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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

NOTICE

Vernet v. Eveready Ins. Co., 931 N.Y.S.2d 691 (2d Dept. November 1, 2011). The Second Department found that an insured's two year delay in providing notice of the underlying lawsuit entitled the insurer to disclaim coverage. On October 15, 2000, two passengers in a livery cab sustained injuries when the cab collided with another vehicle driven by Eveready Insurance Company's insured. Eveready was notified of the subject accident by the insured on October 25, 2000 and via correspondence dated May 29, 2001 and September 26, 2001, from the attorney representing the two injured parties. Thereafter, on August 15, 2005, Eveready received correspondence from counsel for the injured parties advising that a lawsuit had been commenced on July 9, 2003, and that a default judgment was entered on November 19, 2004. Eveready disclaimed coverage to its insured based upon late notice. The Court found Eveready's disclaimer to be proper as the almost two year delay in providing notice of the underlying action was prejudicial as it was not only late but provided after the entry of a default judgment.

National Grange Mutual Ins. Co. v. Croyle, Inc., 2011 WL 4637553 (4th Dept. October 7, 2011). The Fourth Department found that an injured party was not bound by an insured's failure to timely provide notice of a claim to its liability insurer, where the injured party exercised his independent right to provide such notice. On June 26, 2008, Jared Hoffert, a construction worker, was injured during the course of his employment on a project, for which the insured, Croyle, Inc. was the construction manager. The Complaint was served upon Croyle on November 28, 2008, along with correspondence from Hoffert's attorney demanding that Croyle place its liability insurer on notice. In response, on December 9, 2008, Croyle's insurance broker forwarded the pleadings to its CGL carrier. In turn, Hoffert thereafter provided independent notice to the CGL carrier. On January 5, 2011, Croyle's insurer disclaimed coverage due to late notice, although no disclaimer was issued to Hoffert. As a result, Hoffert requested that the disclaimer be reconsidered in light of his independent notice. The Court in the declaratory judgment action concluded that Hoffert, by exercising his independent right to notify the CGL carrier, was not bound by Croyle's late notice and, further, since no late notice disclaimer was issued to Hoffert, the carrier waived its ability to disclaim coverage to Hoffert on that basis.

WAIVER/ESTOPPEL

Atlantic Cas. Ins. Co. v. RJNJ Services, Inc., 2011 WL 5223023 (2d Dept. November 1, 2011). The Second Department found that an insurer was not entitled to entry of a default judgment against its insured where it failed to establish the timeliness of its disclaimer. RJNJ Services, Inc. was retained as a roofing contractor by the building owner defendants and subcontracted various construction work to Painting & Home Design. On March 16, 2005, an employee of Painting & Home sustained injuries when he fell from a roof of a building at the project. In April 2005, the injured employee commenced a lawsuit against the building owners. In June 2006, an agent of Atlantic Casualty Insurance Company, RJNJ's CGL carrier, received a copy of the Complaint from the building owners' insurer. In August 2006, the building owners commenced a third-party action against RJNJ and, in response, on September 29, 2006, Atlantic issued a disclaimer of coverage to RJNJ based primarily upon its failure to provide notice of the underlying accident. Thereafter, a default judgment was entered for RJNJ's failure to appear in the third-party action in 2007. In July 2008, Atlantic commenced a DJ action against RJNJ and the building owners seeking a declaration as to its coverage obligations. RJNJ failed to appear and Atlantic moved for a default judgment and declaration that it had no defense or indemnity obligation. While Atlantic established that RJNJ defaulted, along with proof of RJNJ's late notice and the lack of coverage available, the Court denied the motion, finding a question of fact as to the timeliness of Atlantic's disclaimer. Specifically, it was held that Atlantic would only be entitled to a default judgment pursuant to CPLR § 3215(f) declaring it had no defense or indemnity obligation if it could establish it timely disclaimed coverage to RJNJ since this element is among the "facts constituting [its] claim."

