LB&C QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

ADDITIONAL INSURED COVERAGE

Federal Ins. Co. v. American Home Assurance Co., 639 F.3d 557 (2d Cir. April 7, 2011) This matter arose from an accident that occurred when a tow truck operated by Gerard Taber collided with a stalled vehicle operated by Richard Cannon, causing Cannon's vehicle to explode. At the time of the accident, Taber was responding to a roadside assistance call to change a flat tire. The call originated from the American Automobile Association, Inc. ("AAA") hotline, an affiliation of seventy independently operated and managed automobile clubs ("Member Clubs"), including AAAMA. Taber's employer and the owner of the truck, E & D Auto Repair Towing ("E & D"), was an AAAMA Preferred Service Provider ("Provider"). As a Provider, E & D was contractually obligated to provide roadside assistance to AAA Members within the region of AAAMA's territory, and E & D was authorized to display the AAA insignia and emblem. After the accident, Cannon filed an action for damages against Taber, E & D, AAAMA and AAA. Federal Insurance Company issued three liability policies insuring AAAMA for the relevant time period, including a Commercial General Liability ("CGL") policy, an Umbrella policy and a Business Auto policy. American Home Assurance Company issued a primary CGL policy to AAA, which included an endorsement naming Member Clubs as additional insureds, "but only with respect to liability arising out of [AAA's] operations or premises owned by [AAA]." National Union Fire Insurance Company issued an Umbrella policy to AAA.

Although both AAAMA and Federal tendered AAAMA's defense and indemnification in the *Cannon* action to American Home and National Union, they disclaimed coverage. As such, Federal ultimately commenced an action seeking indemnification for a settlement with Cannon on behalf of AAAMA, arguing that the Cannon accident arose out of AAA's operations. The Second Circuit, however, determined that there was no additional insured coverage as the accident did not arise out of the operations of AAA, since the minimum causal relationship between "the injury and the risk for which coverage is provided" was lacking. In this regard, the Second Circuit reasoned that AAA's accreditation process, policy making, oversight and other activities did not contribute to Cannon's injuries.

Golasiewski v. Waste Management of Pennsylvania, Inc., 2011 WL 2133788 (E.D.N.Y. May 27, 2011) The Eastern District held that Waste Management of Pennsylvania, Inc. was not entitled to additional insured coverage in connection with an underlying bodily injury action under policies issued by National Union Fire Insurance Company, since neither of the policies named Waste Management as an insured or an additional insured. In addition, the Eastern District held that its conclusion was not altered by the fact that Waste Management was listed as an additional insured on Certificates of Insurance. As recognized by the Court, the intent to incorporate additional documents into an insurance policy must be plainly manifested. In this regard, the National Union policies clearly stated that they could only be amended through an endorsement issued by the insurance company. Moreover, the certificates stated that they did not amend, extend or alter the coverage that was provided.

ANTI-SUBROGATION

Homeland Ins. Co. of New York v. Nat'l Grange Mut. Inc. Co., 922 N.Y.S.2d 522 (2d Dep't May 3, 2011) The owner of Olde Post Mall Apartments entered into a contract with Asset Property Services, Inc., to manage the complex. Olde Post agreed to indemnify Asset Property against personal injury claims as well as secure it additional insured coverage. As such, Olde Post obtained a CGL policy from plaintiff, Homeland Insurance Company of New York, providing coverage to Asset Property, as a real estate manager. Asset Property also obtained an independent CGL policy from the defendant, National Grange Mutual Insurance Company. In August 2004, a personal injury action was commenced against both Olde Post and Asset Property by an individual who allegedly sustained injuries when he slipped and fell on a wooden ramp while delivering an appliance at the apartment complex. Homeland assigned counsel to represent both Olde Post and Asset Property. While Homeland initially considered National

Grange's coverage to be excess, Homeland advised National Grange near the completion of discovery that its coverage was co-primary as to Asset Property and requested that National Grange contribute toward the defense and potential indemnity on behalf of Asset Property; National Grange refused. According to the Appellate Division, Second Department, National Grange established its entitlement to judgment as a matter of law by demonstrating that the anti-subrogation rule was implicated by Homeland's handling of the defense of its insured in the underlying action. "Homeland fashioned the litigation to favor its insured, Olde Post, at the expense of its other insured, Asset Property, by not vigorously pursuing a defense on behalf of Asset Property and having the same attorney represent both Olde Post and Asset Property." As per the Second Department, "[b]y doing so, Homeland created a conflict between its interests and the interests of its insured, and attempted to shift the loss of its insured to another insurer, National Grange." As such, pursuant to the anti-subrogation rule, Homeland was barred from recovering from its insured, Asset Property, through Asset Property's insurer, National Grange, for any potential liability on the part of Asset Property in connection with the underlying action.

