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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

A quarterly newsletter from L'Abbate, Balkan, Colavita & Contini, L.L.P. Volume IV · Issue III · Third Quarter 2011

CASES OF INTEREST BY TOPIC

NOTICE

Homestead Vill. Assoc., L.P. v. Diamond State Ins. Co., 2011 WL 4374585 (E.D.N.Y. September 16, 2011). The Eastern District found that the insured's excuse for failing to provide prompt notice – that the plaintiff was injury prone and had not previously filed suit – was unreasonable. On October 22, 2007, an employee of Homestead Village Associate's property manager was allegedly injured while performing maintenance work at the apartment complex. The employee was transported by ambulance and an incident report was prepared. That same day, the property manager notified Homestead's insurance broker and the broker subsequently notified Homestead's workers' compensation insurer, but not its CGL insurer. On March 12, 2009, Homestead was served with the lawsuit, which was forwarded to the CGL insurer. The insurer subsequently disclaimed on late notice grounds. The Court held that the undisputed facts, such as Homestead knowing that the injured employee was taken by ambulance, established that a delay of more than 16 months in providing notice was not reasonable. The Court noted that while not every trivial occurrence implicates a duty to provide notice, an insured cannot rely upon the claimant's previous injuries and decision not to institute a lawsuit as grounds for a belief in its non-liability.

One Beacon Ins. Co. v. Freundschuh, 2011 WL 3739427 (W.D.N.Y. August 24, 2011). The Western District addressed the issue of whether the insured's belief that it would not be involved in a lawsuit would excuse its failure to provide timely notice of an occurrence. The underlying action was brought as a result of injuries (including the loss of an arm) allegedly sustained on December 5, 2007 by a customer while using equipment purchased from the insured, Bobcat of Buffalo. Within a day or two of the event, another customer notified the insured about the incident and, thereafter, the insured's salesman visited the injured customer in the hospital. Then, in February 2008, an investigator hired by the customer's attorney visited the store leaving a list of questions regarding the equipment's operational safety. Nevertheless, the insured did not notify the insurer until after being served with the Complaint in September 2008. The Court rejected the insured's argument that the delay was based upon a lack of sophistication with respect to complex legal theories and insurance coverage matters and the belief that the corporate manufacturer would handle the matter.

B & A Demolition & Removal, Inc. v. Markel Ins. Co., 2011 WL 3511079 (E.D.N.Y. August 9, 2011). The Eastern District refused to apply the statutory requirement that an insurer denying coverage based upon late notice show prejudice in connection with an insurance policy issued before January 17, 2009, but delivered after that date. The Court addressed the applicability of the modifications to New York Insurance Law §3420(a) which allows insurers to disclaim coverage based upon late notice only when they have suffered prejudice. On October 13, 2008, Markel Insurance Company bound a CGL policy on behalf of its insured, B & A Demolition and Removal, Inc.; however, the policy was not *delivered* until February 18, 2009. As the statutory prejudice requirement only applies to "policies issued *or* delivered" after January 17, 2009, B & A contended that Markel needed to show prejudice as the policy was delivered after that date. To the contrary, the Court found that based upon legislative history and the language of Insurance Law §3420(a), policies need not be *both* issued *and* delivered after January 17, 2009 for the prejudice requirement to apply.

Nat'l Union Fire Ins. Co. v. Great Am. E & S Ins. Co., 2011 WL 2637480 (1st Dep't July 7, 2011). The First Department held that the insured's failure to notify its CGL insurer of a contractual indemnification claim was not excused since such an obligation should have been known as it was agreed to in the construction contract. The underlying action was brought as a result of injuries sustained by an electrical subcontractor's employee. Pursuant to the construction contract with the non-party general contractor, the electrical subcontractor agreed to defend, indemnify and hold harmless the property owner and project manager. After the underlying action was commenced, the property owner and project manager impleaded the electrical subcontractor as a third-party defendant seeking, in

part, contractual indemnification. Although the Court noted that a reasonable good-faith belief of non-liability may, in certain circumstances, excuse an insured's failure to give timely notice of an occurrence and/or a lawsuit, such circumstances were not found to exist in connection with the over one-year delay in providing notice in this matter. In fact, the Court held that the insured-subcontractor's belief that it was protected by the workers' compensation bar was not sufficient in light of its contractual indemnification obligations.

