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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

A quarterly newsletter from L'Abbate, Balkan, Colavita & Contini, L.L.P. Volume V · Issue I · First Quarter 2012

CASES OF INTEREST BY TOPIC

ADDITIONAL INSURED COVERAGE

W & W Glass Systems, Inc. v. Admiral Ins. Co., 2012 WL 146702 (1st Dept. Jan. 19, 2012). The First Department found that the phrases "caused by your operations performed" and "arising out of your ongoing operations" as utilized in additional insured endorsements are not materially different. In that regard, in an attempt to defeat a claim for additional insured coverage in connection with a construction site accident, the defendant-insurer argued that the "caused by your operations performed" language contained in the additional insured endorsement of its policy was narrower than the more typical "arising out of your ongoing operations" language and, therefore, the plaintiff-general contractor was not entitled to such coverage. The Court held that both phrases are substantially similar and since the injury was sustained by an employee of the named insured (one of the subcontractors at the project), the general contractor was entitled to additional insured coverage.

Virginia Surety Co., Inc. v. Travelers Prop. Cas. Co. of America, 2012 WL 246087 (Sup. Ct. New York Co., Jan. 12, 2012). The New York County Supreme Court held that summary judgment was appropriate to determine an insurer's duty to defend an additional insured, but not for the reimbursement of settlement sums. Bovis Lend Lease LMB, Inc., the construction manager at a construction site in Manhattan, hired several subcontractors, including Fujitech America, Inc., an elevator installation company, and GM Crocetti Flooring, a flooring contractor. As part of the subcontracts, Fujitech and Crocetti were required to procure additional insured coverage on behalf of Bovis. The blanket additional insured endorsement contained in Crocetti's insurance policy, which was issued by Virginia Surety, was triggered by "arising out of your work" language. In contrast, the additional insured endorsement contained in Fujitech's policy, which was provided by Travelers, was triggered by "caused by your work" language. On December 1, 2005, a number of Crocetti employees were injured in an accident on a Fujitech elevator and, as a result, they sued Bovis. Following commencement of the action, Bovis' CGL carrier tendered the defense to Virginia Surety and Travelers. While Travelers issued a reservation of rights which noted that additional insured coverage was only available if the injury was caused by Fujitech's work, Virginia Surety provided Bovis with a defense with no reservation and ultimately settled all of the claims for approximately $700,000. Thereafter, Virginia Surety instituted a lawsuit as against Travelers for its ratable share of the defense and indemnity payments. On summary judgment, the Court held that Travelers was responsible for half of Bovis' defense costs based upon the allegations in the underlying Complaint. With respect to the settlement sums, however, the Court denied summary judgment to either party as the cause of the elevator malfunction was not determined. In essence, the Court held that Fujitech's installation of the elevator was insufficient on its own to trigger an indemnity obligation under the Travelers policy and that questions of fact remained to be resolved.

Christ the King Regional High School v. Zurich Ins. Co. of North America, 2012 WL 234129 and 2012 WL 234126 (2d Dept. Jan. 24, 2012). In companion decisions, the Second Department held that an insurer was not obligated to provide additional insured coverage for claims arising out of a trip and fall that occurred outside a rented auditorium. As part of a dance competition, All American Talent rented the auditorium and three classrooms from Christ the King Regional High School and, pursuant to the rental agreement, All American secured liability insurance which included an additional insured endorsement which was triggered when such coverage was required by a written contract and when the injury "ar[ose] out of [All American's] operations." The Court began its analysis by looking to the lease agreement and holding that the language requiring a "Certificate of Insurance freeing [the school] of all liability" was sufficiently specific to meet the written contract requirements of the endorsement. However, the Court found that All American's "operations" of conducting the dance competition was held within the school and since the alleged sidewalk defect and fall were outside the leased area, there was no additional insured coverage.

