QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

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PRIVILEGE

Nicastro v. New York Cent. Mut. Fire Ins. Co., 2014 W 1852691 (4th Dept. May 9, 2014). On appeal from an Order granting that part of the plaintiff's motion to compel the production of withheld and partially redacted communications from counsel, the defendant, New York Central Mutual Fire Insurance Company, asserted that the materials requested were protected by the attorney-client and attorney work product privileges. In rendering its decision, the Fourth Department found it well settled that the payment or rejection of claims is a part of the regular business of an insurance company and, as such, reports which aid in the process of deciding which course of action to pursue are made in the insurer's regular business. However, while information received from third persons may not itself be privileged, a lawyer's communication to a client which provides legal analysis and advice may stand on different footing. In this regard, it was noted that the critical inquiry in deciding the applicability of privilege is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client. The Fourth Department found that New York Central did not retain counsel to perform the work of an adjuster or otherwise to handle claims. Instead, New York Central evaluated the insured's claim and determined that it was obligated to pay and did pay him in excess of $100,000 as a result of a fire that damaged two properties. After it became clear that the insured believed the value of his claim was far in excess of what New York Central was willing to pay, New York Central retained counsel to protect its rights. Indeed, counsel expressly stated that he was retained to provide legal services, to advise New York Central of its legal responsibilities, and to conduct an examination under oath of the insured. Accordingly, the Court concluded that counsel was retained to provide legal advice and services to New York Central and, therefore, New York Central was not required to turn over the requested documents as they were privileged.

National Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc., 114 A.D.3d 595, 981 N.Y.S.2d 68 (1st Dept. Feb. 25, 2014). After one of its generators sustained damage, TransCanada Energy USA, Inc. made claim for the costs to repair the generator and attendant business interruption losses under its insurance policies. To assist in the

investigation of the claim and decide the existence of coverage, the insurers retained experts and attorneys. Thereafter, the insurers denied coverage for the loss and together filed a declaratory judgment action against TransCanada. During the course of discovery, TransCanada moved to compel the production of documents–most of which were created before coverage was denied–that the insurers claimed were protected work product and attorney-client privileged communications. In response, the insurers moved for a protective order. In affirming the decision of the trial court, the First Department held that the majority of the documents which the insurers sought to withhold were not protected by the attorney-client privilege, the work product doctrine, or as materials prepared in anticipation of litigation. In this regard, the Court stated that: "[t]he record shows that the insurance companies retained counsel to provide a coverage opinion, *i.e.*, an opinion as to whether the insurance companies should pay or deny the claims. Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because [the] investigation was conducted by an attorney….'" As such, the insurers were required to produce the documents predating the denial of coverage.

LATE NOTICE

<u>Castillo v. Prince Plaza, LLC</u>, 43 Misc.3d 335, 981 N.Y.S.2d 906 (Kings Co. Sup. Ct. Mar. 3, 2014). In August 2011, Fabricio Ivan Hernandez Castillo, an employee of a general contractor hired to perform construction work at a premises owned by Prince Plaza, LLC, commenced an action against Prince Plaza for injuries he allegedly sustained while working at the premises in 2009. Thereafter, a default judgment was entered against Prince Plaza. Prince Plaza reportedly was first on notice of the accident and lawsuit on February 24, 2014, when it received a copy of the default judgment. On February 28, 2012, Prince Plaza sought coverage with its insurer, Century Surety Company, through Prince Plaza's insurance agent. In response, Century disclaimed coverage to Prince Plaza based on, *inter alia*, late notice. The default judgment was subsequently vacated on consent and Prince Plaza commenced a third-party action against Century seeking coverage under its policy. Century then moved for summary judgment arguing, among other things that Insurance Law § 3420(c)(2)(B) creates an irrebuttable presumption that Century was prejudiced as a result of the late notice. In this regard, Century argued that the language of the Insurance Law, which provides, in relevant part: "an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction" is clear and unambiguous and creates an irrebuttable presumption that Century was prejudiced because it did not receive notice until after a default judgment had already been entered. In finding for Prince Plaza, the Kings County Supreme Court held that while Prince Plaza's liability had initially been established via the default judgment, the judgment was vacated and the matter was currently being heard on its merits. As such, the Court found that based upon the plain language of the statute, the irrebuttable presumption of prejudice did not apply. The Court further opined that its interpretation of the statute is consistent with the express legislative intent of preventing insurers from denying coverage for claims based on a technicality. In that regard, it was noted that the default judgment was vacated approximately three months after Century received notice and that there was no evidence that Century expended any time or resources to have the judgment vacated, nor had Century alleged that it had, in fact, been prejudiced in any way. Under these circumstances, the Court held that applying an irrebuttable presumption that Century had been prejudiced would allow Century to disclaim coverage for an inconsequential technicality and, therefore, would not be permitted.

