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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

OCCURRENCE

Mt. McKinley Ins. Co. v. Corning Inc., 96 A.D.3d 451, 946 N.Y.S.2d 136 (1st Dept. June 7, 2012). Multiple insurers, which provided primary, excess, and umbrella comprehensive general liability coverage to Corning Incorporated during the period from 1962 to 1985, brought a declaratory judgment action against Corning to determine the coverage obligations of the insurers for claims against Corning arising from the distribution and/or manufacture of two asbestos-containing products. Before the completion of discovery, most of the insurers moved for partial summary judgment declaring that each of the thousands of claims constituted separate "occurrences" under the subject policies and, thus, each claim was subject to a deductible before coverage was implicated. The policies contained similar language addressing the definition of what constitutes a single "occurrence" for purposes of bodily injury resulting from "exposure" to "conditions", the following of which is representative: "For purposes of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." The First Department stated that while all of the thousands of claims could not be said to have arisen from a single occurrence, any group of claims arising from exposure to an asbestos condition at a common location, at approximately the same time (for example, at the same steel mill or factory), may be found to have arisen from the same occurrence. As such, the First Department affirmed the denial of the insurer's Motions for Partial Summary Judgment stating that a more developed evidentiary record was required before the number of "occurrences" within which the underlying claims can be grouped could be determined.

ADDITIONAL INSURED COVERAGE

Nalene Ramcharan v. Beach 20th Realty, LLC, 94 A.D.3d 964, 942 N.Y.S.2d 593 (2d Dept. April 17, 2012). In August 2005, Munesh Ramcharan was fatally injured while performing electrical work at a warehouse that Unlimited Export, Inc. leased from Beach 20th Realty, LLC. Ramcharan was employed by Excel Electric Co., which had been retained by Beach to perform electrical work at the warehouse. Ramcharan's estate commenced an action against Beach, and Beach subsequently commenced a third-party action against Excel for, *inter alia*, breach of contract for failure to procure insurance on its behalf. Excel's Motion for Summary Judgment was subsequently granted dismissing Beach's third-party action. In affirming the dismissal, the Second Department stated that "[a] provision of a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured." The Second Department found that Excel demonstrated a prima facie entitlement to judgment as a matter of law by establishing that it was not contractually obligated to procure insurance coverage naming Beach as an additional insured. The Court further reasoned, based on the plain meaning reading of the contract between the parties, that Excel was only required to provide Beach with certificates of insurance from all subcontractors—not certificates of insurance from all subcontractors listing Beach as an additional insured.

Admiral Ins. Co. v. American Empire Surplus Lines Ins. Co., 96 A.D.3d 585, N.Y.S.2d 442 (1st Dept. June 21, 2012). Cross Country Contracting, LLC, a concrete superstructure contractor working on a Manhattan construction project, subcontracted its steel reinforcing work to B&R Rebar Consultants, Inc. On October 19, 2005, Li Xiong Yang, an employee of B&R was working at the project when he was struck by falling plywood, sustaining serious injuries. Yang and his wife subsequently commenced a personal injury action against Cross Country, among others, and Cross Country was found solely liable for Yang's injuries. During the damages phase of the trial,

American Empire Surplus Lines Insurance Company, the primary insurer for both B&R and Cross Country, and Admiral Insurance Company, the excess insurer of Cross Country, settled the suit for $2.3 million, with American Empire and Admiral advancing $1,433,333 and $866,667 to the settlement, respectively, pursuant to reservations of rights. Admiral then commenced an action against American Empire, among others, for declaratory relief and equitable contribution among co-insurers. Admiral argued, *inter alia*, that American Empire should have contributed the full $2 million of the primary coverage available under the policies it issued to B&R and Cross Country. B&R's policy, under which Admiral argued that Cross Country was entitled to additional insured coverage, limited such coverage to "liability arising out of [B&R's] operations…." American Empire asserted that Cross Country's liability did not arise out of B&R's operations as B&R was not responsible for Yang's injuries, with Cross Country having been found by the jury to be solely responsible. In finding that Cross Country's liability nonetheless arose out of B&R's operations and that American Empire was required to contribute the full amount of the applicable limit under the B&R primary policy (as well as Cross Country's primary policy), the First Department relied on its decision in *Hunter Roberts Constr. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 508, 904 N.Y.S.2d 52 (1st Dept. 2010), which held, "[w]here…the loss involves an employee of the named insured, who is injured while performing the named insured's work under the subcontract, there is a sufficient connection to trigger the additional insured 'arising out of' operations' endorsement and fault is immaterial to this determination."