TRIGGER OF COVERAGE

Hunt v. Ciminelli-Cowper Co., Inc., 2012 WL 896218 (4th Dept. Mar. 16, 2012). The Fourth Department held that an agreement between the project owner and contractor was an "insured contract," within the meaning of the "Supplementary Payments" section of the contractor's policy and allowed an indemnitee's direct action to continue. Ciminelli-Cowper Co., Inc. was the construction manager at a work site owned by Jamestown Community College. In turn, JCC contracted with prime contractor Pettit & Pettit, which was required by contract to procure insurance coverage naming JCC and Ciminelli as additional insureds. However, Pettit never obtained such coverage. Subsequently, one of the workers at the construction site was injured and commenced a lawsuit against Ciminelli. Ciminelli then instituted a third-party action seeking a declaration, *inter alia*, that Pettit's insurer, Merchants Mutual Insurance Company, was obligated to provide a defense. Although Ciminelli was not an additional insured under Pettit's policy, the "Supplementary Payments" section required Merchants to provide a defense if an indemnitee of the insured is also named as a party to the suit if certain conditions were met. These conditions included: "The 'suit' against the indemnitee seeks damages for which the insured has assumed liability of the indemnitee in a contract or agreement that is an 'insured contract'"; "[the] insurance applies to such liability assumed by the insured"; and "[t]he obligation to defend, or the cost of the defense of, the indemnitee, has also been assumed by the insured in the same 'insured contract…'" The Fourth Department stated that although the contract between JCC and Pettit constituted an "insured contract," Ciminelli's coverage could not be determined as questions of fact needed to be resolved in order to determine if all of the conditions of the "Supplementary Payments" section had been met.

LATE NOTICE

Konig v. Hermitage Ins. Co., 2012 WL 717871 (2 Dept. Mar. 6, 2012). The Second Department found that when an injured party fails to exercise his or her independent right to notify a tortfeasor's insurer of a claim, a late notice declination of coverage will be effective as against the injured party even though he or she does not receive a copy of the same. Shindla Koning was injured on August 6, 2008, when she slipped and fell on an exterior staircase of a building owned by 5324 New Utrecht Realty, Inc. Harleysville Insurance Company provided insurance coverage to New Utrecht for the property in question and its policy required prompt notice of any occurrence or lawsuit. The underlying lawsuit was instituted on October 1, 2008 and after not responding to the complaint, Koning moved for leave to enter a default judgment as against New Utrecht in January 2009. On February 10, 2009, New Utrech's insurance agent faxed a copy of the default judgment motion to Harleysville. In response, on February 26, 2009, Harleysville disclaimed coverage based on late notice of the accident and lawsuit. Pursuant to Insurance Law § 3420, Konig later instituted a direct action against Harleysville seeking to recover the amount of the ultimately unsatisfied judgment. However, the Second Department found that because Konig did not provide notice to Harleysville, the declination was effective against her as well.

TIMELY DISCLAIMER

Quality Building Contractor, Inc. v. Delos Ins. Co., 2012 WL 762891 (Sup. Ct. New York Co., Mar. 8, 2012). The New York County Supreme Court found that an insurer's late notice disclaimer of coverage was ineffective as a matter of law because the insurer delayed in notifying its insured of the same due to the fact that it was conducting an investigation into other possible reasons to disclaim. In that regard, the Court found that Sirius America Insurance Company had sufficient information to issue a late notice disclaimer on February 7, 2007, but did not issue the same until March 21, 2007. Sirius claimed that the delay was due to its need to investigate other potential coverage defenses. In finding that Sirius' disclaimer was ineffective as a matter of law, the Court stated: "Although the timeliness of such a disclaimer generally presents a question of fact, where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law." In rendering its decision, the Court relied on the First Department's recent holding in *George Campbell Painting v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012 WL 118461 (1st Dept. Jan 17, 2012)(addressed below).

George Campbell Painting v. Nat'l Union Fire Insurance Co. of Pittsburgh, PA, 2012 WL 118461 (1st Dept. Jan. 17, 2012). The First Department found that once an insurer has identified a basis for disclaiming coverage on late notice grounds, it may not delay in notifying the insured in order to conduct an investigation surrounding other possible coverage defenses. In that regard, it was found that National Union had sufficient information to disclaim coverage on late notice grounds as of January 19, 2006, but it did not issue the disclaimer until May 17, 2006. National Union relied on DiGuglielmo v. Travelers Prop. Cas., 6 A.D. 3d 344 (1st Dept. 2004), which indicated that an insurer's investigation as to alternative grounds was a reasonable excuse for delay. In response, the Court explicitly overruled DiGuglielmo and held that the plain language of Insurance Law § 3420(d) declares that an insurer must notify its insured of its disclaimer "as soon as is reasonably possible."

