have been a substantial factor in causing the accident. Consequently, in the action to determine the existence of additional insured coverage, the First Department held, *inter alia*, that "it is apparent from the jury's verdict, [that] Bovis' liability [did not arise] out of Garito's work…"

According to the First Department, the jury's finding that Garito's negligence was not a substantial factor in causing the worker's injuries established that Bovis' liability did not arise out of Garito's work for Bovis. To the contrary, the First Department held that "the jury found that Bovis' liability arose out of its own work." Under the circumstances, the First Department concluded that "to require Twin City to indemnify Bovis is to confer a windfall on Bovis' insurer." Moreover, the First Department clarified that its prior decision in the matter, *i.e.*, that Twin City had a duty to defend Bovis as an additional insured (which was not overturned), did not bear relevance on whether Twin City had a duty to indemnify Bovis.

ANTI-SUBROGATION

Morales v. 10th Street, LLC, 25 Misc.3d 1202(A) (N.Y. Sup. Kings County September 17, 2009) The New York Supreme Court, County of Kings, recognized that the anti-subrogation rule, which holds that an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered, only applies to the policy limits of the general liability policy at issue, and claims for contribution and/or indemnification beyond limits of a common insurance policy are not barred.

APPLICABILITY OF EXCLUSIONS

Jahier v. Liberty Mut. Group, 64 A.D.3d 683 (2d Dep't July 21, 2009) The defendant-insurer issued a Deluxe Homeowners' insurance policy to the plaintiffs, insuring, *inter alia*, the plaintiffs' residence and other structures located on their property. Thereafter, during the insurer's coverage period, the plaintiffs' in-ground swimming pool, the surrounding patio area and the plumbing which serviced the pool sustained damage when the pool lifted up several inches out of the ground. At the time of the loss, the pool was empty, having been drained by a contractor hired by the plaintiffs to perform maintenance work. During the time the pool was empty, and shortly before the plaintiffs discovered the damage to the property, heavy rains had fallen. The plaintiffs made a claim under their policy; however, the insurer denied coverage based upon exclusions precluding coverage for earth movement and water damage. The Appellate Division, Second Department, recognized that the plain language of the water damage exclusion relieved the insurer from loss caused "directly or indirectly" by water damage "meaning…water below the surface of the ground, including water which exerts pressure on…a building…swimming pool or other structure", regardless of any other cause or event contributing concurrently or in any sequence to the loss. According to the Second Department, since the "evidence demonstrated that the plaintiffs' loss was attributable to the subsurface water pressure that was exerted upon the empty swimming pool, even thought it was precipitated by the drainage of the pool and heavy rainfall", the defendant-insurer was not obligated to provide coverage.

Colon v. United States Liab. Ins. Group, 2009 WL 2413646 (E.D.N.Y. August 6, 2009) The United States District Court for the Eastern District of New York upheld the applicability of the defendant-insurer's endorsement, entitled: Exclusion of Injury to Employees, Contractors and Employees of Contractors, where the plaintiff, an employee of a subcontractor retained by the insured, sought coverage for a judgment he had secured against the insured. Such direct actions are allowed in New York under the Insurance Law when a judgment against an insured is unsatisfied for more than thirty (30) days.

CHOICE OF LAW

Northland Ins. Co. v. Imperial Car Sales, Inc., 2009 WL 2143565 (E.D.N.Y. July 17, 2009) Pursuant to New York choice of law principles, the United States District Court for Eastern District of New York held that New Jersey law was applicable to a coverage dispute, since that was where the insurance policy was negotiated, the insured was allegedly doing business, and the automobiles covered by the garage policy were kept, as opposed to New York law, where the accident occurred and underlying plaintiff resided. According to the Eastern District, New Jersey was the principle – if not the only – location of the insured risk, a business which sold used automobiles.

DISCLAIMERS

Harleysville Worcester Ins. Co. v. 500 Ocean Apartment Corp., 2009 WL 2709972 (S.D.N.Y. August 26, 2009) The United States District Court for the Southern District of New York recognized, when applying Insurance Law §3420(d), that the Legislature in using the words "denial of coverage" did not intend to require timely notice by an insurer when no policy was in effect, but intended to require notice where coverage was barred by an exclusion in the policy. According to the Southern District, an insurer need not issue a disclaimer pursuant to §3420(d) where a claim falls outside the scope of a policy's insuring agreement because, under those circumstances, the insurance policy does not contemplate coverage in the first instances, and requiring payment of a claim upon failure to timely disclaim would create coverage where none truly existed.