LATE NOTICE

Kalthoff v. Arrowood Indem. Co., 95 A.D.3d 1413, 943 N.Y.S.2d 645 (3d Dept. May 3, 2012). The Third Department held that the efforts of an injured third party, who had obtained a default judgment against an insured, to provide timely notice of claim to the insurer were not reasonable. Debra Ann Kathloff allegedly sustained personal injuries when she slipped and fell on the premises leased by Casual Male, which maintained a liability policy with Arrowood Indemnity Company. Kathloff brought a personal injury action against Casual Male and obtained a default judgment in the amount of $812,000. Kathloff subsequently brought a declaratory judgment against Arrowood seeking a declaration that Arrowood was obligated to pay the default judgment. In moving for summary judgment to dismiss Kathloff's claims, Arrowood presented evidence that Kathloff had become aware in February 2003 that Casual Male had an applicable liability insurance policy and had learned in September 2003 that Arrowood was the entity that issued the insurance. Nonetheless, Kathloff did not provide notice to Arrowood until October 2004. Kathloff argued that the delay was caused by "unusually complicated facts and circumstances," coupled with a mistaken belief that she was prevented from prosecuting the action against Arrowood. The Third Department stated that Kathloff's "professed confusion regarding the applicable law [was] insufficient as a matter of law to constitute a reasonable excuse for [her] delay in notifying [Arrowood] of the accident and [her] claims." As such, the Court found that Kathloff's delay in notifying Arrowood was unreasonable as a matter of law.

TIMELY DISCLAIMER

AIU Ins. Co. v. Veras, 94 A.D.3d 642, 942 N.Y.S.2d 532 (1st Dept. Apr. 24, 2012). The First Department held that an automobile insurer's fifteen day delay in mailing its disclaimer was unreasonable as a matter of law. On June 4, 2005, Jose Veras was in an automobile accident while driving a car owned by Wyner-Ortiz and insured by State Farm Fire and Casualty Company. Nearly four years later, State Farm learned of the accident from Veras, who served it with a judgment entered in a lawsuit against Wyner-Ortiz. Although State Farm had completed its internal investigation and prepared disclaimer letters within two weeks of its receipt of the judgment, State Farm waited another 15 days before sending out the same. State Farm argued that the delay was due to its investigation of other possible grounds for disclaiming coverage. The First Department rejected State Farm's argument stating "just as we would not permit the insured to delay giving the insurer notice of claim while investigating other possible sources of coverage, we should not permit the insurer to delay issuing a disclaimer on a known ground while investigating other possible grounds for avoiding liability". Accordingly, the Court held that State Farm's fifteen day delay was unreasonable and barred it from disclaiming coverage.

City of New York v. Greenwich Ins. Co., 95 A.D.3d 732, 945 N.Y.S.2d 83 (1st Dept. May 29, 2012). The First Department held that a delay of more than six months by an insurer in disclaiming coverage following the insureds' notice of claim was unreasonable as a matter of law. The insureds brought an action against Greenwich Insurance Company seeking a declaration that Greenwich had a duty to defend and indemnify them in connection

with a trip-and-fall personal injury lawsuit. The insureds notified Greenwich on May 17, 2007, when the insureds first learned of the accident. Greenwich's investigation, however, did not begin until June 21, 2007 and continued for another five and one half months. After the investigation was complete, Greenwich disclaimed coverage to the insureds based on late notice. Under New York Insurance Law § 3420(d)(2), an insurer wishing to deny coverage for death or bodily injury must "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage." The First Department noted that while the timelines 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. Accordingly, the First Department held that the delay in disclaiming on the basis of late notice was unreasonable as a matter of law.