APPLICABILITY OF EXCLUSIONS

ACC Const. Corp. v. Tower Ins. Co. of New York, 83 A.D.3d 443 (1st Dep't April 7, 2011) The plaintiff was not entitled to additional insured coverage under the defendant's policy in connection with a lawsuit which was commenced by an injured employee of an independent contractor of the plaintiff, since the defendant's policy contained an independent contractors exclusion, precluding coverage for bodily injury arising out of operations performed for any insured by an independent contractor.

Makris v. Masjid, 31 Misc.3d 1225(A) (N.Y. Sup. Queens County May 13, 2011) The plaintiffs, which had purchased a homeowners' insurance policy from Tower Insurance Company of New York, made a claim for coverage after the property was damaged by negligent construction performed on the adjacent property. Tower denied their claim based upon the "faulty workmanship" exclusion, which precluded coverage for loss to the property caused by "faulty, inadequate or defective…workmanship, repair, construction…of part or all of any property whether on or off the residence premises." The Court, however, held that Tower was incorrect in declining coverage, as the exclusion "does not refer to external forces generated by the activities of third parties that cause damage to the insured premises." According to the Court, the only reasonably explanation of the exclusion was that is applied to negligent work by or on behalf of the insured.

Bentoria Holdings, Inc. v. Travelers Indem. Co., 84 A.D.3d 1135 (2d Dep't May 24, 2011) The defendant-insurer failed to establish that it was entitled to judgment as a matter of law by meeting the heavy burden of demonstrating that the earth movement exclusion clearly and unambiguously applied to the loss at issue, which arose from the excavation of earth from a lot adjacent to the plaintiff's building. In sum, the Appellate Division, Second Department, focused upon the fact that "excavation" was not expressly set forth in the exclusion, while other less common causes of earth movement were. In addition, notwithstanding the fact that the exclusion referred to earth movement caused by "man-made" or "artificial" causes, the Second Department concluded that the defendant failed to demonstrate that the loss fell clearly and unambiguously within the terms of the exclusion.

Burgund v. ESP Café, Inc., 84 A.D.3d 849 (2d Dep't May 10, 2011) The Appellate Division, Second Department, held that the defendant's CGL insurer had no duty to defend or indemnify the defendant-bar owner against personal injury claims brought by a patron alleging that he was injured when a bar employees attacked him. In sum, since none of the patron's claims would exist but for the employees' alleged attack, the allegations in the Complaint fell solely and entirely within the CGL policy's exclusion for bodily injury arising out of assault and battery.

Gray-Line of Niagara Falls, Inc. v. Cincinnati Ins. Co., 95 N.Y.S.2d 300 (4th Dep't June 10, 2011) The Appellate Division, Fourth Department, held that an exclusion under the defendant's CGL policy, which precluded coverage for claims by employees alleging to have sustained bodily injury "in the workplace", applied to bar coverage for claims against the insured arising out of a sexual assault where the victim was the insured's employee at the time of the incident and was working at a tour booth pursuant to the insured's directive, even though the injuries were unrelated to performance of employment duties.

Vantage of Jackson, LLC v. Everest Nat'l Ins. Co., 2011 WL 2409637 (2d Dep't June 14, 2011) The insured property owner brought action against the defendant, which issued the insured a CGL policy, seeking a declaration that it was obligated to provide a defense and indemnity in connection with an underlying action brought by an injured construction worker. The defendant denied coverage based upon a policy exclusion which precluded coverage where the claimed injury and liability resulted from, or were caused by, the work of a contractor or subcontractor, if the contractor or subcontractor failed to have in force an insurance policy including liability coverage for the benefit of the plaintiff, as well as for the contractor or subcontractor for indemnification or contribution claims in the event of a loss. According to the Court, the defendant failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating that the exclusion applied because it failed to include the contractor's policy within its motion papers, instead relying upon a conclusory and unsworn letter from the contractor's insurer denying the owner additional insured coverage. This letter, according to the Second Department, was insufficient to establish that the plaintiff was not covered by the contractor's policy.