Yoda, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA, 2011 WL 4835771 (1st Dept. October 13, 2011). The First Department found that an excess insurer was estopped from disclaiming coverage because its denial was untimely. General contractor, Yoda, LLC, construction site owner, Riverhead Pooh, LLC, and their primary insurer, United National Insurance Company, commenced this action against their subcontractor's excess insurer, National Union Fire Insurance Company of Pittsburgh, PA, seeking a declaration that the National Union policy provided additional insured coverage. In 2003, the defense and indemnity of Yoda and Riverhead was accepted by the subcontractor's primary insurer with active participation and monitoring by National Union. Then, in 2006, the full limits of the subcontractor's primary policy were tendered to National Union prior to a court-ordered Mediation, which National Union accepted and appeared at with settlement authority. After summary judgment motions were decided and the underlying action was set for trial on damages, National Union disclaimed coverage to Yoda and Riverhead claiming that it had just discovered that the Certificate of Insurance naming them as additional insureds was false. The Court determined that National Union had actively participated in the underlying action for more than three years before disclaiming and, therefore, was estopped from denying coverage.

Fish King Enterprises v. Countrywide Ins. Co., 2011 WL 4600612 (2d Dept. October 4, 2011). The Second Department held that an insurer waived its ability to disclaim coverage pursuant to the Employers Liability Exclusion based upon its delay. Juan Bin Yang was involved in an auto accident during the course of his employment for Fish King Enterprises. At the time of the accident, Yang's co-worker was a passenger in the vehicle and sustained injuries. The passenger sued various parties including the vehicle manufacturer and, thereafter, a third-party action was instituted by the defendants against Fish King and Yang seeking contribution and indemnification. On January 9, 2002, Countrywide (Yang's Business Auto insurer) received notice of the underling action along with copies of the Third-Party Complaint from Fish King's insurance broker. Then, on January 17, 2002, Countrywide received copies of the police report and underlying Summons and Complaint from Fish King. In response, on March 6, 2002, Countrywide issued a disclaimer of coverage to Fish King and Yang based on the policy's Employers Liability Exclusion, which precluded coverage for "[b]odily injury to any employee of the insured arising out of and in the course of his or her employment by the insured." According to Countrywide, after it received a copy of the pleadings in the underlying action, it was required to conduct an investigation to evaluate the full extent of both actions and ascertain the identity of all relevant parties. However, the ultimate basis for Countrywide's disclaimer was the underlying plaintiff's employee status, falling within the purview of the exclusion. Since the identity of the parties was readily apparent from the face of the Complaint, the issuance of a disclaimer by Countrywide 49 days after receipt was deemed untimely.

ADDITIONAL INSURED COVERAGE

Broadway Fee Owner, LLC v. Seneca Ins. Co., Inc., 2011 WL 6032007 (1st Dept. December 6, 2011). The First Department found that additional insured coverage extended to include a building staircase located outside of the space leased to the insured. The underlying action arose out of an accident which occurred on December 10, 2006, when an employee of restaurant owner, SRJ Broadway, fell down a staircase at a Manhattan building, owned by 1515 Building Fee Owner LLC, managed by SL Green Realty Corp., and leased to SRJ. As required by the lease agreement, SRJ procured a CGL policy from Seneca Insurance Company which provided additional insured coverage. However, in response to a tender from 1515 and SL Green, on April 2, 2008 and, again, on June 26, 2008, Seneca rejected the same as the underlying injury occurred in an area of the subject building that was not "part of the premises leased to [SRJ]." In that regard, the policy contained an endorsement entitled "Additional Insured – Managers or Lessors of Premises," providing such coverage "with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [SRJ] and shown in the Schedule." The coverage available was further defined by the endorsement entitled "Limitation of Coverage to Designated Premises or Project," which provided that "this insurance applies only to 'bodily injuries'…and medical expenses arising out of…the ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises." The Court concluded that Seneca had a duty to defend 1515 and SL Green in the underlying action as the claim took place during the course of an activity necessarily incidental to operating the leased restaurant and, therefore, arose out of the "maintenance or use" of the leased premises, within the meaning of the policy's Additional Insured Endorsement.