Castro v. Prana Assocs. Twenty One, LP, 95 A.D.3d 693, 944 N.Y.A.2d 558 (1st Dept. May 22, 2012). Prana Associates Twenty One, LP obtained a default judgment in a third-party action it commenced against Four Star for indemnification in an underlying lawsuit. Prana then brought an action and moved for summary judgment against Northfield Insurance, Four Star's insurer, seeking enforcement of the default judgment it obtained against Four Star. Northfield subsequently cross-moved for summary judgment, seeking a declaration that it was not obligated to defend or indemnify Prana in the underlying action. The First Department found that Northfield demonstrated that it did not receive notice of the third-party lawsuit against Four Star until it received the default judgment from Prana on May 25, 2010, and notice of the Summons and Complaint from Four Star's broker on June 2, 2010. The First Department stated that, using either notice date (May 25, 2010 or June 2, 2010), Northfield's disclaimer letter, dated June 14, 2010, was timely as a matter of law, and thus, Northfield had no obligation to defend or indemnify Prana in the underlying action.

AUTO COVERAGE

State Farm Mutual Automobile Ins. Co. v. Perez, 94 A.D.3d 1314, 942 N.Y.S.2d 688 (3d Dept. Apr. 19, 2012). While insured by State Farm Mutual Automobile Insurance Company under a supplementary uninsured/underinsured motorist ("SUM") policy, Michael Perez was injured in a rear-end motor vehicle collision. After the accident, Perez sent two letters to State Farm, the first notifying it of his intent to commence a negligence action against the tortfeasor and the potential for a SUM claim, and the second, dated May 28, 2010, stating that he and the tortfeasor agreed to a binding arbitration proceeding. Perez was awarded $50,000 through arbitration and, shortly thereafter, executed a general release with the tortfeasor for $25,000. Perez also notified State Farm of the arbitration award and filed a request for a SUM claim. A condition of the SUM policy provided that if the insured elected to settle with a tortfeasor involved in a motor vehicle accident, "[a] release may be executed with such party after thirty calendar days actual written notice to us.…An insured shall not otherwise settle with any negligent party, without our written consent, such that our rights would be impaired." State Farm denied the SUM claim on the grounds that it did not receive a written notice of an intention to settle or a request for its consent to settle. In finding that Michael Perez did not provide notice as required by the SUM policy, the Third Department stated that the letter Perez sent to State Farm dated May 28, 2010 indicated only that the parties had agreed to binding arbitration. The Court elaborated that noticeably absent from the letter was any reference to any intention to settle; the letter expressed only an intent to arbitrate, which impermissibly impaired State Farm's subrogation rights.

In re GEICO v. Baik, 94 A.D.3d 888, 941 N.Y.S.2d 872 (2d Dept. Apr. 10, 2012). Sinyoung Baik sought uninsured motorist benefits under a policy issued by GEICO for physical injuries she allegedly sustained when an unknown hit-and-run driver rear-ended the insured's vehicle, in which Baik was a passenger. GEICO then commenced a proceeding to permanently stay the arbitration of Baik's claim on the ground that neither she nor the insured complied with the supplementary uninsured/underinsured motorist endorsement of the policy at issue. The Second Department held that because neither Baik nor the policyholder had reported the alleged accident to the police, a peace or judicial officer, or to the Commissioner of Motor Vehicles within twenty-four hours of the accident, or as soon as reasonably possible thereafter, as required by the policy, Baik was not entitled to uninsured motorist benefits under the GEICO policy.