DISCLAIMERS

GPH Partners, LLC v. Am. Home Assur. Co., 2011 WL 3847425 (1st Dep't September 1, 2011). The First Department held that while a prompt disclaimer of coverage is unnecessary when a claim does not fall within the Insuring Agreement of a policy, Insurance Law §3420(d) requires that a timely disclaimer be issued when relying upon late notice or policy exclusions. GPH Partners, LLC commenced this action against its CGL insurer, Admiral Insurance Company, seeking a declaration that Admiral had a duty to defend and indemnify the underlying action. Admiral was put on notice of GPH's claim for coverage via e-mails sent in January 2007, approximately four months before it disclaimed coverage. The Court held that the grounds for Admiral's disclaimer – late notice and the wrap-up exclusion – should have been readily apparent to Admiral when the e-mails were received and, even if they were not, Admiral should have at least started an investigation at that time.

Admiral Ins. Co. v. State Farm Fire & Cas. Co., 2011 WL 3185197 (1st Dep't July 28, 2011). The First Department addressed the issue of whether an insurer's disclaimer of coverage was timely when no information was provided with the initial tender. P & K Contracting, Inc., insured by Admiral Insurance Company, entered into a subcontract with Shahid Enterprises to perform construction work, which required Shahid to procure additional insured coverage which was obtained through State Farm Fire and Casualty Company. An employee of Shahid was allegedly injured on October 19, 2002, and a lawsuit was commenced against P & K in 2003. On September 22, 2003, Admiral tendered the defense and indemnity to Shahid, requesting that Shahid turn the letter over to its insurer, which was done on December 17, 2003. However, according to State Farm, the tender was sent to an inactive claims office, and not forwarded to an active office until January 22, 2004. On February 5, 2004, State Farm requested further information, stating that it knew nothing about the accident or claim, and on March 19, 2004, reserved its rights based on late notice. On March 22, 2004, Admiral again requested that State Farm assume P & K's defense and on March 23, 2004, State Farm responded that it needed the previously requested information. Ultimately, on April 13, 2004, State Farm disclaimed coverage based on P & K's alleged failure to give prompt notice. In response, Admiral and P & K argued that State Farm's disclaimer was untimely based upon a 113-day delay. The Court found that there was an issue of fact regarding whether State Farm acted reasonably in seeking to investigate as the tender contained no information. While the Court held that the tender fulfilled the State Farm policy's notice of claim requirements, triggering State Farm's obligation to timely disclaim under New York Insurance Law §3420(d), the Court disapproved of the argument advanced by Admiral and P & K – to "disclaim now and investigate later" – and held that an insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation and, in fact, a reasonable investigation is preferable to piecemeal disclaimers.

DUTY TO DEFEND

Bridge Metal Indus., L.L.C. v. Travelers Indem. Co., 2011 WL 3962581 (S.D.N.Y. September 7, 2011). The Southern District addressed whether a duty to defend existed in an intellectual property lawsuit in which the insurer argued that the claims did not constitute one of the enumerated offenses contained within the definition of "advertising injury," were not caused by an offense committed in the course of advertising, or were otherwise excluded by way of breach of contract and knowing violation of rights exclusions. While the Court went to great lengths to address the foregoing and found that some of the claims may not ultimately be covered, it determined that a duty to defend existed. The Court held that if any allegations fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be, an insurer must defend.

Sunham Home Fashions, LLC v. Diamond State Ins. Co., 2011 WL 3806129 (S.D.N.Y. August 29, 2011). The Southern District addressed the issue of whether the allegations in a copyright infringement action constituted "advertising injury" under a CGL policy. Pem-America, Inc. filed a copyright infringement action against the insured, Sunham Home Fashions, LLC, a textile manufacturer and designer. Pem-America sought an injunction

of the sale of the infringing products and to have the infringing products destroyed. Advertisements of Sunham's products from catalogues were attached to the Complaint; but they were not identified as such (which may have changed the Court's ruling). The Court found that the CGL policy language unambiguously excluded coverage for the type of injury alleged, which did not involve the misappropriation of an advertising concept or an infringement of Pem-America's copyrighted products in advertising, as required to constitute an "advertising injury" under the policy. Rather, the alleged infringement fundamentally concerned the misappropriation of the designs. Moreover, the Court noted that the CGL policy's express exclusion for advertising injury "[a]rising out of actual or alleged infringement of…copyright, other than copyrighted advertising materials" would be rendered meaningless if Pem-American's claims were covered.