DISCLAIMER

<u>KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.</u>, 2014 WL 2573382 (Ct. of App. June 10, 2014). Keyspan Gas East Corporation commenced an action seeking a declaration that Munich Reinsurance of America, Inc., Century Indemnity Company, and Northern Assurance Company of American (collectively referred to as the "Insurer Defendants") had a duty to defend and indemnify Keyspan for liabilities associated with the investigation and remediation of environmental damage at manufactured gas plant sites formerly owned and operated by Long Island Lighting Company ("LILCO"). The Insurer Defendants issued excess insurance policies to LILCO which required, as a threshold condition for coverage, prompt notice of any occurrence that potentially implicated their duty to indemnify. In 1994, LILCO notified the Insurer Defendants by letter about environmental concerns at various retired gas plant sites. LILCO stated that, although no regulatory agencies had commenced a lawsuit or formal investigation, agency action was expected and that the extent of its potential liability, if any, could not yet be determined. LILCO also notified the Insurer Defendants that a neighboring owner had brought a property damage claim for environmental contamination allegedly caused by one of the manufactured gas plant sites. Over the following year, the Insurer Defendants wrote letters to LILCO and generally reserved all rights and coverage defenses in connection with the claims, including late notice. Thereafter, LILCO commenced a declaratory judgment action against the Insurer Defendants. In their Answers, the Insurer Defendants asserted late notice as an affirmative defense warranting a denial of coverage, and they later moved for summary judgment based on untimely notice. The Insurer Defendants appealed an order of the Appellate Division, First Department, which held that although LILCO failed as a matter of law to provide timely notice under the polices, issues of fact regarding whether the Insurer Defendants waived their right to disclaim coverage by failing to timely issue a disclaimer precluded summary judgment. On appeal, the Insurer Defendants argued that the Appellate Division wrongly applied the strict timeliness standard from Insurance Law § 3420(d)(2) in considering whether they waived their right to disclaim coverage. In rendering its decision, the Court of Appeals noted that by its plain terms, §3420(d)(2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy. In this regard, the Court surmised that where the underlying claim does not arise out of an accident involving bodily injury or death, the notice of disclaimer provisions set forth in § 3420(d)(2) are inapplicable and, in such cases, the insurer will not be barred from disclaiming coverage simply as a result of a passage of time, but its delay should be considered under common-law waiver and/or estoppel principles. In abrogating *Este Lauder Inc. v. OneBeacon Ins. Grp. LLC*, 62 A.D.3d 33 (1st Dept. 2009) (which held that an insurer is required to disclaim coverage relative to environmental damage claims as soon as reasonably possible after learning of the accident or of the grounds for disclaimer, and that the failure to do so will preclude an effective disclaimer), among other decisions, the Court of Appeals held that the Appellate Division erred when it held that the Insurer Defendants had a duty to disclaim coverage "as soon as reasonably possible" after they learned that LILCO's notice was untimely under the policies as LILCO's environmental contamination claims did not fall within the scope of Insurance Law § 3420(d)(2). Nevertheless, the Court of Appeals remitted the matter to the Appellate Division to determine if, under common-law principals, triable issues of fact existed as to whether the Insurer Defendants clearly manifested an intent to abandon their late-notice defense.