BAD FAITH

Federal Ins. Co. v. North American Specialty Ins. Co., 83 A.D.3d 401 (1st Dep't April 5, 2011) According to the Appellate Division, First Department, in order for an excess insurer to establish bad faith against a primary insurer, the excess insurer must show that the primary insurer's conduct constitutes a "gross disregard" of the excess insurer's interests and that the primary insurer's conduct involved a "deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer."

CHOICE OF LAW

In Re Liquidation of Midland Ins. Co., 16 N.Y.3d 536 (N.Y. April 5, 2011) The question presented before the New York Court of Appeals was whether the insurance policies issued by Midland Insurance Company must be interpreted under New York substantive law because Midland has been adjudged insolvent and placed into liquidation in New York. The Court of Appeals held, in sum, that New York law need not apply and that for each policy in dispute an individual choice-of-law analysis must be conducted to determine which law should govern.

DIRECT ACTIONS

Alejandro v. Liberty Mut. Ins. Co., 84 A.D.3d 1132 (2d Dep't May 2011) The plaintiff-claimant established his right to proceed directly against the defendant-insurer under Insurance Law 3420(a)(2)(which allows injured parties to bring direct actions against insurers for judgments not paid within 30 days) by submitting an affidavit of service attesting that a copy of the judgment that the plaintiff secured against the defendant's insured in the underlying personal injury action, with notice of entry, was mailed to both the defendant and the defendant's insured. The affidavit of service created a presumption of proper mailing and receipt, which was insufficiently rebutted by the defendant's submissions in opposition. Moreover, the defendant-insurer was prohibited from denying coverage to the plaintiff, based upon the plaintiff's failure to provide timely notice, since the defendant waited two-months after receiving a copy of the default judgment before issuing a disclaimer in violation of Insurance Law 3420(d).

DUTY TO DEFEND

In Re East 51st Street Crane Collapse Litigation, 84 A.D.3d 512 (1st Dep't May 10, 2011) The Appellate Division, First Department, held that the insurer had no obligation under a CGL policy to continue defending its insureds after its policy limit was exhausted. Even though the policy provided that the insurer "will have the right and duty to defend the insured against any suit seeking…damage", the policy likewise provided that the insurer's "right and duty to defend ends when we have used up the applicable limit of insurance payment of judgments or settlements." It was noted that while there is a New York State Insurance Department regulation requiring automobile insurers to pay all defense costs until a case ends, there is no similar statutory or regulatory authority for the proposition that a similar duty applies in the context of CGL insurance.

EMPLOYERS' LIABILITY COVERAGE

Merchants Mutual Ins. Co. v. New York State Ins. Fund., 2011 WL 2436586 (4th Dep't June 17, 2011) The plaintiff, Merchants Mutual Insurance Company, commenced action against The New York State Insurance Fund seeking reimbursement of settlement monies based upon the Fund's failure to indemnify their mutual insured, Jerrick Waterproofing Co., Inc., a third-party defendant in a wrongful death action. Jerrick held an insurance policy issued by the Fund that provided unlimited employers' liability coverage, as well as a Commercial Umbrella policy issued by Merchants providing excess coverage upon the exhaustion of all other insurance policy limits. The plaintiff in the underlying wrongful death action sought damages for injuries sustained by the decedent, a construction worker employed by Jerrick, when he fell from scaffolding on a work site where T&G Contracting, Inc. was the general contractor and Jerrick a subcontractor. The wrongful death action was settled and Merchants proceeded with this action. The Appellate Division, Fourth Department, held that the Fund was obligated to provide unlimited coverage for the accident, despite an exclusion in its policy for liability assumed under a contract. Although T&G was granted summary judgment on its contractual indemnification cause of action against Jerrick, T&G's common law indemnification cause of action in the third-party action was still viable at the time of the settlement. The Fund also attempted to argue that the otherwise unlimited coverage provided by its policy was limited by language on the declarations page of Merchants' umbrella policy, which indicated that the Fund's policy limit was $100,000. The Fourth Department rejected this contention since the Merchants' policy unambiguously excluded coverage in situations where workers' compensation coverage was applicable. Thus, the Fund was obligated to provide unlimited coverage to Jerrick with respect to its liability for decedent's accident, and the obligation of Merchants' to provide excess coverage was never triggered, thus requiring the Fund to reimburse Merchants.