Iacobellis v. A-1 Tool Rental, Inc., 2009 WL 2884726 (2d Dep't September 8, 2009) In an action to recover damages for personal injuries, the defendant-insureds appealed the lower court's order granting a motion which defense counsel had submitted seeking leave to withdraw. The Appellate Division, Second Department, held that defense counsel's motion for leave to withdraw, based upon the insurer's disclaimer of coverage, was a "poor vehicle" to test the propriety of the disclaimer. In this regard, the Second Department advised that a declaratory judgment action is the appropriate vehicle for resolving issues of coverage, affording the insured an opportunity to adequately litigate the disclaimer.

DUTY TO DEFEND

J. Lucarelli & Sons, Inc. v. Mountain Valley Indem. Corp., 2009 WL 1885602 (3rd Dep't July 2, 2009) The Appellate Division, Third Department, held that the defendant-insurer was under no obligation to provide a defense to the plaintiff-insured, an excavation contractor, in connection with the third and fourth-party actions filed against the insured, which alleged breach of contract and breach of warranty, since the allegations sought damages for faulty workmanship.

Carucci v. Argonaut Ins. Co., 2009 WL 2600907 (W.D.N.Y. August 24, 2009) Under New York law, it is well-settled that to require an insurance company to provide coverage for punitive damages is against public policy. This prohibition extends to insurance policies issued to governmental agencies as well as to private insureds. However, based upon the theory that an insurer's duty to defend is broader than its duty to indemnify, an insurer will be obligated to provide a defense where both compensatory and punitive damages are commingled.

NOTICE

Liriano v. Eveready Ins. Co., 65 A.D.3d 524 (2d Dep't August 4, 2009) In an action brought against the defendant-insurer, pursuant to New York Insurance Law §3420(a)(2), to recover the amount of an unsatisfied judgment against the insured, the Appellate Division, Second Department, held that the lower court improperly granted the plaintiff's motion for summary judgment. In support of its motion seeking coverage for the judgment it secured against the insured, the plaintiff submitted a process server's affidavit of service, indicating that the insurer was served by mail with the default judgment on August 13, 2007 (six months prior to the denial of coverage) which, according to the Second Department, constituted prima facie evidence of proper service. In response, however, the insurer submitted a sworn denial of receipt and an affidavit of an employee, with personal knowledge regarding the insurer's regular practices

and procedures in retrieving, opening, and indexing its mail, as well as in maintaining its files, indicating that the defendant did not receive the judgment in the mail, and, instead, first learned of the judgment on March 13, 2008, upon which it promptly issued a disclaimer six days later. The Second Department held that, under the circumstances, the defendant-insurer's submission raised a triable issue of fact regarding the service of the judgment, and that the question of whether the insurer's disclaimer of coverage was timely could not be determined prior to resolving that issue.

Continental Ins. Co. v. Atlantic Cas. Ins. Co., 2009 WL 2476538 (S.D.N.Y. August 13, 2009) The United States District Court for Southern District of New York denied the defendant's motion for reconsideration, affirming its June 4, 2009 decision, wherein it held that if the insured is the first to give notice of a claim to the insurer, then the injured party's rights are considered derivative of the insured. As such, where an insured's notice is first and untimely, and the insurer disclaims coverage based upon the same, an injured party will be unable to recover under Insurance Law §3420 (which allows direct claims against insurers to recover unpaid judgments) on a judgment ultimately secured against the insured. Thus, it is critical, according to the Southern District, when assessing a claim brought against an insurer under Insurance Law §3420, to determine which party first notified the insurer of the claim - the injured party or the insured. Implicit from this decision, therefore, is the contention that if the injured party's notice is first and timely, but the insured's subsequent notice is not, a claim under §3420 will stand.