492 Kings Realty, LLC v. 506 Kings, LLC, 2011 WL 5086344 (2d Dept. October 25, 2011). The Second Department in this matter addressed an insurer's obligation to provide additional insured coverage in connection with a claim for property damage. In May 2006, property owner, 506 Kings, LLC, contracted with Metrotech Construction of New York Corp., retaining it to perform underpinning work in connection with the construction of a condominium. On September 14, 2006, an adjacent building owned by 492 Kings Realty, LLC, and occupied by a tenant, Kosher Corner Supermarket, Inc., suffered a partial collapse. As a result, Kings Realty and Kosher Corner instituted a lawsuit against various parties, including 506 Kings, seeking to recover for the damages to their property. 506 Kings thereafter commenced a third-party action against Metrotech and its CGL insurance carrier, Scottsdale Insurance Company, seeking, in part, a declaration that 506 Kings was entitled to additional insured coverage. Although the Scottsdale policy provided additional insured coverage for ongoing operations, Scottsdale argued that the completion of Metrotech's work at the project pre-dated the collapse. Nevertheless, the Court found that Scottsdale owed 506 Kings a defense based upon the broad allegations in the main action that the negligence of 506 Kings in "conducting" the construction project caused the property damage.

APPLICABILITY OF EXCLUSIONS

K.J.D.E. Corp. v. Hartford Fire Ins. Co., 2011 WL 5607804 (4th Dept. November 18, 2011). The Fourth Department held that water damage to property fell within the purview of a property policy's flood exclusion. K.J.D.E. Corp. was the lessee and owner of the property in question and, in 2006, after a heavy snow storm, the property flooded. Upon investigation, the flooding was deemed to have been caused by an overflowing creek nearby along with blocked road culverts. Hartford Fire Insurance Company's property policy defined "flood" as "[s]urface water…or overflow of any natural or man[-]made body of water from its boundaries…" Hartford disclaimed coverage to K.J.D.E. based upon the exclusion and because the evidence established that the water overflow caused the damage. The Court deemed the exclusion applicable.

Devoe Properties, LLC v. Atlantic Cas. Ins. Co., 2011 WL 4711864 (E.D.N.Y. October 4, 2011). The Eastern District of New York found that there was no coverage for a default judgment entered against the insured, where the judgment arose out of conduct barred by a policy exclusion. On March 27, 2006, Devoe Properties, LLC hired a general contractor for a construction project requiring the demolition of a pre-existing structure and construction of a new condominium. Thereafter, the owner of the adjacent property commenced suit against Devoe to recover damages sustained to its foundation and interior walls due to the excavation performed. In response, a third-party action was instituted by Devoe against its general contractor, along with two sub-contractors, for contribution and indemnification claiming that the damage was allegedly due to third-party defendants' negligence in performing excavation and underpinning. On August 11, 2008, a default judgment was entered against third-party defendant, Lexus Construction, Inc. in the amount of $547,962. Atlantic Casualty Insurance Company, Lexus' CGL carrier, had previously disclaimed coverage due to the application of the policy's Excavation Exclusion which precluded coverage for property damage caused by "structural damage to any building or structure due to grading of land, excavation, burrowing, filling, backfilling…moving, shoring or underpinning, raising or rebuilding of any building or part thereto." With respect to the default judgment entered against Lexus, the Court concluded that Atlantic had no indemnity obligation as it arose out of Lexus' work, which fell within the Excavation Exclusion.

1765 First Assocs., LLC v. Continental Cas. Co., 2011 WL 4735373 (S.D.N.Y. October 3, 2011). The Southern District of New York required a Builder's Risk insurer to reimburse its insured for certain losses which were not excluded by the Faulty Work Exclusion. 1765 First Associates, LLC claimed that it suffered damages as a result of a May 30, 2008 crane collapse at the construction site which it owned. First Associates was insured by Continental Casualty Company under the Builder's Risk policy and, as a result of the collapse, Continental reimbursed First Associates for certain costs arising from the damages to and cleanup of the construction site and building. With respect to construction delay costs, Continental refused to reimburse the same claiming that they were barred by the Faulty Work Exclusion. As the crane collapse was not caused by First Associates' faulty work, the Court concluded that the exclusion was not applicable.