Nat'l Cas. Co. v. Am. Safety Cas. Ins. Co., 2011 WL 4389208 (S.D.N.Y. August 23, 2011). The Southern District found that a Commercial Auto insurer was not obligated to defend an underlying action which involved a physical altercation between two motorists. The underlying plaintiff claimed that after an employee of the insured allegedly "cut him off" while driving on a highway, both men exited their vehicles and became involved in an altercation, during which the employee allegedly struck the plaintiff in the head with a metal pole, causing a severe injury. The employer was insured by a Commercial Auto policy issued by National Casualty Company and a CGL policy issued by American Safety Casualty Insurance Company. National had advised that it would provide a defense subject to a reservation of rights. Thereafter, this lawsuit was filed to determine whether the Commercial Auto policy or CGL policy provided coverage. The Court noted that "the determination of whether an accident has resulted from the use or operation of a covered vehicle requires consideration of whether, *inter alia*, the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produced the injury," and where the operation, driving or condition of the auto itself is not the proximate cause of the injury, the occurrence does not arise out of its use or operation. The Court found that although the use of the vehicle may have been the "but-for" cause of the altercation, it was not alleged that the employee used his vehicle to perpetrate the alleged assault. As such, the Court found that the alleged assault was not an "accident" "resulting from the ownership, maintenance or use of a covered 'auto'."

APPLICABILITY OF EXCLUSIONS

Szymanski v. 444 Realty Co., LLC, 2011 WL 4486310 (1st Dep't, App. Term September 28, 2011). The Appellate Term, First Department, found a cross liability exclusion applicable, in the context of a claim by an employee of a subcontractor of the insured, where the CGL policy excluded coverage for any personal or bodily injury to independent contractors, subcontractors, and their employees. When presented with an argument that the exclusion was ambiguous when compared to other policy provisions, the Court held that "[e]xclusions in policies of insurance must be read seriatim, not cumulatively, and if any one exclusion applies there can be no coverage, since no one exclusion can be regarded as inconsistent with another."

ADDITIONAL INSURED COVERAGE

Cusumano v. Extell Rock, LLC, 86 A.D.3d 448 (1st Dep't July 14, 2011). The First Department determined that the Hard Rock Café International, Inc., as lessee, was not entitled to additional insured coverage under a Twin City Fire Insurance Company policy, which was issued to the insured. The Court found that Hard Rock was not entitled to such coverage because the policy only provided the same when the named insured had agreed in a written contract or agreement that another person or organization was to be added as an additional insured and, here, the construction agreement, which required additional insured coverage, was not signed by either the insured or Hard Rock.

NUMBER OF SELF-INSURED RETENTIONS

Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2011 WL 4389671 (2d Dep't September 20, 2011). The Second Department found that underlying sexual abuse claims occurred over multiple policy periods and, as such, triggered multiple self-insured retentions. The insureds sought coverage solely under the CGL policies issued by their insurer, National Union Fire Insurance Company of Pittsburgh, in effect for two years, even though the sexual abuse took place over seven years. National Union established its prima facie

entitlement to judgment as a matter of law, with a finding that the alleged acts of sexual abuse, which occurred over the seven-year period, at different times and locations, constituted multiple occurrences requiring the insureds to exhaust a $250,000 self-insured retention for each policy period. The Court held that in the absence of a specific aggregation-of-claims provision precisely identifying the operative incident giving rise to liability, the Court must apply the "unfortunate events" test to determine whether multiple "occurrences" are presented. The Court noted that an analysis was required of the "temporal and spatial relationships between the incidents and the extent to which they were part of an undisrupted continuum to determine whether they can…be viewed as a single unfortunate event – a single occurrence." Using that reasoning, the Court found that there was no close temporal and spatial relationship between the acts of sexual abuse, and that National Union had demonstrated the existence of multiple occurrences, requiring the application of multiple retentions.

WAIVER OF SUBROGATION

Stranz v. N.Y. State Energy Research & Dev. Auth., 2011 WL 4507208 (4th Dep't September 30, 2011). The Fourth Department found that a waiver of subrogation clause in a contract and insurance policy did not bar a third-party claim where the pedestrian-plaintiff brought suit against a property owner, contractor and subcontractor, for injuries allegedly sustained when she slipped and fell on an icy staircase. The owner and subcontractor instituted third-party actions against the contractor. Pursuant to the general provisions of the construction contract, the subcontractor's insurance policy was to contain a provision stating that the insurer agreed to waive "'any rights of subrogation against [the contractor]…which might arise by reason of any payment under this policy'" and the policy, in fact, contained such a provision. However, the Court held that as the waiver of subrogation clauses only barred the insurer from subrogating, the same would not bar the subcontractor's third-party action.