APPLICABILITY OF EXCLUSIONS

<u>U.S. Underwriters Ins. Co. v. 101-19 37th Avenue LLC</u>, 2014 WL 1277888 (E.D.N.Y. Mar. 27, 2014). U.S. Underwriters Insurance Company filed a declaratory judgment action against its insured, 101-19 37th Avenue LLC, among others, seeking a declaration that it had no duty to defend or indemnify in connection with an underlying personal

injury action commenced by Jose Montesdeoca. In December 2011, Montesdeoca, an employee of Feldman Lumber Company Inc., was injured while delivering sheetrock to a construction project at a premises owned by 101-19 LLC. Feldman Lumber would deliver supplies to the premises and was paid on a monthly basis. It was, however, unclear as to whether 101-19 LLC, the general contractor or the subcontractors at the premises had purchased the sheetrock. Nevertheless, U.S. Underwriters received notice of the Montesdeoca accident and disclaimed coverage to 101-19 LLC based on (the Injury to Employee Exclusion to its policy). Thereafter, U.S. Underwriters commenced a declaratory judgment action and moved for summary judgment. Specifically, U.S. Underwriters contended that the Injury to Employee Exclusion precluded coverage for 101-19 LLC as Montesdeoca was an employee of a contractor or subcontractor performing services on its behalf. In opposition, 101-19 LLC asserted that the Injury to Employee Exclusion does not bar coverage as Feldman Lumber operated as a supplier or material-man for the work at the premises. While 101-19 LLC conceded that the Injury to Employee Exclusion precludes coverage for injuries sustained by employees of contractors and subcontractors, it argued that the exclusion's silence concerning injuries sustained by employees of suppliers or material-men should be construed against U.S. Underwriters. In granting U.S. Underwriters' motion, the United States District Court for the Eastern District of New York noted that Montesdeoca was injured at the premises while transporting sheetrock via a fork-lift truck from one location to another at the behest of 101-19 LLC or its general contractor or subcontractors. The Court stated that although Montesdeoca worked for Feldman Lumber, he would not have been injured but for the order for sheet rock placed by 101-19 LLC or its general contractor or subcontractors. Accordingly, the Court held that the Injury to Employee Exclusion precluded coverage for 101-19 LLC relative to the Montesdeoca action.

Utica First Ins. Co. v. Mumpus Restorations, Inc., 2014 WL 1228403 (2d Dept. Mar. 26, 2014). Utica First Insurance Company commenced an action against its insured, Mumpus Restorations, Inc., and the claimant, Albert Guilbe Montalvo, seeking a declaration that it was not obligated to defend or indemnify an underlying personal injury action. On appeal from an Order denying the Motion for Summary Judgment seeking a ruling that Utica was obligated to indemnify Mumpus, Montalvo asserted that his accident did not fall within the exclusion to the Utica policy which precluded coverage for damages "arising out of any Roofing Operations, which involve any replacement roof or recovering of existing roof…." In this regard, Montalvo argued that the work being performed when he sustained the alleged injuries did not involve the replacement of the entire roof, but merely the replacement of only a portion of the roof. In upholding the trial court's decision, the Second Department stated that the policy's plain meaning excluded coverage for injuries arising out of the work that allegedly led to Montalvo's accident and that nothing in the plain language limited the exclusion to projects involving the replacement or recovering of entire roofs. Accordingly, the Court held that Mumpus was not entitled to coverage in connection with Montalvo's personal injury action.