HOMEOWNERS' COVERAGE

Neary v. Tower Ins., 94 A.D.3d 725, 941 N.Y.S.2d 279 (2d Dept. Apr. 3, 2012). Raymond and Janet Neary owned a residence in Brooklyn, which they insured under a homeowners' policy with Tower Insurance. The policy only provided coverage for premises where the Nearys, as the insureds, resided. On January 18, 2005, the premises were damaged in a fire. Tower disclaimed coverage on the ground that the Nearys did not reside at the premises at the time of the loss. The Nearys then commenced an action against Tower to, *inter alia*, recover damages from Tower for breach of the insurance contract. Tower moved for summary judgment on the basis that the Nearys did not meet the policy's residency requirement as, under the policy, the definition of a "residence premises" included "a two family dwelling where you reside in at least one of the family units…." In affirming the lower court's decision to grant Tower's summary judgment motion, the Second Department stated, "[t]he standard for determining residency for purposes of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain" (internal citations omitted). The Second Department found that Tower made a prima facie showing that the Nearys did not reside at the subject premises when the fire occurred.

Alexander v. New York Central Mutual, 96 A.D.3d 1457, 949 N.Y.S.2d 305 (4th Dept. June 8, 2012). The Fourth Department held that an insured's failure to submit a sworn proof of loss utilizing the necessary form was an absolute defense to a claim against the insurer. The insured, who had procured a homeowners' policy from New York Central Mutual, commenced an action seeking a judgment declaring, *inter alia*, that New York Central was obligated to indemnify him for property theft losses resulting from the burglary of his home. New York Central asserted that it owed no obligation to the insured as the insured failed to submit a sworn proof of loss after New York Central demanded it from and provided the necessary form to the insured. The Fourth Department stated that "[w]hen an insurer gives its insured written notice of its desire that proof of loss under a policy of…insurance be furnished and provides a suitable form for such proof, failure of the insured to file proof of loss within 60 days after receipt of such notice…is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense." The Court further stated that the insured's unsworn statement of loss and receipts for the stolen items were insufficient to comply with New York Central's demand.

FAILURE TO COOPERATE

All State Properties, LLC v. Old Republic Nat'l Title Ins. Co., 95 A.D.3d 1049, 944 N.Y.S.2d 310 (2d Dept. May 15, 2012). The Second Department held that an insured breached its title insurance policy by failing to cooperate with the insurer in connection with the insured's claim, thereby relieving the insurer of its obligations under the policy. All State Properties, LLC procured a title insurance policy from Old Republic National Title Insurance Company and subsequently submitted a notice of claim to Old Republic pursuant to the policy. Less than one month after giving Old Republic notice of its claim, All State commenced an action, which named Old Republic as a defendant, seeking to quiet title to the property that was the subject of the claim. Old Republic moved for summary judgment to dismiss the Complaint. The Second Department explained that "[w]hile the mere act of commencing suit against one's insurer does not, standing alone, constitute noncooperation sufficient to relieve the insurer of its obligations under the policy, here, All State's noncooperation was established by the fact that it also precipitously brought its own action on the claim, instead of affording Old Republic reasonable time within which to investigate the claim and determine how to proceed." As such, the Second Department held that Old Republic was relieved of its obligations under the policy it issued to All State, as Old Republic demonstrated that All State had breached the policy by failing to cooperate.

MISCELLANEOUS

Gilbert v. Allstate Ins. Co., 95 A.D.3d 1072, 943 N.Y.S.2d 780 (2d Dept. May 15, 2012). Jeffery Gilbert procured a fire insurance policy from Allstate Insurance Company solely in his name on property he owned as a tenant-in-common with a business partner. In October 2009, the premises were destroyed by a fire. Allstate paid Gilbert one half of the value of the property on the ground that Gilbert had only a one-half insurable interest in the property. Gilbert, arguing that a tenant-in-common has an undivided right to the full use, enjoyment, and possession

of the entire property, brought an action to recover the full value of the destroyed property. The Second Department stated that New York Insurance Law § 3401 limits a contract or policy of insurance to the insured's insurable interest. In finding that Gilbert was not entitled to recover the full value of the property, the Second Department held that when two co-tenants own real property which is damaged by a fire and insurance is procured in the name of only one co-tenant, recovery under the policy is limited to the insured co-tenant's one half interest in the real property.

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