RESCISSION/REFORMATION

The United States Life Ins. Co. in the City of New York v. Blumenfeld, 92 A.D.3d 487, 938 N.Y.S.2d 84 (1st Dept. 2012). The First Department held that an insurer's acceptance of premiums constituted ratification of the policy and waiver of its right to rescind. On April 25, 2006, the plaintiff-insurer issued a $5 million life insurance policy to the defendant-insured. Thereafter, in March 2007, the insurer received an investigative report revealing that the insured allegedly misrepresented information such as net worth and yearly income on her application. After obtaining this information, the insurer retained and processed the insured's premium payments. Nevertheless, the insurer commenced a declaratory judgment action in April 2008 seeking to rescind the policy. The First Department found that "[a]n insurer's failure to rescind a policy promptly after obtaining sufficient knowledge of alleged misrepresentations by an insured constitutes a ratification of the policy," and that "an insurer that accepts premiums after learning of facts that it believes entitles it to rescind the policy has waived its right..." The First Department went on to hold that "an insurer's attempt to reserve its rights while accepting premiums is unenforceable for a lack of mutuality" noting that "[t]his rule applies even where the insurer claims it accepted premiums after commencing a rescission action to 'protect' the insured pending a determination of the action..."

Magie v. Preferred Mutual Ins. Co., 2012 WL 224896 (3d Dept. Jan. 26, 2012). The Third Department held that an insurer could not void a homeowner's insurance policy on the basis of fraud because the insurer failed to demonstrate scienter. James Magie had a homeowner's insurance policy with Preferred Mutual Insurance Company. In August 2005, Magie's house was destroyed in a fire, and he subsequently notified Preferred Mutual of the loss. Preferred Mutual made two partial advance payments and, after a considerable delay, paid the outstanding mortgage balance. However, in March 2006, Preferred Mutual informed Magie that it considered the policy void based on its conclusion that he had misrepresented material facts and engaged in fraudulent conduct regarding, *inter alia*, the value of his personal property. The Court stated that "[a] policy may be voided if the insured willfully and fraudulently placed in the proofs of loss a statement of property lost which the insured did not possess, or has placed a false and fraudulent value upon the articles which the insured did own." However, "[i]ncorrect information is not necessarily tantamount to fraud or material misrepresentation as the insurer must tender proof of intent to defraud—a necessary element to the defense." In reviewing the evidence presented at trial, the Third Department found that Preferred Mutual simply did not compel the conclusion that Magie intended to defraud it.

REINSURANCE

U.S. Fid. & Guar. Co. v. American Re- Insurance Co., 2012 WL 178229 (1st Dept. Jan. 24, 2012). The First Department found that reinsurer American Re-Insurance Co. was liable to pay its insurer over $420 million in connection with asbestos claims dating as far back as the mid-20th century. United States Fidelity and Guarantee Company was the original insurer to Western Asbestos in the 1950s and 1960s. Western Asbestos was taken over by Western MacArthur in 1967. After a protracted litigation concerning various bodily injury claims arising from asbestos exposure, Western MacArthur entered into a mass settlement and filed for bankruptcy protection. U.S. Fidelity, Western MacArthur's insurer, paid its share of the settlement and submitted a reinsurance claim to American Re. American Re denied the claim and sought a declaratory judgment. In essence, American Re argued that U.S. Fidelity had neglected to assert various defenses, including that Western MacArthur's retention should have been higher than demanded, and that the settlement impermissibly included bad faith claims as designated by the Bankruptcy Court. The Court held that the "Follow the Fortunes" doctrine applied to preclude all of American Re's arguments. It explained that the Follow the Fortunes doctrine, which is uniquely applicable in the context of

reinsurance, prevents a reinsurer from asserting underlying defenses to liability. The Court proceeded to hold that it was not bound by findings made by the Bankruptcy Court in connection with the question of whether the settlement included payment for bad faith claims because the issue was never "actually litigated."