BUSINESS INCOME COVERAGE

Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 2014 WL 1642906 (S.D.N.Y. Apr. 24, 2014). On October 29, 2012, in anticipation of storm-related flooding due to Hurricane Sandy, Consolidated Edison Company of New York, Inc. preemptively shut off power to certain of its service networks to preserve the integrity of the utility system. Resultantly, Newman Myers Kreins Gross Harris, P.C., which maintained its office in a building in Manhattan, was without full power from October 29 until November 3, 2012. Although access to Newman Myers's building was not formally blocked, Newman Myers employees reportedly tried to enter

the premises, but were informed that the building was closed due to a loss of power and that management was waiting for ConEd to fully restore electricity. As such, during the power outage, Newman Myers treated the premises "as being closed to tenants." Thereafter, Newman Myers filed a claim under its commercial property insurance policy with Great Northern Insurance Company for loss of business income and extra expenses it had incurred as a result of the loss of power to its office. Great Northern disclaimed coverage to Newman Myers on the basis that it had not suffered a covered loss. Newman Myers then filed an action against Great Northern seeking, *inter alia*, a declaration that it was entitled to coverage and both parties cross-moved for summary judgment. The Great Northern policy provided coverage for loss of business income and extra expenses in the event of "direct physical loss or damage by a covered peril to property." Newman Myers conceded that its office did not sustain any structural damage as a result of Hurricane Sandy, but contended that the phrase "direct physical loss or damage", construed in line with the reasonable expectations of the insured, did not require actual structural damage to the covered premises. Instead, Newman Myers argued that there need only have been "an initial satisfactory state that was changed by some external event into an unsatisfactory state." In finding in favor of Great Northern, the United States District Court for the Southern District of New York held that the policy language at issue—"direct physical loss or damage"—unambiguously required some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage and that Newman Myers could not demonstrate any such loss or damage to the building. The Court further stated that other provisions of the policy supported its interpretation. In this regard, it was noted that loss of business and extra expense coverage was limited to the "period of restoration", which was defined as "the period of time that…begins[ ] immediately after the time of direct physical loss or damage by a covered peril to property," and "will continue until your operations are restored,…including the time required to", *inter alia*, "repair or replace property…." The Court opined that the words "repair" and "replace" contemplate physical damage to the insured premises as opposed to loss of use. As such, the Court held that Newman Myers was not entitled to coverage for its claim for lost business income and extra expenses stemming from the loss of power.

PERSONAL AND ADVERTISING INJURY

Sportsfield Specialties, Inc. v. Twin City Fire Ins. Co., 116 A.D.3d 1270 (3d Dept. Apr. 17, 2014). In the fall of 2009, Sportsfield Specialties, Inc. hired a competitor's employee who was subject to a non-compete agreement and an electronic rights agreement, which imposed various restrictions upon, among other things, his use/dissemination of the competitor's proprietary information. In November 2009, Sportsfield's competitor commenced an action alleging tortious interference with contract and business relations, unfair and deceptive trade practices, and misappropriation of trade secrets against Sportsfield. At all times relevant, Sportsfield was insured by a Commercial General Liability policy issued by Twin City Fire Insurance Company and a Commercial Umbrella policy issued by CastlePoint Insurance Company. Sportsfield provided notice to its insurers, but both Twin City and CastlePoint denied coverage. After judgment was rendered in the underlying action, Sportsfield commenced an action against Twin City and CastlePoint seeking, among other things, a declaration that they had a duty to defend and indemnity Sportsfield relative to the underlying action. Following joinder of issue, Sportsfield moved for summary judgment and Twin City and CastlePoint cross-moved. The Twin City policy (to which the CastlePoint policy followed form) defined "personal and advertising injury" as injury, other than bodily injury, arising out of both the insured's business and one or more of the enumerated offenses set forth therein, including the "[o]ral or written publication of material that violates

a person's right of privacy". As such, Sportsfield argued that the term "person" contained within the definition of "personal and advertising injury" denotes both individuals and corporations and, therefore, the claims asserted against it in the underlying action are entitled to coverage. In finding for Twin City and CastlePoint, the Third Department held that the Twin City policy did not support the construction proffered by Sportsfield. In that regard, the enumerated offense at issue – the "[o]ral or written publication of material that violates a person's right of privacy" – appeared between two other offenses in the policy which expressly referenced the misdeeds perpetrated against either a person or an organization, thereby suggesting that the omission of any reference to an organization from the subject offense was intentional. It was further noted that equating the allegations asserted against Sportsfield in the underlying action with an invasion of the competitor's "right of privacy" ignores the competitor's status as a corporate entity as well as the historically personal nature of privacy rights in general. Accordingly, it was held that Sportsfield was not entitled to coverage under the Twin City or CastlePoint policies in connection with the underlying action.