REINSURANCE

Lexington Ins. Co. v. Tokio Marine & Nichido Fire Ins. Co., 2011 WL 3962641 (S.D.N.Y. September 7, 2011). The Southern District determined that the proper remedy in a World Trade Center reinsurance dispute would be for breach of contract and not unjust enrichment. In May 2001, American Home Assurance Company issued a primary property policy with a per-occurrence limit of $10 million and Lexington Insurance Company issued part of two layers of excess property coverage (the "First-Layer Coverage" and "Second-Layer Coverage") to the Port Authority. Lexington's First and Second-Layer Coverage were issued as "fronting" policies pursuant to an agreement with Tokio Marine & Nichido Fire Insurance Company Limited under which Tokio agreed to reinsure 100% of the risk under those policies. As a result of the two September 11, 2001 terrorist attacks on the World Trade Center Towers ("WTC"), the Port Authority sustained damage in excess of $1 billion. The Port Authority's insurers, including Lexington, litigated whether the attacks on the WTC constituted two separate occurrences. After extensive negotiations, the Port Authority, American Home and Lexington entered into a settlement agreement under which an additional $11 million was paid and allocated between the policies. Lexington submitted a reinsurance claim for the settlement amount and alleged that Tokio benefited from the settlement because it resolved all amounts that Tokio would ever have to pay under the fronting arrangement and eliminated the risk that it would have to reimburse Lexington for a second per-occurrence limit. However, Tokio rejected the same based upon the contention that $10 million should have been allocated to the primary level. Lexington argued that Tokio was obligated to "follow the fortunes" of Lexington and, therefore, must indemnify the settlement as long as it was fair, reasonable and made in good faith. In the end, the Court held that Lexington's claim for unjust enrichment was not viable given the existence of the valid and enforceable written agreement between the parties that governed this dispute.

RESCISSION

Sec. Mut. Ins. Co. v. Perkins, 86 A.D.3d 702 (3d Dep't July 7, 2011). The Third Department addressed a claim for rescission in connection with a homeowners' insurance policy. The insurer sought a declaration that, *inter alia*, the homeowners' insurance policy was void *ab initio* and, therefore, could be rescinded, in light of the insured's alleged misrepresentation in his application that he did not have "any animals or exotic pets" even though he owned a dog. The Court held that even if unintentional, if the insured made a false statement of fact as an inducement to making the contract and the misrepresentation was material, an insurer may rescind the contract and avoid liability.

However, the Court noted that a response to a particular application question (such as pet ownership) will only be deemed a material misrepresentation if the question is "so plain and intelligible that any applicant can readily comprehend [it]," and any ambiguity will be construed against the insurer. The Court found no ambiguity because, while a dog is not an exotic pet, it clearly is an animal, and the insured under a homeowners' insurance policy admitted that he understood that the term "any animals" included pet dogs. As such, the Court concluded that the insurer was not precluded from rescinding the policy.

CHOICE OF LAW

Wausau Bus. Ins. Co. v. Horizon Admin. Servs. LLC, 2011 WL 2945827 (E.D.N.Y. July 21, 2011). The Eastern District addressed the applicable law to apply in a retrospective premium dispute claim. Wausau Business Insurance Company had issued insurance policies in 2008 and 2009 to sixteen various named insureds – nine of which were either New York corporations and/or corporations with a New York principal place of business; five of which were either Pennsylvania corporations and/or corporations with a Pennsylvania principal place of business; and two of which were Delaware corporations. Wausau alleged that the insured-defendants failed to pay outstanding premiums, and sought the amounts due. In response, the insureds counterclaimed that Wausau's claims were barred as it did not adequately defend them in lawsuits which resulted in a negative claims history and increased retrospective premiums. Wausau moved to dismiss the Counterclaim, arguing that New York law applied to the entire action regardless of the domicile of certain of the insureds, whereas the insureds argued that New York law did not apply to all of the insureds. The Court noted that under New York law, where a true conflict exists, one looks to the jurisdiction which has the greatest interest in the litigation, using a "center of gravity" or "grouping of contacts" approach, under which the Court weighs the contacts each jurisdiction has to the transaction and the parties to determine which relationship is most significant, considering factors such as the place of contracting, the place of negotiation and performance, the location of the subject matter of the contract, and the place of business or domicile of the contracting parties. The Court held that where the "principal location of the insured risk" is unclear because the insured risks are equally spread across many states, New York courts generally substitute the "principal location of the insured risk" with the insured's domicile. Nevertheless, the Court set forth that it would defy logic to have a single policy governed by the laws of several different states, and that the insureds' argument was particularly troubling based upon the specific policy provisions at issue, under which the retrospective premium is determined for all insureds combined. As such, the Court concluded that the balance of contacts tipped in favor of applying New York law based upon the fact that: (i) the majority of insureds (including the first named insured – the only insured entitled to collect return premium) were domiciled in New York; (ii) Wausau, though not a New York corporation, was a corporation authorized to do business in New York; and (iii) both policies were issued from New York to New York (and countersigned there).

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