TRIGGER OF COVERAGE

Empire State Shipping Service, Ltd. v. Hanover Ins. Co., 931 N.Y.S.2d 605 (1st Dept. November 1, 2011). The First Department found that a Businessowners' policy was inapplicable to negligence and intentional infliction of emotional distress claims arising out of the handling of human remains. Empire Shipping Service, Ltd commenced suit against Hanover Insurance Company, seeking coverage under a policy which provided coverage for "bodily injury" only if it was caused by an "occurrence" during the policy period. The Court held that the underlying action did not trigger coverage under this policy as the allegations of negligence and intentional infliction of emotional distress occurred two years after the insured cancelled its policy with Hanover. Furthermore, the Court concluded that while the underlying action potentially contained allegations that Empire was negligent during the policy period, the Hanover policy was not triggered as the plaintiff in the underlying action did not claim to have sustained "bodily injury" during that time.

RESCISSION/REFORMATION

Interboro Ins. Co. v. Fatmir, 2011 WL 5865840 (2d Dept. November 22, 2011). The Second Department concluded that an insured's material misrepresentation on an application for a Homeowners' insurance policy supported rescission. The insured, Miruku Fatmir, sought coverage from Interboro Insurance Company in connection with a bodily injury claim arising out of an April 2, 2008 incident on Fatmir's premises. As unoccupied dwellings are considered unacceptable risks under Interboro's underwriting guidelines, it issued the subject policy based upon Fatmir's misrepresentations that the premises was occupied. It was ultimately determined that Interboro was entitled to rescind the subject policy due to such misrepresentations.

South Hylan, LLC v. CNA Ins. Co., 931 N.Y.S.2d 704 (2d Dept. November 1, 2011). The Second Department found that an insurer was not obligated to reform its insurance policy to include the identity of an additional insured absent proof of mutual mistake. The plaintiffs sought a defense and indemnity from the CGL carrier, National Union Fire Insurance Company of Hartford; however, coverage was not provided as the plaintiffs were not insureds under the policy. In response, the plaintiffs argued reformation of the policy was required so that they were included as additional insureds. The Court held that because the plaintiffs failed to prove a mutual mistake between the parties in the procurement and issuance of the National Union policy, reformation was not required.

MISCELLANEOUS

Farm Family Cas. Ins. Co. v. Nason, 2011 WL 5429541 (4th Dept. November 10, 2011). The Fourth Department held that an insurer owed no defense or indemnity to the son of its named insured. A wrongful death action was commenced as a result of an accident occurring on farm property owned by Gerald Nason, Sr. Specifically, the decedent died as a result of injuries sustained while he was examining a hay elevator that had been offered for sale. Coverage in connection with the underlying action was subsequently sought by the insured's son under his father's insurance policy. In addition to the farm property, Nason, Sr. owned land upon which he resided, which was insured by Farm Family Casualty Insurance Company. Pursuant to the terms and conditions of the Farm Family policy, coverage was provided to Nason, Sr.'s relatives as insureds so long as they were residents of his "household". The Court concluded that Farm Family was not required to defend or indemnify the son, finding he was not considered a member of Nason, Sr.'s household and was not an anticipated family member entitled to coverage under said policy.

Santa v. Capitol Specialty Ins., Ltd., 2011 WL 5304155 (N.Y. Co. Sup. Ct. November 1, 2011). This action arose out of an alleged assault on several plaintiffs at a Manhattan night club on November 13, 2004. As a result of this incident, on August 29, 2005, a bodily injury action was commenced by the plaintiffs against the nightclub. On August 14, 2006, during the course of the underlying litigation, the nightclub disclosed its insurance coverage information, including the existence of an assault and battery sub-limit under its CGL policy issued by Capitol Specialty Insurance, Ltd. Thereafter, the plaintiff's counsel claimed this sub-limit notification was untimely pursuant to Insurance Law § 3420(d). The Court concluded Insurance Law § 3420(d) to be inapplicable as Capital neither disclaimed nor denied coverage for the underlying action. With respect to the nightclub's excess policy, the Court

held the excess coverage was triggered upon exhaustion of the Capitol policy's sub-limit, without requiring exhaustion of the full $1 million policy limit.

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