PRIORITY OF COVERAGE

WCHCC (Bermuda) Ltd. v. Granite State Ins. Co., 2014 WL 1758662 (2d Cir. May 5, 2014). Granite State Insurance Company issued a professional liability insurance policy to a nurse working at Westchester Medical Center ("WMC") which contained an "Other Insurance" provision providing, in relevant part: "if there is other insurance, which applies to the loss covered under this Policy, the other insurance must pay first." WMC procured a Commercial General Liability insurance policy from WCHCC (Bermuda) Ltd. which also covered its staff. The "Other Insurance" clause to the WCHCC policy indicated that its coverage is "excess of any valid and collectible insurance or self-insurance coverage afforded or provided to…a nurse…, whether such other insurance or self-insurance is stated to be primary, contingent, [or] excess." During the coverage period, the nurse was sued for medical malpractice and the suit was ultimately settled by WCHCC. Thereafter, WCHCC commenced an against Granite State to recover reimbursement for Granite State's share of the indemnity and defense costs and WCHCC moved for summary judgment. In response, Granite State argued that its coverage was excess to that provided by WCHCC and, as such, it was not required to contribute to the nurse's defense or settlement until the WCHCC policy was exhausted. In relying on the New York Court of Appeals case of *Lumbermens Mut. Cas. Co. v. Allstate Ins. Co.*, 417 N.E.2d 66 (1980), the Second Circuit, in a Summary Order, noted that the *Lumbermens* Court identified three types of excess insurance policies – two of which were relevant to the matter at hand. The first category encompasses policies generally stating that they are excess to other sources of insurance, but contain no explicit statement about their position with respect to other excess policies, whereas the second type involves policies stating they are excess to other policies and specifically addresses the interplay with other excess insurance. The Court surmised that the Granite State "Other Insurance" clause mirrors the language of the first category as it is considered excess of primary insurance, but contains no explicit statement about its position with respect to other excess policies. The WCHCC language, by contrast, fell within the second category of excess insurance as it indicates that it is implicated after any policies issued to a nurse, whether excess or otherwise. Based upon the foregoing, the Court held that the plain language of the policies "Other Insurance" provisions dictated that the WCHCC policy was excess to that issued by Granite State and, accordingly, the Granite State was required to reimburse WCHCC for the defense and settlement costs.

MISCELLANEOUS

No Hero Enterprises, B.V. v. Loretta Howard Gallery Inc., 2014 WL 1813757 (S.D.N.Y. May 7, 2014). In 2011, the Loretta Howard Gallery Inc. procured an insurance policy from AXA Art Insurance Corporation whereby AXA agreed to insure certain property in the Howard Gallery's possession. During the policy period, the Howard Gallery was transporting a valuable painting, consigned to it by No Hero Enterprises, B.V., when the painting was badly damaged. Thereafter, No Hero commenced an action against the Howard Gallery and the Howard Gallery filed a third-party suit against AXA. AXA moved to dismiss the third-party Complaint for failure to state a cause of action. Specifically, AXA argued that the Howard Gallery's claim was time barred under the policy's two year limitations period, which provides, in relevant part, that the Howard Gallery may not "bring a legal action against [AXA] under this coverage unless…the action is brought within two years after [the Howard Gallery] first [has] knowledge of the 'loss'" which is defined as "accidental loss or damage". In this regard, AXA contended that the definition of "loss" should be read to reference the accident itself and, as such, the limitations period began to run on the date on which the painting was damaged. In opposition, the Howard Gallery asserted that the limitations period did not begin to run until its cause of action against AXA accrued—namely, the date on which AXA disclaimed coverage for the loss. In relying on the Second Circuit's decision in *Fabozzi v. Lexington Ins. Co.*, 601 F.3d 88 (2d Cir. 2010), the United States District Court for the Southern District of New York stated that a reference to the date of "loss or damage", without more, is understood to mean the date of the accrual of the cause of action, not the date on which the physical damage occurred. That being said, the Court noted that the question presented was whether or not AXA's definition of "loss", which included the word "accidental" before "loss or damage" was sufficiently specific to change the default rule. In finding that it was not, the Court opined that the phrase "accidental loss or damage" could reasonably be read to refer to the category of losses or damages that happen by accident (as opposed to purposeful or intentional damages), but not to the accident itself. More importantly, the Court reasoned that the AXA policy used the single defined term "loss" to convey a number of meanings, including in reference to the amount in which the property decreased in value or the amount of the claim itself—many of which could not reasonably be construed to refer to the accident itself. As such, the Court held that the two year time limitation began to run when the Howard Gallery's cause of action against AXA accrued (after it declined coverage) and, therefore, the Howard Gallery's claim was timely.