INSURANCE AGENTS OR BROKERS

Sawyer v. Rutecki, 92 A.D.3d 1237, 937 N.Y.S.2d 811 (4th Dept. 2012). The Fourth Department held that an insurance agent did not have a continuing duty to advise, guide, or direct owners to obtain additional coverage following the cancellation of the procured coverage. The Fourth Department reasoned that because the insurance agent did not receive any compensation from the insured over and above the commissions received for the policy procured, owners did not use agent as their exclusive agent, and one of the owners retained final decision-making authority over what coverage to obtain, a special relationship did not exist carrying such an enhanced duty.

AUTO

Ocean Gardens Nursing Facility, Inc. v. Travelers Cos., Inc., 2012 WL 149469 (2d Dept. Jan. 17, 2012). The Second Department found that the trial court was premature in granting summary judgment in favor of the insurer, where the insured's employee caused damage while using a vehicle which was not insured under a Commercial Auto policy. The Court reasoned that since the insured's liability to the underlying plaintiff had not yet been determined, the trial court should not have ruled on the issue of whether the loss was to be covered. In addition, the Court rebuffed the insurer's argument that summary judgment should be affirmed because the insured provided late notice. Since the insured had raised an issue of fact as to whether its belief in non-liability was a reasonable excuse for the delay, an issue of fact remained that precluded the grant of summary judgment.

MISCELLANEOUS

Greenhomes America, LLC v. Farm Family Casualty Ins. Co., 91 A.D.3d 1352, 936 N.Y.S.2d 829 (4th Dept. 2012). The Fourth Department held that an "anti-transfer" clause in a liability policy prohibited the insured from transferring its rights under policy to its successor. The insured, Greenhomes America, LLC, merged with HughesCo, Inc., which had a liability policy issued by defendant Farm Family Casualty Insurance Company with an anti-transfer clause. In November 2005, there was a fire in a residence allegedly caused by Greenhomes and HughesCo, and the homeowners' insurer sought by way of subrogation reimbursement for the losses incurred as a result of the alleged negligence. Greenhomes then sought a declaration that Farm Family was obligated to defend and indemnify it against the subrogation action. In finding that the anti-transfer clause in HughesCo's liability policy prohibited transferring rights under the policy to Greenhomes, the Fourth Department stated, "As a general matter, New York follows the majority rule that [an anti-transfer clause] is valid with respect to transfers that were made prior to, but not after, the loss has occurred…The idea behind the majority rule is that, once the insured-against loss has occurred, the policy holder essentially is transferring a cause of action [or its liability] rather than a particular risk profile..."

Persuad v. Bovis Lend Lease, Inc., 2012 WL 1020680 (2d Dept. Mar. 27, 2012). The Second Department held that a sub-subcontractor was not contractually obligated to procure insurance for the subcontractor or the general contractor on a construction project. Gessin Electrical Contractors, Inc. entered into a subcontract with Building Technologies Group, Inc. and while working at the construction site, one of Gessin's employees was injured. The injured employee commenced a lawsuit against BTG and Bovis Lend Lease, Inc. BTG and Bovis then commenced a third-party action against Gessin, *inter alia*, for contractual indemnification and to recover damages for breach of contract for failure to procure insurance on their behalf. In holding that Gessin was not required to procure insurance on behalf of BTG and Bovis, the Second Department found that these causes of action were based upon a promise found in the prime agreement between BTG and Bovis, to which Gessin was not a signatory. The Court elaborated that "[d]espite the fact that the construction subcontract signed by Gessin incorporated the main agreement by reference, under New York law, incorporation clauses in a construction subcontract, incorporating the prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor." Accordingly, the Second

Department held that the provisions in the prime agreement relating to contractual indemnification for an employee's injuries and insurance procurement were not incorporated by reference into the subcontract between BTG and Gessin.

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