Atlantic Cas. Ins. Co. v. Northway Pool Service, Inc., 2009 WL 2778659 (E.D.N.Y. August 24, 2009) When examining whether an insured's delay in providing notice of an occurrence to its insurer is excused, courts have adopted a two part inquiry. With respect to whether the insured lacked knowledge of the occurrence, a court will examine the facts known to the insured during the relevant time period and whether such facts would have alerted a reasonable person/entity that there had been an occurrence or prompted a reasonable person/entity to inquire as to whether there had been an occurrence. With respect to the second prong, a delay will be excused if the insured, in good faith, believed the occurrence would not lead to liability covered under the policy at issue. The reasonableness of the belief does not turn on whether the insured believes it will ultimately be found liable for the injury, but whether it has a reasonable basis for a belief that no claim will be asserted. Whether a delay in notification was reasonable is generally a question of fact; however, courts will determine whether notice was provided in a reasonable amount of time when (1) the facts bearing on the delay in providing notice are not in dispute, and (2) the insured has not offered a valid excuse for the delay.

STANDING

RLI Ins. Co. v. Steely, 65 A.D.3d 539 (2d Dep't August 4, 2009) The defendant, William Steely, sought insurance coverage for a boating accident pursuant to, *inter alia*, a homeowner's policy issued to him by New York Central Mutual Fire Insurance Company and an umbrella policy issued to him by RLI Insurance Company. After New York Mutual denied coverage based upon an exclusion in its policy, RLI commenced a lawsuit seeking a judgment declaring, *inter alia*, that New York Mutual was required to provide coverage to Steely and that any coverage provided by RLI's policy was excess to that provided by New York Mutual. New York Mutual moved to dismiss RLI's complaint arguing that RLI lacked standing to challenge the disclaimer. The Appellate Division, Second Department, held that RLI did have standing to challenge New York Mutual's disclaimer based upon the premise that a plaintiff need not be in privity to an insurance contract to commence a declaratory judgment action to determine the rights and obligations of the respective parties, so long as the plaintiff stands to benefit from the policy. Finding that RLI stood to benefit from the New York Mutual policy, the Second Department denied New York Mutual's motion to dismiss.

TIMELY DISCLAIMERS

Industry City Mgmt. v. Atlantic Mut. Ins. Co., 64 A.D.3d 433 (1st Dep't July 7, 2009) The Appellate Division, First Department, held that a letter to the defendant-insurer, written on behalf of the plaintiff by its own insurer's claim administrator, seeking coverage for the plaintiff as an additional insured in connection with an underlying personal injury action, constituted timely notice to the defendant-insurer within the meaning of New York Insurance Law §3420(a)(3) and, as such, required a timely disclaimer from the insurer.

State Ins. Fund v. American Hardware Mut. Ins. Co., 64 A.D.3d 581 (2d Dep't July 7, 2009) The Appellate Division, Second Department, held that since the disclaimers issued by the defendant-insurers to their mutual insured, which was seeking coverage in connection with an underlying personal injury action, were based upon policy exclusions, the defendant-insurers were required to provide timely notice of the same under Insurance Law §3420(d), which sets forth rules regarding the timeliness requirement for disclaimers of coverage, and that their four month delay in disclaiming coverage after receiving notice of the third-party action against their insured was untimely as a matter of law. In addition, contrary to the insurers' contention, no showing of prejudice was required.

TIG Specialty Ins. v. Allstate Ins. Co., 2009 WL 2170496 (N.Y. Sup. App. Term July 14, 2009) The Appellate Term for the New York Supreme Court recognized that New York Insurance Law §3420(d) applies, by its terms, only in cases of bodily injury or death. In other cases, even an unreasonable delay in giving notice of a disclaimer, will not estop an insurer from disclaiming coverage, unless the insured shows prejudice arising from the delay. Moreover, the Court went on to recognize that a disclaimer is only required if a claim falls within the specific exclusions of an insured policy, noting that where a claim falls outside the purview of coverage, no disclaimer is required.

St. Paul Fire & Marine Ins. Co. v. Sledjeski & Tierney, PLLC, 2009 WL 2151425 (E.D.N.Y. July 17, 2009) According to the United States District Court for the Eastern District of New York, the notice of disclaimer provisions set forth in New York Insurance Law Section 3420(d) did not apply to the legal malpractice claims in the underlying action from which no death or bodily injury arose. In addition, the Eastern District recognized that where §3420 is inapplicable, under the common-law rule, delay in giving notice of a disclaimer of coverage, even if unreasonable, will not estop the insurer from disclaiming, unless the insured has suffered prejudice from the delay.

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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 lbcclaw.com