EXCESS COVERAGE

General Star Nat'l Ins. Co. v. Universal Fabricators, Inc., 2011 WL 2315159 (2d Cir. June 14, 2011) General Star National Insurance Company, which provided excess coverage to Universal Fabricators, Inc. above a primary policy issued by Mutual Marine Office, Inc., appealed a judgment of the lower court holding that General Star was obligated to reimburse Mutual Marine for the amount it paid in excess of its policy limits in connection with an underlying action and agreement apportioning a share of liability in that action to Universal Fabricators. General Star protested that it never agreed to the compromise agreement as required by its policy. The Second Circuit disagreed with General Star, since at the time when it was anticipated that the underlying action would not implicate its coverage, General Star told Mutual Marine to "handle the matter as it saw fit" and informed Mutual Marine it had closed its file. Accordingly, Mutual Marine discharged its duty to defend Universal Fabricators by retaining counsel, who ultimately entered into the agreement apportioning liability. General Star, therefore, relinquished its ability to demand compliance with its policy provisions requiring written consent to a compromise agreement.

JURISDICTION

Miraglia v. State Ins. Fund, 920 N.Y.S.2d 633 (N.Y. Sup. Bronx County April 8, 2011) The plaintiff commenced an action seeking to compel the State Insurance Fund to pay a $23,448,741.54 judgment issued in plaintiff's favor against his former, and subsequently defunct, employer, as well as the Fund's insured, Lane & Sons Construction Corp. In holding that it did not have subject matter jurisdiction over the action, the Court recognized that the plaintiff's claim actually was, in fact, an effort to collect money against the Fund, a state agency, based upon a contractual obligation, the insurance policy, and the proper forum was, therefore, the Court of Claims. In addition, although a direct action against an insurer is permitted under Section 3420(a)(2) of the New York Insurance Law, the Fund is expressly exempt from such provisions via Section 1108(c).

NOTICE

Continental Cas. Co. v. Employers Ins. Co. of Wausau, 923 N.Y.S.2d 538 (1st Dep't June 2, 2011) Where an insured gives one of two co-insurers timely notice of a claim, the insurer that received notice may obtain reimbursement from the other insurer only if it gives the other insurer notice of the claim that is reasonable under the circumstances. In this matter, the plaintiff, which had received timely notice from the insured, was not entitled to co-insurance from the defendant, a co-insurer of the insured, since there was no timely notice and because prejudice to the defendant due to the untimely notice was obvious.

WORKERS' COMPENSATION COVERAGE

Chmura v. T&J Painting Co., 83 A.D.3d 1193 (3rd Dep't April 7, 2011) The claimant, a resident of New York, was injured on the job and filed a claim in New York for workers' compensation benefits. The claimant's employer was a New Jersey corporation, with its sole office located in New Jersey. At the time of the accident, the claimant was working in New York on a project lasting five or six days. The Appellate Division, Third Department, determined that Travelers Indemnity Company, the employer's workers' compensation carrier, was not required to provide coverage, since the terms of its unambiguous Limited Other States endorsement expressly indicated that if the employer was going to begin operations in any state other than New Jersey, it would be required to obtain insurance coverage in that state and do whatever else may be required under that state's law "as this endorsement does not satisfy the requirements of that state's workers' compensation law." Moreover, the Third Department held that the employer's reliance on the language of its Certificate of Insurance indicating that "coverage is extended to New York" and its contention that such certificate creates an ambiguity were unavailing, as the certificate was neither conclusive proof of the existence of a specific contract nor was it a contract, in and of itself. Furthermore, the policy's information page clearly stated that it only applied in New Jersey. In addition, the policy indicated that it could not be changed or waived expect by endorsement issued by Travelers as part of the policy, which the certificate of insurance was not.

RESCISSION

Novick v. Middlesex Mut. Assurance Co., 84 A.D.3d 1330 (2d Dep't May 10, 2011) To establish its right to rescind an insurance policy, an insurer must show that the insured made a material misrepresentation when he or she secured the policy. A misrepresentation is material if the insurer would not have issued the policy had it known the facts as a matter of law. The insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks in order to that show that it would have not issued the same policy if the correct information had been disclosed in the application. However, conclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law.

East 115th Street Realty Corp. v. Focus & Struga Building Developers, LLC, 925 N.Y.S.2d 56 (1st June 14, Dep't 2011) The Appellate Divison, First Department, held that a builder's risk insurance policy was void *ab initio* due to material misrepresentations on an insurance application submitted by the insured's broker, where the broker advised the insurer that there would be no structural alterations to the subject building, despite the insured's principal's admissions that there would be structural work, and relevant underwriting guidelines established that the insurer would not have issued the policy had it known the true state of affairs.

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