Wadsworth v. Allied Professionals Ins. Co., 748 F.3d 100 (2d Cir. Apr. 4, 2014). In 2005, Renata Wadsworth sought treatment from Dr. John Ziegler, a chiropractor in Ithaca, New York. During her four visits with him, Ziegler repeatedly touched Wadsworth in an inappropriate sexual manner. Wadsworth reported Ziegler's conduct to the local authorities, who arrested him, and Ziegler later pled guilty to third-degree assault. Wadsworth subsequently filed a civil action against Ziegler seeking damages for emotional injury and lost income. Following a bench trial, the Tompkins County Supreme court entered a judgment in Wadsworth's favor, which Ziegler failed to satisfy. Pursuant to the direct action provision of New York Insurance Law (pursuant to which a claimant can seek direct recovery from a tortfeasor's carrier if a judgment or settlement is unsatisfied for 30 days), Wadsworth commenced suit against Ziegler's insurance carrier, Allied Professionals Insurance Company ("APIC"), which is a non-domiciliary registered in New York as a federal risk retention group. Both parties moved for summary judgment. APIC argued that the Federal Liability Risk Retention Act ("LRRA") preempts the application of New York's direct action provision to foreign risk retention groups. The preemption provision to the LRAA provides, in relevant part: "Except as provided in this

section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would…make unlawful, or regulate, directly or indirectly, the operation of a risk retention group….” Wadsworth, in turn, argued for a narrow construction of the preemption provision. In this regard, she asserted that Congress's main purpose in passing the LRRA was to ensure that states would no longer discriminate against alternative insurance providers and, as the direct action provision is a nondiscriminatory statute that does not conflict with or frustrate the purpose of the LRRA, it is, therefore, not preempted. In rendering its decision, the Second Circuit stated that Wadsworth's reading of the statute was untenable as the LRRA was not directed toward placing risk retention groups on equal footing with traditional insurers, but to excuse risk retention groups from certain requirements that states may and do impose upon insurers licensed within that state. The Court further surmised that the legislative history of the LRRA makes it clear that Congress intended to exempt risk retention groups broadly from state law requirements that make it difficult for risk retention groups to operate on a multi-state basis. Moreover, the Court reasoned that the effects of the application of the direct action provision would have on non-domiciliary risk retention groups further bolstered its conclusion. To that end, it was noted that the application of the direct action provision to APIC or any other foreign risk retention group would undoubtedly “regulate, directly or indirectly,” those groups by subjecting them to lawsuits filed in New York by claimants who were not parties to APIC's contracts with the insureds and would make it difficult for foreign risk retention groups to maintain uniform underwriting, administration, claims handling, and dispute resolution process. As such, the Court held that the LRRA preempts the application of the New York Insurance Law's direct action provision to APIC and, therefore, Wadsworth could not maintain her action.

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